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 EXCEPTIONS TO REFEREE'S REPORT AND FINDINGS OF FACT

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DEATH PENALTY

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INTRODUCTION

On December 31, 2002, this Court appointed the Habeas Corpus Resource Center to represent Petitioner, Kenneth Earl Gay, in capital habeas corpus proceedings.

On December 28, 2004, Mr. Gay, through counsel, filed a petition for writ of habeas corpus ("Petition") presenting guilt-phase claims challenging his conviction of capital murder.

The Court ordered informal briefing on the Petition, on December 29, 2004. Informal briefing was concluded approximately two and one-half months later, with the filing of Mr. Gay's Reply to the Attorney General's Informal Response on March 14, 2005.

On August 4, 2008, the Court ordered the Director of the Department of Corrections and Rehabilitation to show cause "why petitioner is not entitled to relief on the ground of trial counsel's conflict of interest that prejudicially affected his representation at the guilt phase of petitioner's trial, and on the ground of trial counsel's failure to adequately investigate and

present evidence at the guilt phase tending to show that petitioner did not participate in the murder of Officer Verna." *Gay (Kenneth Earl) on Habeas Corpus*, California Supreme Court Case No. S130263, Amended Order to Show Cause, filed August 4, 2008.

On January 23, 2009, Respondent filed a Return and exhibits.

On October 19, 2010, Petitioner filed his Amended Traverse.

On May 18, 2011, the Court filed its Reference Order, directing the selection of a judge of the Los Angeles Superior Court to take evidence and make findings regarding several questions. Questions 1-3 addressed Claim Three in the Petition, which alleged trial counsel's failure to investigate and present evidence that Petitioner did not participate in the commission of the murder:

> 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?

Questions 4 and 5 addressed the conflict of interest arising from the embezzlement investigation:

> 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?

On June 26, 2013, the Court appointed the Honorable Lance Ito, Judge of the Los Angeles County Superior Court, to serve as the Court's referee in the proceedings.

Beginning on September 15, 2014, Judge Ito 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.

In reviewing a referee's findings of fact, this Court generally defers to factual findings that are supported by "substantial evidence." *In re Bacigalupo*, 55 Cal. 4th 312, 333 (2012). If the factual findings are not supported by substantial evidence, this Court retains the final decision-making authority and can decide the referee's findings are not binding on the Court. *In re Hardy*, 41 Cal. 4th 977, 993 (2007).

Although the Court affords deference to factual findings that are supported by substantial evidence, the Court will undertake an independent review of prior testimony as well as mixed questions of fact and law. *In re Hardy*, 41 Cal. 4th at 993. Thus, as relevant to the claims here, the Court ultimately assess *de novo* questions of prejudice, ineffective assistance of counsel and the existence of potential and actual conflicts of interest within the meaning of the Sixth Amendment. *In re Ross*, 10 Cal. 4th 184, 201 (1995).

On the whole, the referee's findings confirm the existence of the facts necessary to support a claim that Daye Shinn performed deficiently by failing to discover and present a wealth of exculpatory and impeaching evidence that Mr. Gay did not participate in the murder of Officer Verna. While the referee

did not find the existence of a conflict of interest, he did find or acknowledge the factual predicates upon which this Court may base its independent determination that such conflicts adversely affected trial counsel's representation of Mr. Gay.

EXCEPTIONS TO THE REFEREE'S FINDINGS

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

In response to this Court's Question 1, Part 1, the referee made the following specific findings:

> Shinn's investigation consisted of reading and evaluating the materials generated by the police investigation and hiring an experienced defense investigator. Rpt. at 9:3-5 (footnote omitted). Shinn represented petitioner at the preliminary hearing which was conducted over an 8-day period in August of 1983 and gave Shinn the opportunity to personally question and evaluate many of the witnesses who would be called during the 1985 trial. *Id.* at 9:5-9. Shinn read the reports generated by the police investigation which included the incident report, witness statements, crime scene reports, reports of the surveillance of Robin Gay and Pamela Cummings, the arrest reports, medical treatment reports for Kenneth Gay, the autopsy report from the Los Angeles County Medical Examiner, reports from the live lineups, investigators' chronologies, etc. *Id.* at 9:21-10:4. The trial prosecutor, John Watson, noted Shinn had examined the District Attorney case file four times. *Id.* at 10:3-4. Shinn appears to have read the transcripts from the grand jury proceedings . . . *Id.* at 10:23-24. The only witness interview listed by Shinn is 3 hours for Robin

Gay. *Id.* at 13:11-12.

Shinn retained the services of an experienced investigator: Douglas Payne with whom he had worked on previous matters including capital cases. Although the Los Angeles Superior Court's records indicate the appointment of Payne on 18 July 1984, Payne's billing records [Petition Exhibit 120] indicate he began working on the case 1 May 1984. Payne's testimony at the 1996 reference hearing indicates Payne's involvement as early as August 1983, around the time of the preliminary hearing. [RT 240]. *Id.* at 11:18-24.

Payne testified Shinn directed him to obtain discovery materials, read and review those materials, create defense investigation books, index all the police reports, read and review the police reports, obtain and evaluate any tape recordings, and to present his findings to Shinn. [RT 198] At the first reference hearing Payne testified his duties were: " . . . *To formulate a witness list, to locate those witnesses, interview those witnesses where possible, to meet and confer with the client, basically what Shinn and I called client control.*" [People's Exhibit 709 at page 796] Payne canvassed the crime scene neighborhood for three days before the start of trial to locate any additional witnesses. He created a crime scene diagram indicating the location of witnesses. He analyzed the crime scene and the statement of Rose Marie Perez, and based upon his experience as a police traffic accident investigator, calculated the time period Perez could have observed the incident up Hoyt Street. Payne believed the reliability of the eyewitnesses was a significant issue [RT 198] but that the strength of the prosecution's case made a penalty phase likely. [RT 296] Payne testified the decision on what additional investigation was needed was a collective decision by Shinn, petitioner and Payne, and Payne would follow up as requested. [RT 199] Payne noted his main focus was field investigation and client control. [RT 202] Shinn placed no limits on Payne's efforts, although Shinn did not request the court's permission for out of state travel or spoken language interpreters. *Id.* at 12:1-21. Payne noted Shinn conducted witness interviews at

> the courthouse, outside the courtroom, in the parking lot or cafeteria for the convenience of the witnesses who were mostly located in the North San Fernando Valley. *Id.* at 13:1-4.

Mr. Gay takes the following exceptions to the foregoing findings regarding Question 1, Part 1.

1. Mr. Gay takes exception to the finding that Douglas Payne's involvement in Mr. Gay's case began in August of 1983.

The referee finds that although Payne was appointed by the Los Angeles Superior Court on July 18, 1984, and his billing records indicate he had begun work on the case on May 1, 1984, his "involvement" in Mr. Gay's case began as early as August of 1983, which was around the time of the preliminary hearing. Rpt. at 11:18-24; 6 CT 1543 (Appointment Order). To the extent the finding suggests any *substantive* involvement in Mr. Gay's case at that early date or prior to May 1984, Mr. Gay takes exception.

The best and most direct evidence of when the investigation began is Payne's appointment order, his billing records, and Payne's own testimony about his pre-appointment involvement in the case. Payne testified that he opened the file with an initial contact card in 1983, but did not have and did not recall any billing until May 1984. 3 EH RT 281:12-17. Prior to May 1984, his only "involvement" in the case was simply to sit with Shinn at the preliminary hearing and, perhaps, assist with taking notes. 3 EH RT 281:12-283:4 ("the only recollection I would have [as to 1983] is I may have [sat] through the preliminary hearing with Mr. Shinn, assisted in taking notes"). Consistent with Payne's recollection, the referee found that Payne did not begin billing until May 1984, after which Payne's first detailed accounting submitted to the trial court indicated he conducted his "Initial File sort/review" in early May 1984. Rpt. at 12:21; Ex. A120 at 6.

Mr. Gay respectfully submits that this Court should adopt the referee's

finding that Payne did not begin investigating Mr. Gay's case until May 1984, and further find that any prior "involvement" in 1983 was limited to Payne observing the preliminary hearing with Shinn at counsel table.

2. Mr. Gay takes exception to the finding that Douglas Payne and/or Daye Shinn formulated a witness list and interviewed those witnesses with respect to guilt-phase investigation.

No evidence exists to support the referee's finding that Payne "formulate[d] a witness list" of *guilt*-phase witnesses and "interview[ed] those witnesses where possible." Rpt. at 12:4-8. The only evidence cited by the referee for this indicated finding was Payne's testimony at the "*first* reference hearing" in 1998, which was limited to his *penalty*-phase preparation. *Id.* at 12:4-5 (emphasis added). In the 1998 habeas corpus proceedings, this Court found that Payne formulated a penalty phase witness list consisting of Mr. Gay's family members and friends. *In re Gay*, 19 Cal. 4th 771, 788, 810 (1998) (Payne "formulate[d] a witness list" and "spoke to every witness that he could find based on information [Mr. Gay] and other family members provided"). There is no evidence to support the suggestion that Payne also formulated a similar guilt-phase "witness list" and interviewed those witnesses. The referee does not cite any evidence for such a finding other than Payne's testimony limited to his penalty-phase work.

Similarly, the referee's finding that "Payne noted Shinn conducted witness interviews at the courthouse, outside the courtroom, in the parking lot or cafeteria," is also based on Payne's 1998 testimony about his penalty-phase work. Rpt. at 13:1-4; *see also* 3 EH RT 253:12-26 (asking Payne "Did you testify [in 1998] . . . 'they would then be talked to by Mr. Shinn outside the courtroom in the hallway, wherever we were at over the lunch break, in the parking lot . . . ?'"). Because the only evidence the referee relies on to support this finding is based on Payne's 1998 testimony, it is no surprise that

the referee's language here echoes this Court's finding in 1998. *Compare* Rpt. at 13:1-4 ("Shinn conducted witness interviews at the courthouse, outside the courtroom, in the parking lot or cafeteria") *with In re Gay*, 19 Cal. 4th at 788 ("Payne testified that Shinn had spoken to *penalty phase witnesses* before their appearance . . . outside the courtroom . . . in the hallway, at his office, and at places where Payne could put them in touch.") (emphasis added).

Accordingly, there is no evidence to support a finding that Payne formulated a guilt-phase "witness list" and interviewed those witnesses, because the only evidence the referee cites to support this finding is Payne's testimony describing his penalty-phase work.

Mr. Gay respectfully submits that this Court should independently find that there is no evidence of a list of guilt-phase homicide witnesses who were interviewed by Payne or Shinn beyond the prosecution witnesses Shinn recalled in the defense case-in-chief. Payne testified that he and/or Shinn spoke only to "each and every witness *that was to be used*" in court. 3 EH RT 253:16-23 (emphasis added); *see also In re Gay*, 19 Cal. 4th at 788 (Shinn had no recollection of "interviewing any of the potential defense or prosecution witnesses other than those who were put on the stand").[1] At the guilt phase, Shinn "used" the testimony of only seven witnesses in the defense case-in-chief, five of whom were prosecution witnesses who were

---

[1] Shinn's own billing records support a finding that he did not interview any guilt-phase witnesses prior to trial. Shinn's pre-trial compensation requests filed pursuant to California Penal Code sections 987.2 and 987.9 reveal that Shinn did not interview a single lay witness nor consult a single expert witness. 4 CT 1122-23. As the referee found, the only guilt-phase witness Shinn interviewed was Robin Gay, which took place in jail on March 6, 1985 after the trial had already begun. Rpt. at 13:11-12; *see also* 7 CT 1875 (Shinn billing record).

recalled to essentially recite their same testimony that was mostly harmful to Mr. Gay. *See* 85 RT 9705-86 RT 9827. The remaining two witnesses were Billy Sims (who testified about a robbery) and investigator Douglas Payne himself. Beyond these seven witnesses, there was no other guilt-phase witness list or witness preparation.

Similarly, the record reflects that at no time before or during the 1985 trial did anyone from Mr. Gay's defense speak to any of the critical percipient witnesses who testified at the evidentiary hearing. *See, e.g.*, 13 EH RT 1733 (Irma Rodriguez), 9 EH RT 1274 (Walter Roberts); 11 EH RT 1381, Ex. A27 at 2 (Martina Jimenez); 10 EH RT 1336:22-28 (Ejinio Rodriguez).

3. Mr. Gay takes exception to the finding that Daye Shinn placed no limits on Douglas Payne's Efforts.

Mr. Gay respectfully excepts to the referee's categorical finding that "Shinn placed no limits on Payne's efforts." Rpt. at 12:19.

First, Payne's testimony on this point explained that Shinn obtained funds from the trial court to compensate Payne for *his* services, but did not authorize or seek other ancillary expenses for out-of-state and foreign travel, or for the expert services Payne recommended. Thus, in response to the prosecution's narrowly-focused questions, Payne testified at the evidentiary hearing that Shinn repeatedly applied to the trial court for funds for *Payne's* compensation:

> Q. Now, is it correct that whenever you exhausted the funds that had been ordered by the court *for you*, you made an application for new funds for additional hours?
>
> A. That's correct.
>
> Q. And is it correct that at no time was the question of funds or money available to pay for *your* activities, it was never an issue in the case; is that right?
>
> A. No, sir, it was never an issue.

Q. Whatever you felt *you needed* that you told Mr. Shinn needed to be done, he went to court, filed the paperwork, *you got a grant* for more money until it ran out each time?

A. Yes, sir.

3 EH RT 244:24-245:9 (emphasis added).

Payne testified on re-direct, however, that in contrast to the absence of restrictions "on funds for [his] services," if he "needed to take a trip, it had to be authorized," and "[i]f there was going to be funds for an expert, it had to be authorized." 3 EH RT 289:5-8, 20-22. There was, however, no authorization for out-of-state or foreign travel; nor any authorization to consult with the forensics laboratory or eyewitness expert whom Payne recommended to Shinn to investigate the "significant" issue of the reliability of eyewitness testimony. 3 EH RT 198:22-199:2; 200:24-201:8; 207:24-208:8.

Second, for similar reasons, the referee's finding that "Shinn placed no limits on Payne's efforts, *although Shinn did not request the court's permission for out of state travel or spoken language interpreters,*" is internally inconsistent. Rpt. at 12:19-21 (emphasis added). As a practical matter, the failure to request out-of-state or foreign travel and interpreter services imposed a significant restriction on the ability to conduct an investigation that would have included interviewing Elizabeth Martina Jimenez Ruelas, a Spanish-speaking witness who had moved to Northern Baja California, Mexico shortly after observing the offense. As acknowledged by the referee, Ms. Jimenez's "initial descriptions given to the police more strongly point towards Raynard Cummings than petitioner" as being the shooter. Rpt. at 26. In turn, her testimony at the evidentiary hearing confirmed her description of the shooter as "a black man" with "dark" skin. 11 EH RT 1379:22-28; *see also People v. Gay*, 42 Cal. 4th 1195, 1224 (2008) (Martina Ruelas (née Jimenez) was one of the eyewitnesses who "would have

described the shooter's complexion as inconsistent with [petitioner's] but consistent with Raynard Cummings's").

Third, Shinn also effectively placed limits on Payne's efforts by failing to follow up the avenues of investigation Payne suggested based on his review of the discovery, and consultation with Mr. Gay and Shinn. 3 EH RT 199:3-13. Payne testified that Shinn did "not necessarily" follow up on suggested investigation or tasks, and in fact Payne had no idea if Shinn "ever actually followed through." 3 EH RT 199:3-6, 200:16-23.

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

In response to this Court's Questions 1, Part 2, the referee made the following specific findings:

> Shinn presented a multi-pronged defense: 1. The witnesses who have identified petitioner as the shooter have made inconsistent statements which call into question the credibility and weight of their testimony. Rpt. at 13:18-21. 2. Percipient witnesses have identified co-defendant Raynard Cummings as the person outside the vehicle who shot Officer Verna or as the person who resembles the shooter more than petitioner. *Id.* at 14:16-18. 3. There are no witnesses who observed the murder weapon pass from Raynard Cummings to petitioner, thereby undermining the prosecution's two shooter theory. *Id.* at 15:2-4. 4. Pamela Cummings is a liar who is lying to protect herself and her husband Raynard Cummings. *Id.* at 15:19-20. 5. Raynard Cummings had on several occasions claimed full responsibility for firing all six shots at Officer Paul Verna. *Id.* at 18:7-8.
>
> Shinn's opening statement made on 26 February 1985 reflects his preparation of petitioner's defense that petitioner did not participate in the shooting of Officer Verna. [TT 6292-6399]. He began by reminding jurors what the lawyers say in their

> opening statements is not evidence, and that the prosecution bears the burden of proof beyond a reasonable doubt. The defense has no obligation to prove a thing, " . . . *but nevertheless the defendant is going to show you that the events did not occur the way Mr. Watson has just suggested to you.*" Shinn told the jury that after the grand jury proceedings and the preliminary hearing the prosecution found it had a strong case against co-defendant Raynard Cummings and a weak case against petitioner. The decision to plea bargain with co-defendant Pamela Cummings was a desperate move because the witnesses against petitioner were weak. Shinn then identified five reasonable doubts. Rpt. at 19:17-20:5.
>
> Shinn's closing argument to the jury three months later on 28 May 1985 reflects the development of the defense theory that petitioner did not fire any of the shots at Officer Verna and also his adjustments for adverse and favorable developments. Shinn began by reminding the jury of the presumption of innocence and the burden of proof upon the prosecution. He advised the jury he would review the evidence presented and show them where there is reasonable doubt. He then produced a chart upon which he has listed eleven reasonable doubts, any one of which would justify an acquittal. Rpt. at 21:11-18.
>
> Petitioner's contention: "Shinn, having rested the entire defense theory on the fact that the police reports contained no evidence that any eyewitness actually saw the gun being passed, completely disengaged from any further guilt phase investigation," [POB] is not supported by this record. *Id.* at 25:20-23.

Mr. Gay takes the following exception to the foregoing regarding Question 1, Part 2:

1. Mr. Gay takes exception to the finding that the record does not support the contention that Daye Shinn disengaged from further guilt-phase investigation once he based the defense on the absence of reported evidence that any eyewitness saw the gun passed from Cummings to Mr. Gay.

Mr. Gay respectfully submits that, contrary to the referee's finding, the record fully supports the conclusion that Shinn completely disengaged from the guilt-phase investigation once he determined the prosecution did not have a witness who could testify truthfully to seeing Cummings pass the gun to Mr. Gay.

First, it is only by characterizing Shinn's review of the discovery and transcripts of earlier proceedings – or his review of Payne's summaries of such materials – as constituting an "investigation" that Shinn can charitably be said to have had any involvement in the investigation at all. As reflected in the referee's findings above, the "results" of Shinn's purported investigation of the homicide consisted almost exclusively of his reliance on the contents of police reports and prosecution witnesses' prior testimony at the preliminary hearing, grand jury proceedings and trial. The only independent defense witness called by Shinn to defend against the homicide was Payne, after Payne fortuitously observed a prosecution investigator in the hallway at trial coaching a young witness to identify Mr. Gay in court. 86 RT 9827 *et seq.* As discussed below, Shinn did not investigate or present a single affirmative witness to identify Cummings as the shooter or to testify to Cummings's admission that he, alone, shot the victim. Indeed, the referee's Report cites the trial transcript over sixty-five times in describing the "results" of Shinn's investigation. Rpt. at 13-25. None of those citations, however, refers to an item of evidence uncovered as the "result" of Shinn's "investigation."

Second, Shinn testified in the earlier habeas proceedings that he

delegated the guilt-phase, as well as the penalty-phase investigations, to Payne. *See* Ex. A25 at 58 (Payne "would do all the investigations"); 1 EH RT (1996) 80 (Payne "did all the investigations, I myself did not"). His billing did not reflect a single pre-trial interview with a single lay witness or contact with a single expert witness. 4 CT 1122-23. His records further reflect that from the date of his fraudulently engineered appointment in Mr. Gay's case until the start of jury selection he visited Mr. Gay in jail exactly twice. 4 CT 1122-23.

Payne's testimony at the evidentiary hearing confirmed that it was his responsibility to review and summarize the discovery, present Shinn with his findings and make recommendations for next steps. 3 EH RT 198:5-26, 199:3-16, 200:16-23; Resp. Ex. 709 at 796:6-11. But, as noted above, Payne was unaware of any instance in which Shinn actually followed up any suggested line of investigation or expert consultation. 3 EH RT 200:16-23. Rather, it was Mr. Gay who provided Payne with "much more detailed notes, diagrams and suggestions," based on review of the police reports and witness statements "than Mr. Shinn was doing." 3 EH RT 283:22-284:2; *see also* 3 EH RT 208, 245; Ex. A155 (Mr. Gay became so desperate he handwrote a removal order for Donald Anderson to testify about Marsha Holt's statement that she did not see the shooting). According to Payne, Shinn's lack of follow-up was one of the most obvious indications that Shinn was just "'going through the motions'" at the guilt phase of the trial. 3 EH RT 299:25-300:4.

Shinn's pre-trial guilt-phase inactivity thus reflected his same desultory performance that occurred in regards to the penalty phase: he "did none of the investigation for the penalty phase and gave his investigator no specific instructions regarding the evidence to be sought." *In re Gay*, 19 Cal. 4th 771, 810 (1998). Similarly, as with the penalty phase, Shinn "could and should have given specific directions to and monitored his investigator," but failed

to do so. *In re Gay*, 19 Cal. 4th at 814-15.

Mr. Gay respectfully submits that the substantial evidence shows that Shinn was not engaged in the guilt-phase investigation.

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

In response to this Court's Question 2, Part 1, the referee made specific findings as to five categories of additional evidence that Mr. Gay could have presented to show that he did not participate in the shooting of Officer Verna. *See* Rpt. at 26-36 (grouping the evidence into additional eyewitnesses, inmate witnesses, sworn peace officer witnesses, impeachment witnesses, and expert witnesses).

Mr. Gay will indicate any exceptions to each category in turn.

ADDITIONAL EYEWITNESSES

> The Court has already identified 4 additional eyewitnesses present on 2 June 1983 who were not called during the 1985 trial whose descriptions of the shooter pointed more towards co-defendant Raynard Cummings and away from petitioner. Rpt. at 26:2-5 (footnote omitted).
>
> **Elizabeth Martina Jimenez Ruelas**, then 9 years of age, was in the front yard of her family home at 12133 Hoyt Street, which is at the intersection with Gladstone Avenue. She was talking with Officer Verna from inside the fence of her front yard when he drove off on his police motorcycle to conduct a traffic enforcement stop. She observed Officer Verna walking up to the car when he was shot. When interviewed in 1985 she described the shooter as a male black, tall, young looking, thin and ugly. [Petition Exhibit 43] In 2014 she described the shooter as a male black with a dark complexion. [RT 1379] She was interviewed by the police on the evening of 2 June 1983 and several times since. She attended the live line up 6 June 1983 but was unable to make an identification. See Exhibits

757 and 758. Her initial descriptions given to the police more strongly point towards Raynard Cummings than petitioner. The interviews in 1983 and 1985 were conducted in Spanish." Rpt. at 26:6-18.

Walter Roberts, then age 12, was present in the front yard driveway area of the Rodriguez residence at 12097 Hoyt Street, playing with his brother Shannon Roberts and Ejinio Rodriguez while Irma Rodriguez Esparza sat nearby, also in the front yard. Walter Roberts heard what he at first believed to be fireworks, looked down the street and saw the police officer lying on his back in the street with a car nearby. [RT 1270-71] Walter Roberts saw two other persons, a male black driver and a female Caucasian passenger. He did not recall seeing any weapons. Walter Roberts then ran to his home next door to call 911. Walter Roberts was interviewed twice on 2 June 1983. Once at 6:25 p.m. by Police Officer R. Burrow #16402, Exhibit 751; and again at 8:30 p.m. by Detective G. Rock #17672, Exhibit 752. He told Burrow he " . . . *heard one shot and observed the driver pointing a small handgun (describing a Derringer) out the driver's window (holding gun in left hand). Witness observed the officer on his back. The driver then exited the vehicle and pointed the weapon (right hand) at the downed officer and fired two additional rounds (driver described as a male Negro, black, 6' 0", 170, 25/30, Long sleeve multicolor shirt, dark pants, tennis shoes 1-2 inch afro).*" Walter Roberts later described the shooter to Detective Rock as the driver: "*The driver was described as a male Negro, black unknown 6-0/6-1, 175, 25/30 medium complexion, 3-4 inch afro, clean shaven, thin, wearing a dark blue long sleeve shirt, blue jean pants, dark shoes.*" The initial shooter descriptions given by Walter Roberts more strongly point to Raynard Cummings than petitioner based upon complexion and dark colored shirt clothing described; however, the height description is more consistent with petitioner. Rpt. at 26:19-27:17.

Ejinio Rodriguez, then age 8, was playing with neighborhood friends in the front yard of his family home at 12097 Hoyt Street. While playing Ejinio Rodriguez became aware of a

police officer making a traffic stop down the street, but returned to play. His attention was again drawn down the street by what he first thought were firecrackers and he saw two people. He saw the car drive up the street, make a u-turn at Prager and speed back down Hoyt Street, stopping in front of the officer lying on his back in the street and someone jumping out and grabbing the officer's gun. In the days, weeks and months following the incident Ejinio Rodriguez was not interviewed by any police officer or defense investigator. In 2003 he gave a statement to a defense investigator: "*The shooter was a black man who had dark skin and was wearing a dark shirt.*" [RT 1352] The description of the shooter given by Ejinio Rodriguez points more strongly towards Raynard Cummings than petitioner based upon complexion and the dark shirt description. Rpt. at 27:18-28:5.

Irma Rodriguez Esparza, then age 13, was present in the front yard of her parents' home at 12097 Hoyt Street. When interviewed the next day by Officer A.R. Moreno she described the driver / shooter as a dark skinned male negro, about twenty-five years old with a three to four inch afro. She described the passenger in the front seat as a male negro about twenty or twenty-five years old, light skin, wearing a white long sleeved shirt. [Exhibit A013] During the evidentiary hearing more than 3 decades later she testified: "*I recall my brothers playing in the front yard, and a car being pulled over, and I just remember them shooting the police officer.*" She described the shooter, the driver of the car, as a male black and very tall. The passenger seated next to the driver was a lighter skinned person compared to the shooter/driver. [RT 1700-01] She now recalls the police officer being shot in the neck. [RT1717] " . . . *I remember more him being shot in the neck and then him being shot again. I don't, after that, I really don't know, right now I don't recall anything else besides just remembering just that one more vivid shooting was the first one on his neck.*" [RT 1727] The descriptions given by Irma Rodriguez Esparza point more strongly towards Raynard Cummings based upon complexion and height, with the added fact that she

differentiates between the shooter and a lighter complexion male Negro wearing the white long sleeved shirt as the front seat passenger. Rpt. at 28:6-25.

Linda Orlik was at home at her residence at 11611 Gladstone Avenue standing in the front yard with her mother when she heard gunfire . . . . She heard five shots in about three seconds: three shots followed by a short pause, and then two more shots. [RT 1013] Orlik was interviewed by police in June of 1983 and her hearing shots fired [was] documented. [Exhibit 761] The time frame described by Orlik suggests an argument petitioner would not have had enough time to adjust to the shock of the muzzle blast just a few feet from his head, receive the revolver from Raynard Cummings, emerge from the passenger seat by either driver's or passenger's door (witness accounts vary) and fire the remaining shots. Rpt. at 29:2-12.

1. Mr. Gay takes exception to the referee's omission of additional evidence that could have been presented at the guilt phase.

The substantial evidence demonstrates that in addition to the testimony of the four exculpatory eyewitnesses the referee described above, Shinn could have presented additional evidence to support Mr. Gay's defense. This additional evidence was not addressed by the Report. The additional evidence includes:

- When presented with side-by-side photographs of Raynard Cummings and Kenneth Gay at the reference hearing, Martina Jimenez affirmatively identified Raynard Cummings as the person she saw shoot the officer. *See* 11 EH RT 1401:6-9; *see also* Ex. A27 at ¶ 7.
- Shortly after the shooting, Walter Roberts made two live line-up identifications of the shooter. Both of the men Walter Roberts identified in the live line-up point to a black male consistent with Raynard Cummings as the shooter. Ex. 755 (No. 4 "looks the same" as the shooter and is the most dark-skinned person in the line-up); Ex. 753 (No. 2 with thick, dense afro identified as "same kind of curls" as shooter).
- In addition to identifying the dark-skinned black man wearing a dark shirt

standing over the police officer as the shooter, Ejinio Rodriguez was able to differentiate between the dark-skinned and light-skinned black men when he observed the car speed up Hoyt Street, make a u-turn at Prager Street to go back down Hoyt Street, and described seeing a light-skinned man (different from the dark-skinned shooter) jump out of the car to retrieve a gun. 10 EH RT 1331:1; Ex. A24 at ¶ 8.

INMATE WITNESSES

Shinn did not call as witnesses other inmates who heard statements by Raynard Cummings in which Raynard Cummings claims credit for shooting Officer Verna. Rpt. at 29:16-18.

James Jennings was in custody at the Los Angeles County Mens Jail in 1985, charged with a murder unrelated to petitioner's case and was transported to the San Fernando Courthouse with Raynard Cummings. Jennings no longer remembers any details of any conversations he may have had with Cummings; however when Jennings [w]as interviewed by police detectives in February of 1985 he told them the truth. The report of the interview of Jennings is included in this record as Exhibit A5: " . . . *Cummings then stated that he had a 38 cal revolver hidden between his legs, and when 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.*"

Jennings was subsequently convicted of first degree murder in his own case and sentenced to twenty-eight years to life in prison. Jennings grew up in the same neighborhood as petitioner, knew of petitioner, but was better acquainted with petitioner's brother and sister. Jennings was motivated to help on his own case; however he was not called to testify and did not receive any help with this case. Rpt. at 29:19-30:13.

Norman Purnell was an inmate at Los Angeles County Mens Jail from 1983 to 1985 when he heard a person he knew as

"Slim" discuss his case: "*I recall him saying he was the one that shot the police officer, and if he was going down, his crimie* [crime partner] *was going down, too.*" Purnell told a Sheriff's Deputy about the conversation, " . . . *Because I was feeling it was kind of cruel to take someone with you when the person didn't have nothing to do with it, you know.*" [RT 1588]. Rpt. at 30:14-20.

John Jack Flores was an inmate at Los Angeles County Mens Jail housed in a cell adjacent to Raynard Cummings. On 11 July 1983 Flores was interviewed by Los Angeles County District Attorney Investigator Robert Tukua whose report runs five pages of single spaced type and is included in the record of this case as Petitioner's Exhibit A173. This statement is of note because of the details included and the early point in time when the information was provided to the prosecution. Raynard Cummings claims credit for firing all six bullets which struck Officer Verna. Rpt. at 30:22-31:3.

David Elliott was an inmate at Los Angeles County Mens Jail and was reported to have had a conversation with Raynard Cummings wherein Raynard Cummings stated he was the person who had shot and killed Officer Verna. A brief summary of the statement is included in Exhibit A61: '*Witness Elliott while in custody had a conversation with co-defendant, Raynard Cummings, and during this conversation Cummings told Elliott that he was the person who shot and killed Officer Paul Verna. This conversation took place in the County Jail on the 20 or 21 of July 1983.*' Rpt. at 31:4-11.

Mr. Gay does not take exceptions to any of these findings.

SWORN POLICE OFFICERS

Los Angeles Sheriff's Deputy **William McGinnis** was escorting Raynard Cummings to court line. McGinnis instructed Raynard Cummings and the other inmates to follow the "no talking" rules while in the passageways. Raynard Cummings stated to McGinnis: "*I can't wait to get back on the street so I can run into one of you punk-ass motherfuckers.*"

McGinnis responded, "*Well, I never shot anybody in the back.*" Raynard Cummings responded, "*Yeah, well, I put two in front of the motherfucker, and he wouldn't have got three in the back if he hadn't turned and ran, coward punk-ass motherfucker.*" [TT 7040-41]. Rpt. at 31:13-20.

Los Angeles Sheriff's Sergeant **George Arthur** was assigned to the 3000 module at Los Angeles Men's County Jail and was escorting Raynard Cummings with Deputy Michael McMullan. Other jail inmates were taunting Raynard Cummings with chants of, "*Dead man walking.*" McMullan testified Raynard Cummings responded by saying: *'I am no ghost. The only ghost I know is Verna. I put six in him.'* [TT 7149] McMullan also testified Raynard Cummings shouted at Sergeant Arthur, '*He took six of mine.*' [TT 7150]. Rpt. at 31:21-32:1.

Los Angeles Sheriff's Lieutenant **Richard Nutt** was a new Sheriff's Deputy working an overtime assignment in the Mens County Jail. While escorting three high security inmates to and from the showers, Raynard Cummings spoke directly to Nutt: '*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.*' [RT 2423] Nutt reported Raynard Cummings statement to a supervisor, Sergeant George Arthur, who declined to take a formal report due to the number of similar comments made by Raynard Cummings to other Sheriff's personnel. Rpt. at 32:6-14.

Mr. Gay takes the following exceptions to the foregoing findings.

2. Mr. Gay takes exception to the finding that Deputy McGinnis's testimony would have established that Cummings admitted firing *two* shots before Officer Verna attempted to retreat.

The referee found Shinn could have presented evidence that while awaiting trial, Raynard Cummings threatened that he would "take care of [McGinnis]" and, referring to Officer Verna, said to Deputy McGinnis:

"*Yeah, well, I put two in front of the motherfucker, and he wouldn't have got three in the back if he hadn't turned and ran, coward punk-ass motherfucker.*" Rpt. at 31:18-20 (emphasis in original). To support the factual finding, the referee cites Deputy McGinnis's testimony at the Evidence Code section 402 hearing. Rpt. at 31:20 (citing 65 RT 7040-41).

Mr. Gay respectfully submits that the substantial evidence shows that Shinn could have introduced additional evidence that Raynard Cummings boasted to Deputy McGinnis that he put "three [shots] in the front," rather than "two [shots] in the front" as the referee found. *See* Rpt. at 31 (emphasis added). At the section 402 hearing, Deputy McGinnis mistakenly testified that Cummings had said he "put two" and not three shots in front. Deputy 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.[2]

At trial, the prosecution's theory depended on its argument that Cummings shot the officer "once and maybe twice," and that all the shots were fired in "just seconds." 58 RT 6212, 6233. Cummings's admission that he fired at least "three" shots at the front of the victim repudiated the prosecution's theory that he "passed the gun" to Mr. Gay after the first or second shot. Even if the remainder of Cummings's boast does not make it clear, in context, that he fired the remaining shots (which it does), his admission to firing the first three shots, and the fact that all shots were fired in quick succession necessarily exculpates Mr. Gay. *See* Return at 70, ¶ 168

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SHOT ANYONE IN THE BACK. CUMMINGS REPLIED "YA WELL I PUT THREE IN THE FRONT OF TH MOTHER FUCKER AND HE WOULDN'T HAVE GOT TH IN THE BACK IF HE HADN'T BEEN RUNNING — T PUNK ASS COWARD MOTHER FUCKER."

(respondent admitting "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."). Deputy McGinnis's report was obviously available at trial and a reasonably competent defense attorney would have used it either to refresh the Deputy's recollection or as a prior inconsistent statement to prove that Cummings admitted to firing the first three shots into the officer's body, which would have been a compelling reason to doubt Mr. Gay's participation in the homicide. At the very least, a reasonably competent defense attorney would have called Deputy McGinnis to testify in front of Mr. Gay's jury to these statements.

3. Mr. Gay takes exception to the referee's omission of Cummings's adoptive admission that he shot Officer Verna multiple times.

In addition to the referee's findings on Cummings's statements to Nutt that Cummings "killed Verna" and "when I get out of prison, you will have about 16 years on and I will kill you too," Rpt. at 32:9-11, Mr. Gay presented substantial evidence, unaddressed by the referee, that Nutt grew angered by Cummings and confronted him. Ex. A161. Nutt told Cummings he was a coward for shooting Officer Verna in the back five times, and if Cummings wanted to hurt him, to do it now. *Id.* Cummings said nothing to dispute Nutt's description of the number of times Cummings shot the officer. *Id.* Cummings's adoptive admission that he shot Officer Verna in the back five times is further evidence that supported a defense Mr. Gay did not participate in the shooting. *See* Cal. Evid. Code § 1221.

IMPEACHMENT WITNESSES

Donald Anderson testified he was married to Marsha Holt. While visiting Anderson who was then being held at Los Angeles County Mens Jail, Marsha Holt told Anderson about

the shooting: "*She told me that her, her mother and somebody else was in the house. They heard gunshots and they ducked down.*" *Marsha Holt also told Anderson:* "*Well, she told me she wasn't going to go to court, because she didn't see anything.*" [RT 2143] Anderson was ordered out from state prison and brought to court twice during the 1985 trial but did not testify. Rpt. at 32:16-23.

Deborah Cantu, Pamela Cummings' sister, a civilian employee of the Los Angeles Police Department, was called by the prosecution to establish Raynard Cummings' prior possession of a firearm similar to the murder weapon. The prosecution also sought to elicit certain statements made by Raynard Cummings to the effect he would resist being arrested should he be confronted by police. [TT 8885-95] Petitioner notes Pamela Cummings spoke to Cantu shortly after the shooting and falsely claimed it was Milton Cook who shot and killed Officer Verna. Petitioner reasons Pamela Cummings first sought to falsely implicate Milton Cook because Milton Cook physically resembles her husband Raynard Cummings which suggests it was Raynard Cummings who shot and killed Officer Verna. Pamela Cummings then falsely accused petitioner after Milton Cook was able to establish an alibi. Shinn did not ask any questions of Cantu concerning the earlier statements by Pamela Cummings implicating Milton Cook. Rpt. at 32:24-33:9.

4. Mr. Gay takes exception to the referee's omission of additional evidence available through Deborah Cantu that exculpates Mr. Gay.

In addition to the referee's findings that Cantu would have testified that her sister, Pamela Cummings, was trying to place blame on Raynard's look-a-like, Milton Cook, in the hours after the shooting, there is substantial evidence in the record, which could have been presented at trial, to show that in Pamela Cummings's earliest account of the shooting, she exculpated Mr. Gay.

Deborah Cantu gave the police a tape-recorded statement recounting her conversation with her sister Pamela Cummings hours after the shooting. Ex. A134 (transcript of interview with Cantu). Pamela Cummings, who was scared and crying, explained that she was in the car with Mr. Gay and a man named Milton Cook, when an officer pulled them over. Ex. A134 at 3-5. When Pamela described how "Milton Cook" fired the first shot, Pamela told Cantu:

> *Kenny Gay was so scared, he jumped out on the ground* and [Milton Cook] 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 [Pamela], "Okay, bitch. Don't you say a word. Just get in the car and drop me off."

Ex. A134 at 5:17-23 (emphasis added). 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." Ex. A134 at 14:8-13. This additional evidence that hours after the shooting, Pamela Cummings stated that Mr. Gay was so scared that he jumped out of the car and got on the ground would have supported a defense that Mr. Gay did not participate in the murder of Officer Verna.

5. Mr. Gay takes exception to the referee's omission of additional impeachment evidence that could have been presented at trial.

Substantial evidence in the record shows that Shinn could have presented additional impeachment of prosecution witnesses. But this additional evidence was not mentioned or addressed in the Report. This

additional evidence[3] includes:

To refute the prosecution's argument that Marsha Holt saw Mr. Gay shoot the officer, 95 RT 10893:25-26, Daye Shinn could have presented:

- Celester Holt, Marsha Holt's mother, who would have testified that Marsha was not looking out the window watching the officer being shot, because the two were lying on the bed together watching television when Gail Beasley came into the room to tell them an officer had been shot. *See* Ex. A118 (Celester Holt police statement); 1 Supp. CT 281 (Celester Holt grand jury).
- Mackey Como, Gail Beasley's mother, who would have testified about the confounded view of bars and grating on the window that Marsha Holt claimed to have been looking out, Ex. A170, as well as credible testimony about the layout of the bedroom to prove the window Holt claimed to have been looking out from affords no vantage point of the shooting area, Ex. A123.
- Gail Beasley, who would have reiterated her preliminary hearing testimony that Marsha Holt, and her mother, Celester, were watching television on the bed, and only after Beasley told them an officer had been shot, did they "both [get] up from the bed" and go to the window and ask what was going on. 74 RT 8333:4-7; *see* 79 RT 8950 (when Gail Beasley was located and produced as a witness, Shinn did not examine her).

To refute prosecution witness Robert Thompson's 1985 trial testimony, Daye Shinn could have presented:

- Evidence that Robert Thompson's composite drawing of the shooter, which perfectly described Raynard Cummings ("male Negro, black hair, finger wave . . . baggy jeans with brown short-sleeve shirt. Medium to dark complexion" sitting in the backseat) was missing.[4] *Compare* Ex. A45 at 1 (Robert Thompson's detailed descriptions of three suspects) *with* Ex. A45 at 8 (Thompson's sketch of Pamela Cummings) *and* Resp. Ex. 707 (Thompson's sketch of Mr. Gay).
- Evidence that Robert Thompson noted two dark-skinned black men as the possible shooter at the live line-up days after the shooting, Ex. A45 at 10-11, instead of Shinn erroneously eliciting on Thompson's cross-

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[3] This additional evidence is more fully detailed in Petitioner's Post-Hearing Brief. *See* Pet. Br. at 75-91.

[4] The composite of the black male in the backseat has never been produced.

examination that he could not identify anyone in the lineups, 68 RT 7642:10-11.

- Evidence that Thompson identified a medium-shade black man (resembling Raynard Cummings) as the outside shooter at the grand jury, 2 Supp. CT 460, instead of (again) erroneously arguing on cross-examination that Thompson could not recognize anyone at the grand jury, 68 RT 7643:14-16.

To refute the preliminary hearing testimony of Gail Beasley that was read to Mr. Gay's jury, Daye Shinn could have presented:

- Gail Beasley's prior, consistent identifications of the shooter wearing a dark-colored shirt, thereby providing evidence of the "unconscious transference" of Mr. Gay's light complexion onto Raynard Cummings. *See* 1 Supp. CT 208:17 (grand jury) ("I know [the shooter's] shirt was red.").
- Richard Delouth and Donald Anderson's testimony that Gail Beasley was a heavy PCP and crack cocaine user at the time of the crime. 16 EH RT 2141:17-21; 1 EH RT (1996) 248:17-23.

To refute prosecution witness Pamela Cummings's trial testimony, Daye Shinn could have:

- Introduced Robin Gay's grand jury testimony. This would have provided evidence that hours after the murder, Raynard Cummings reenacted how he "emptied his gun" into Officer Verna, that Pamela Cummings knew that Milton Cook was the "same height, same color, and the same attitude" as Raynard Cummings, and that Pamela and Raynard devised the plan to "blame" Milton Cook. 3 Supp. CT 799-800 (grand jury testimony); 76 RT 8582 (prosecution attempt to introduce Robin Gay's grand jury testimony).
- Impeached Debbie Warren with her prior grand jury testimony that Pamela Cummings admitted to her the morning after the shooting that it was Raynard Cummings who shot the officer. 3 Supp. CT 662-63 (grand jury).

EXPERT WITNESSES

Eyewitness Expert Identification. As noted by the Court: "Several eyewitnesses observed some of the events on Hoyt Street. Their versions of events and identification of the shooter or shooters varied greatly." People v. Cummings, supra at

1259. The record reflects Shinn was familiar with eyewitness identification experts. Such evidence was suggested to Shinn by petitioner's investigator Douglas Payne, including the name of Dr. Robert Shomer [RT 200-201]. Shinn also informed the trial court, in Payne's presence, of Shinn's need to consult with such witnesses during an in camera hearing: "We are going to put a psychologist, two or three psychologists, eyewitness testimony so now the doctors, didn't anticipate bringing them this early. I told my investigator, told him get these doctors but get them for the end of the murder case where eyewitness testimony is going to be essential just like the robbery case, eyewitness testimony, and I am going to use him, that psychologist, for eyewitness testimony aspects of the case at the end of the trial for the robbery and for the murder." [Petition Exhibit 121] Payne's guilt phase billing records includes 3 hours for dealing with experts. Rpt. at 33:26-34:14.

Human Eyesight Expert. Petitioner also suggests expert testimony concerning the conditions of visibility would have been helpful in a critical analysis of the testimony of the residents located at 12127 Hoyt Street: Gail Beasley and Marsha Holt, to suggest to the jury Beasley and Holt could not have seen what they said they saw. Petitioner presented Dr. Paul Michel as an example of such a witness. Dr. Michel's report prepared for the 2000 retrial is included as Petition Exhibit 021. Rpt. at 34:15-22.

Biomechanics Expert. The prosecution's case theorizes Raynard Cummings fired the first shot and perhaps the second shot from the back passenger side seat of the two door Oldsmobile, then handed the revolver to petitioner seated in the front passenger seat who then emerged from the driver's door to fire four or five more shots at Officer Verna. [Dr. Solomon's] report is included as Petition Exhibit A017 . . . . Dr. Solomon offered a calculation for the amount of time Shequita Chamberlain had to make her observations of a dark complected male black [sic] wearing a dark shirt who appeared to be speaking to a police officer after she heard a gunshot. Dr. Solomon conducted a number of experiments to determine

how quickly one could exit from the rear passenger side seat out the driver's door, from the front passenger seat out the driver's door and from the passenger seat out the passenger door, all to a standing position outside the driver's door. A similar demonstration was conducted during this reference hearing.

The gist of Dr. Kenneth Solomon's testimony is that Raynard Cummings could well have fired the first shot from the back seat, then fired again as he emerged from the rear seat via the driver's door, and then fully exited and fired the remaining four shots in the very short period of time described by some of the percipient witnesses.

Dr. Solomon also testified about the startling effect a gunshot would have had upon petitioner under the prosecution's "pass the gun" theory. A gunshot fired from a revolver within feet of petitioner's unprotected ears and in a confined space like a car interior would be loud in the extreme and would result in momentary confusion and disorientation even if one were anticipating the gunshot. A body of literature concerning delayed reaction time based upon the startling effect exists within the scientific community. Rpt. at 34:23-36:6.

Forensic Evidence. Petitioner argues the gunshot residue analysis, firearm ballistics and autopsy evidence concerning the location, trajectory, and order of the gunshot wounds inflicted upon Officer Verna constitute "hard scientific evidence" that refutes or calls into question some of the percipient witness accounts. Marsha Holt, Gail Beasley and Shannon Roberts each testified they observed petitioner exit the passenger door, walk around the front of the car and then fire at Officer Verna from the area of the front driver's side fender. The distance described exceeds that supported by the gunshot residue analysis presented at trial. Shinn did not challenge any of these three witnesses's credibility on this basis during the 1985 trial. Rpt. at 36:11-20.

6. Mr. Gay takes exception to the referee's implication that Daye Shinn directed Douglas Payne to consult and retain eyewitness identification experts.

Substantial evidence supports the referee's finding that Daye Shinn did not call an eyewitness identification or memory expert even though he was familiar with eyewitness identification experts at the time of Mr. Gay's trial, and that investigator Douglas Payne even suggested an eyewitness identification expert, Dr. Robert Shomer, with whom he was familiar, for use in Mr. Gay's defense. Rpt. at 34:2-5. Mr. Gay takes exception, however, to any suggestion that the entries in Payne's billing records totaling "3 hours for dealing with experts" corroborate Shinn's misrepresentations to the trial court that he had instructed Payne to retain "'two or three psychologists'" to present "'eyewitness testimony.'" Rpt. at 34:7-8.

First, Payne explicitly denied the truth of Shinn's representations to the trial court that he had instructed Payne to retain the eyewitness experts:

> Q. Did Mr. Shinn ever order or authorize you to retain the services of three eyewitness experts?
>
> A. No, he did not.

3 EH RT 212:8-10.

Second, Payne further testified at the evidentiary hearing without contradiction that he suggested an eyewitness identification expert, as well as an accident reconstruction firm to Shinn, but Shinn ignored him, never followed up on Payne's request, and never directed Payne to engage or consult any experts. 3 EH RT 200:16-26; 3 EH RT 208:3-6 ("I only provided the [expert] information to him. I did not have the authority to engage anyone, so I merely provided the information to Mr. Shinn, and if he would have instructed me, I would have followed up on it.").[5]

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[5] *See also* 3 EH RT 200:24-201:5, 299:25-301:1 (Payne recommended

Third, the three hours of generic "expert" work, which the referee implies *may* be consultation with an eyewitness expert, actually referred to a last-ditch attempt by Payne while in trial to find a gunshot residue expert, not an eyewitness expert. Rpt. at 34:13-14. Payne testified that after the start of trial, Shinn hurriedly asked him to find a gunshot residue expert as a "last-hour . . . last-minute" request. 3 EH RT 303:21-304:4. Payne's billing records corroborates his testimony. The three hours the referee cites were billed on April 30, 1985 and May 14, 1985. Ex. A120 at 38-39. By those dates, the guilt phase was nearly completed, Payne did not have time to locate a gunshot residue expert, and Shinn never called any such expert in his defense case-in-chief. 9 CT 2369; 81 RT 9180 (by April 30, 1985, the trial was already in the Cummings's case in chief).

Therefore, there is no substantial evidence upon which to infer from Shinn's statements that he actually instructed Payne to locate an eyewitness expert, and all of the substantial evidence – including Payne's testimony – is to the contrary.

7. Mr. Gay takes exception to the referee's omission of additional expert testimony concerning the accuracy and reliability of eyewitness testimony.

Mr. Gay takes exception to the referee's failure to mention or address the substantial evidence supporting the availability of eyewitness expert testimony that would have assisted the jury to understand and evaluate the factors that affect the accuracy and reliability of eyewitness testimony. This Court observed that the number of potential and actual eyewitnesses, the

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Truesdail Laboratories in Orange County, which was an "excellent place to start" consulting with experts in the fields of eyewitness testimony, gunshot residue and accident reconstruction; but "at no point" did Shinn direct Payne to follow up or "bring in any experts from Truesdale [sic] Laboratories").

variations in their descriptions of events, the number of gunshots, and the physical logistics involved in the prosecution's "pass the gun" theory all indicated that expert testimony likely would assist the jury in evaluating the evidence, including "understanding the inconsistencies in the identifications made by Robert Thompson and other prosecution witnesses." *People v. Gay*, 42 Cal. 4th at 1215.

At the evidentiary hearing, Mr. Gay presented the expert testimony of Dr. Kathy Pezdek explaining, *inter alia*, ten factors related to the accuracy of eyewitness testimony: distraction and change 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. Mr. Gay submitted evidence that these scientific tools would have assisted Mr. Gay's jury in reconciling the various accounts of the shooting including accounting for Gail Beasley's unconscious transference of Raynard Cummings and Mr. Gay; crediting Robert Thompson, Pamela Cummings, and Oscar Martin's earliest accounts of the shooting (seeing a dark-skinned black man exit the car to shoot the officer); and explaining how saccadic eye movements could have explained Rose Perez's accounts of seeing Mr. Gay on the passenger side of the car and an unidentified person (Raynard Cummings) on the driver side of the car when the officer was shot. *See, e.g.*, Pet. Br. at 28-45.

Yet, noticeably absent from the referee's findings is any reference to any of Dr. Pezdek's extensive expert testimony. *See* 2 EH RT 12 *et seq.*; 4 EH RT 427 *et seq.*, 9 EH RT 1163 *et seq*. (testifying on three days during the reference hearing). Nevertheless, the substantial evidence demonstrates that Shinn could have presented evidence to inform the jury of the factors that are more fully summarized in Mr. Gay's post-hearing brief. *See* Pet. Br. at 28-45.

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

In response to this Court's Question 2, Part 2, the referee made the following specific findings:

> **ADDITIONAL EYEWITNESSES**
>
> Walter Roberts, Elizabeth Martina Jiminez Ruelas, Linda Lee Orlick and Irma Rodriguez Esparza were each interviewed by police on 2 June 1983 or shortly thereafter. Their names and addresses were in the reports of witness statements compiled by the investigating officers. Ejinio Rodriguez was identified by his nickname "Choppie" or "Choppy" in the witness statements of Walter Roberts and noted [to] be present in the front yard of 12097 Hoyt Street at the time of the shooting. Ejinio Rodriguez was also mentioned in the grand jury testimony of Shannon Roberts. Ejinio Rodriguez's address was available from the witness statement of his sister Irma Rodriguez Esparza. Rpt. at 36:25-37:7.
>
> **INMATE WITNESSES**
>
> The names of the inmate witnesses John Jack Flores, Norman Pernell, David Elliott and James Jennings were each contained in reports compiled by the investigating officers. [Petition Exhibits A61 and A005] John Jack Flores also testified at Raynard Cummings' penalty trial, called by the prosecution, but was not asked about Raynard Cummings' statements exonerating petitioner. Rpt. at 36:7-12.
>
> **SWORN PEACE OFFICERS**
>
> The names of the Los Angeles Sheriff's Department sworn employees George Arthur and William McGinnis were each contained in reports compiled by the investigating officers and provided to the defense in discovery materials. Sheriff's Deputy Richard Nutt's statement was not taken by detectives until at or about the time of the 2000 retrial and was thus not reasonably available to Shinn. Rpt. at 36:12-17.
>
> **IMPEACHMENT WITNESSES**

Donald Anderson was actually twice ordered out from state prison during the 1985 trial at the request of petitioner, but not called as a witness. The early statements made by Pamela Cummings to her sister Deborah Cantu implicating Milton Cook, a person resembling her husband Raynard Cummings, were available to Shinn as part of the discovery materials provided by the prosecution. Rpt. at 36:17-22.

EXPERT WITNESSES

Eyewitness Identification. *People v. McDonald, supra*, concerning eyewitness identification expert witnesses, was published by the Court on 21 November 1984, and should have been known to the trial counsel. Dr. Robert Shomer, the expert witness suggested to Shinn by petitioner's investigator, Douglas Payne, is described and mentioned by name in the Court's opinion, as is Dr. Elizabeth Loftus, another well-known eyewitness identification expert. Rpt. at 37:24-38:4.

Human Vision. The study of the dynamics of human vision is an accepted science. The credentials of petitioner's expert at this reference hearing, Dr. Paul Michel, are not extraordinary. The referee does not doubt Shinn or Payne could have located a witness with similar credentials in 1984-85. Rpt. at 38:5-9.

The Oldsmobile. The precise dimensions and configuration of the subject Oldsmobile Cutlass Supreme were available to Shinn for analysis because the police had recovered the stolen car and the owner was cooperative with the police. The owner made the Oldsmobile available to the court for the 1985 trial . . . . Event reconstruction, also known as accident reconstruction, was an established study in 1985, although not commonly used by criminal practitioners beyond matters involving traffic collisions. Attorneys' directories of expert witnesses listed such experts, and publications like the Los Angeles Daily Journal carried advertisements for such witnesses. Petitioner's trial investigator Douglas Payne testified he recommended Truesdail Laboratories in Orange County to Shinn. [RT 201]. Rpt. at 38:10-14; 38:24-39:4.

Forensic Pathologists. Board certified forensic pathologists

with credentials similar to Dr. Joseph Cogan, Dr. William Sherry or Dr. Paul Herrmann would have been available to Shinn for consultation and testimony. Rpt. at 39:5-8.

EXPERT WITNESS FUNDING

Funding for an indigent client would have been available pursuant to Penal Code § 987.9. Rpt. at 39:10-11.

Mr. Gay takes the following exceptions to the foregoing findings regarding Question 2, Part 2:

1. Mr. Gay takes exception to the finding that Deputy Lieutenant Nutt's testimony was not available at trial.

While awaiting trial, Raynard Cummings admitted to Deputy Lieutenant Nutt that he killed Officer Verna, and did not dispute Nutt's allegation that Cummings shot Officer Verna five times in the back. Rpt. at 32:6-14; 19 EH RT 2421-35; Ex. A161 (Nutt report). Nutt reported Cummings's confession to his supervisor, Sergeant George Arthur, but Arthur told Nutt that he need not write a report because so many deputies had made similar reports and "he believed the situation had been covered." Ex. A161; Rpt. at 32:13-14. It was only when Nutt came across Mr. Gay years later in custody in 2000, did Nutt remember his exchange with Raynard Cummings, prompting him to memorialize Cummings's statements in a report. Ex. A161; 19 EH RT 2431 (explaining the individual who threatened him was Cummings). Mr. Gay takes no exception to these findings.

The referee concludes that since Nutt did not write down Cummings's inculpatory statements until 2000, that this report was not reasonably available to Shinn in 1985.[6] Rpt. at 37:15-17. However, no substantial

[6] If this Court were to adopt the referee's finding that Nutt's testimony was not available to Shinn only because his supervisor, Sergeant George Arthur, instructed him not to memorialize Cummings's inculpatory statement, then the referee's finding supports a claim that favorable evidence was suppressed

evidence exists to support the referee's finding that Deputy Lieutenant Nutt's testimony was not reasonably available to Shinn.

While Nutt's written statement was not available, his testimony certainly was had Shinn actually investigated the case. Nutt reported Cummings's inculpatory statements to Sergeant George Arthur, who was known to Shinn. Rpt. at 37:13-14. Had Shinn or Payne interviewed Sergeant Arthur about Cummings's inculpatory statements, Arthur would have told them that other deputies, including Deputy Lieutenant Nutt, had made similar reports of Cummings's inculpatory statements. Shinn could have directed Payne to go interview Nutt. This Court should not adopt a finding that allows exculpatory evidence to be deemed "unavailable" due to Shinn's own unreasonable failure to interview witnesses such as Sergeant Arthur who had known, exculpatory information, which would have led to other sources of exculpatory evidence. *Cf. Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (finding if counsel had performed competently by obtaining a file on defendant's prior conviction, it would have led to a "range of [other] leads that no other source had opened up," including childhood evidence of poverty and mental illness).

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

Children Eyewitnesses. In response to this Court's Question 3, Part 1, the referee made the following observations of the additional

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by the State in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In addition to Nutt's statement, to the extent the referee's finding supports a claim that the prosecution failed to disclose an untold number of similar reports which, as evidenced by the current record, may have additional degrees of explicit detail indicating that Cummings alone was the shooter, then the finding further supports a *Brady* violation. *See* Brief on the Merits at 60-61.

eyewitnesses' appearance, manner and demeanor while testifying:

> Elizabeth Martina Jimenez Ruelas . . . was clearly frightened and traumatized by the experience of witnessing a police officer being shot and killed. Rpt. at 39:20-23.
>
> During his testimony in this hearing more than thirty years later this referee observed [Ejinio Rodriguez] to be anxious and distressed. [RT 1331] He recollected being particularly frightened and disturbed by the fact the adult neighbors were frantic yet helpless to assist the fallen officer. [RT 1336] He testified the events of June 1983 were still very upsetting to him. [RT 1343]. Rpt. at 41:11-16.
>
> Irma Rodriguez Esparza . . . described the experience as still upsetting to her. [RT 1700]. Rpt. at 42:12-13.
>
> Each of the children witnesses was traumatized for a lifetime by witnessing the murder of Officer Verna. Shannon Roberts, while waiting at the courthouse to testify in 2014 suffered a cardiac episode requiring the placement of a stent. [RT 2349] Ejinio Rodriguez had difficulty speaking and was clearly distressed when he testified about seeing the body of Officer Verna lying in the street. [RT 1335-36] Elizabeth Martina Jiminez Ruelas did not wish to testify in petitioner's presence in 2014 and was observed by the referee to be in tears at the conclusion of direct examination by counsel for petitioner. [RT 1382] Irma Rodriguez Esparza in 2014 was moved to tears when first asked to recall the events from June of 1983. [RT 1700]. Rpt. at 43:21-44:4.

Mr. Gay does not take exception to the observations and findings regarding the emotional impact the shooting had on the additional eyewitnesses, both at the time they witnessed the shooting and again when on the witness stand. Although the referee did not make any additional findings as to what effect the witnesses' emotional state had on their credibility, Mr. Gay respectfully submits that lasting traumatic effect of the eyewitnesses' reported observations weigh in favor of finding their testimony both truthful and

believable.

If Shinn had located, interviewed and presented these four eyewitnesses, a jury would have observed first-hand the emotional impact that witnessing and recounting the events had on them, and it is clear by their testimony that they were not untruthful or testifying falsely to seeing something they did not actual see. Indeed, the emotional discomfort of recounting the events was itself an indication that the witnesses were testifying to their independent recollections, unaffected by coordinating their testimony with others because many of these witnesses kept this information to themselves for the past thirty years. *See, e.g.*, 10 EH RT 1343:9-14 (Ejinio Rodriguez testifying he has kept the shooting to himself since he witnessed it); 9 EH RT 1280-81 (Walter Roberts did not talk to his brother, Shannon Roberts, or Ejinio Rodriguez about the shooting). A similar, genuine demeanor while testifying at trial would have been regarded by impartial jurors as an indication of the witnesses' veracity and credibility. As the referee found, the witnesses' lifetime trauma stemmed directly from "*witnessing* the murder of Officer Verna." Rpt. at 43:22 (emphasis added).

Impeachment Witness. The referee made only one, explicit credibility determination – in the case of Donald Anderson's testimony that his wife, Marsha Holt, admitted to him that she had not witnessed the shooting:

> Donald Anderson was not a credible witness for several reasons. He had a simply horrifying adult criminal record including multiple convictions and state prison commitments for rape, rape in concert, burglary and robbery. [Exhibit 800] Anderson had been acquainted with petitioner since age fifteen in about 1971 and considered himself petitioner's friend who wanted to help petitioner, a bias the prosecution would call to the jury's attention. Rpt. at 47:7-12.

1. Mr. Gay takes exception to the finding on Donald Anderson's credibility.

Mr. Gay takes exception to the referee's finding that Donald Anderson was not a credible witness given his criminal record, his prior acquaintance with Mr. Gay, and Marsha Holt's description of the shooter as someone consistent with Mr. Gay. Rpt. at 47:7-48:1.

First, witnesses with serious criminal records were not foreign to Mr. Gay's jury. By the force of the referee's reasoning, the prosecution would not have called their own lead witnesses at trial, who were all inmate witnesses with their own pending felony charges. 64 RT 6956, 6961 (prosecution lead witness, Gilbert Gutierrez, pending capital murder case); 64 RT 7022 (prosecution witness Alfred Montes, pending burglary case); *see also* 64 RT 7010-11 (Montes listing his prior felony convictions); 65 RT 7063-65 (prosecution witness Michael Kanan, chronic heroin addict in custody on a fugitive state warrant for a Texas criminal case).

Further, to the extent the prosecutor would have attacked Anderson's credibility using his criminal convictions, that attack would also implicate the credibility of prosecution witness Marsha Holt, the wife of a man with a "simply horrifying adult criminal record," who agreed to marry him the day before he was sentenced and transported to prison. Rpt. at 47:8. Similarly, Donald Anderson's testimony that he knew of Mr. Gay from the neighborhood does not show bias, but rather strengthens the credibility of his testimony: he was willing to publicly contradict his wife's purported eyewitness testimony for a man who he considered an acquaintance from around the neighborhood. That Marsha Holt reported seeing a light-skinned Mr. Gay shoot the officer is in significant doubt given the additional evidence presented before the referee. *See* 74 RT 8332 (Gail Beasley stated Marsha Holt asked her "what's happening?" when Beasley told her an officer had been shot); Ex. A118, 1 Supp. CT 281 (Celester Holt, Marsha Holt's mother,

told police she was lying on the bed with Marsha when Beasley came in to tell them an officer had been shot); Ex. A170 at 3066-68, Ex. A123 (Mackey Como could have testified that the window Marsha was standing at affords no vantage point of the crime scene); 4 EH RT 316 *et seq.* (conditions of visibility expert like Dr. Paul Michel would have testified that *even if* a jury disbelieved these previous four reasons, there is no way Marsha Holt could have seen the events from the window as she described it). Thus, this additional evidence would have been given Donald Anderson's testimony further credibility because it was corroborated by similar testimony.

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

In response to Question 3, Part 2, the referee made the following findings regarding factors that may have affected the value of the additional evidence:

> **CHILDREN WITNESSES**
>
> **Elizabeth Martina Jiminez Ruelas** . . . . The factors impacting the value of Jiminez Ruelas' potential testimony were her age at the time of the incident, the angle and distance from which her observations were made, and the discrepancy between her first statement that she did not see the shooting and her statement in February of 1985 describing the shooter as a tall, thin, ugly male black emerging from the passenger seat. "Tall, thin, ugly male black . . . " points more towards Raynard Cummings. Emerging from the passenger seat points more towards petitioner's position in the car. Jiminez Ruelas failed to make any identifications at the live lineup four days later. Petitioner's investigator Douglas Payne opined Jiminez Ruelas' testimony was not helpful to the defense case. [RT 221]. *Id.* at 40:12-21. The presentation of this witness was additionally complicated by her status as a minor, her residence

outside both California and the United States, the extreme reluctance of her parents to allow her to be involved to the extent they moved from the United States, and the difficulty to secure the compulsory attendance of a minor child as a witness over the objection of her parents. *Id.* at 40:22-26.

Ejinio Rodriguez, also known as Choppy, then age 8, was not interviewed in 1983 or at any other time prior to the 1985 trial; however, his recollection twenty years later in 2003 was that the shooter was a dark complected black man wearing a dark colored shirt . . . . Ejinio Rodriguez's parents were reluctant to allow Ejinio's sister Irma Rodriguez to be involved in the police investigation. One would conclude they would have a similar reluctance on behalf of the younger Ejinio. Rpt. at 41:8-11; *id.* at 16-18.

The testimony of both Ejinio Rodriguez and Elizabeth Martina Jiminez Ruelas would have likely motivated the court to give CALJIC 2.20.1 EVALUATION OF TESTIMONY OF CHILD TEN YEARS OF AGE OR YOUNGER. *Id.* at 41:19-22.

Walter Roberts, then age 12, was interviewed at 6:25 p.m. and again at 8:30 p.m. on 2 June 1983. [Petition Exhibits 751 and 752] Walter Roberts continued to live on Hoyt Street and was reasonably available to be subpoenaed as a witness through the standard minor witness process. The weight of Walter Robert's [sic] description of the shooter as a male black with a medium complexion wearing a dark blue shirt is offset by his description of the shooter being six feet tall. Raynard Cummings is described by witnesses and the arrest records as being a very tall man. Walter Roberts also describes the second male black at the scene as also being six feet tall wearing, black long sleeve shirt. Walter Robert's [sic] recollection of the female emerging from the right front door and then walking over to the fallen officer and removing his gun is not shared by any other witness. Walter Roberts also identified a fourth suspect seated in the right rear seat who did not leave that position during the entire incident. Walter Roberts made his observations from a front yard approximately 250 feet away at

a slight angle and downhill. Rpt. at 41:23-42:11.

Irma Rodriguez Esparza, then age 13, described the experience as still upsetting to her. [RT 1700] She testified she was pregnant at the time of the event and was in more of an emotional state as a result. During the incident the other children were yelling at each other to duck down and take cover. It is not a subject she wishes to speak about even more than thirty years later. [RT 1709, 1714] In 1983 her parents urged her not to get involved, which perhaps explains the notation in the police neighborhood canvas summary for Irma Rodriguez, 12097 Hoyt: "Was inside residence but did not see or hear anything." [Exhibit 761] More problematic is that her description of the events differ significantly from that of other witnesses. In her statement to police dated 3 June 1983, [Exhibit A013] she described the driver as a male Negro, dark skinned, twenty-five years old with a three to four inch afro. She described the front seat passenger as a male Negro, twenty to twenty-five years old, with light skin wearing a white long sleeved shirt. According to Irma Rodriguez there were two other persons in the car. The driver punched the officer in the face and pulled the officer's gun from its holster and shot the officer in the neck. The driver then shot the officer two more times and the officer fell backwards. As the car was leaving someone inside the car threw the gun out of the passenger side window, and it landed three feet away from the officer lying on the ground. Shortly after the light skinned passenger got out of the car and retrieved the gun. While her descriptions of the shooter as a dark complected male Negro and the light skinned passenger are helpful to petitioner, her recollection of events is largely inconsistent with that of the other witnesses. These discrepancies call into question the value and weight of her testimony. Irma Rodriguez made her observations from a front yard approximately 250 feet away, at a slight angle and downhill. Rpt. at 42:12-43:11.

Shannon Roberts, who was 11 years old in June of 1983 and testified at the 1985 trial, was presented at the 2014 reference hearing by petitioner, suggesting Shannon Roberts had been

unduly influenced by the police detectives, *e.g.* by suggesting their understanding of the events when Shannon Roberts professed confusion or lack of memory. However, in 2014 Shannon Roberts repeated his description of the shooter as being, " . . . *like me*." When asked by the referee for a description, Shannon Roberts said: "*I think I could be described as a Mexican or Puerto Rican, or possibly half black and half white*." [RT 2348]. Rpt. at 43:12-20.

As a matter of strategy, trial counsel must exercise caution when contemplating calling young children as witnesses to traumatic events. Rpt. at 44:4-6.

1. Mr. Gay takes exception to the finding that there is a discrepancy between Martina Jimenez's first and second statements to police.

Mr. Gay takes exception to the referee's finding that there is a "discrepancy between [Martina Jimenez's] first statement that she did not see the shooting and her statement in February of 1985 describing the shooter as a tall, thin, ugly male black emerging from the passenger seat." Rpt. at 40:14-16. There is no discrepancy. Although the police report summarizing her first statement indicates that she did not see the *shooting*, it clearly reflects that she did see the *shooter*. Ex. A43 at 1.

In Ms. Jimenez's first statement to police hours after the shooting, she described the shooter as: "male negro, poss. about mid-twenties about 5'10/6'0 medium to thin bilt [sic], however she did not see his face." Ex. A43 at 1.[7] As noted earlier, the referee found that this *initial* description

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7 YARD WHEN SHE HEARD (3 or 4) SHOTS. SHORTLY SHE THEN SAW THE POLICEMAN FALL TO THE GROUND SHE WAS SURE A MALE NEGRO POSS ABOUT MID-TWENTIES ABOUT 5-10/6-0 MEDIUM TO THIN BILT, HOWEVER SHE DID NOT SEE HIS FACE.

"given to the police more strongly points towards Raynard Cummings than petitioner." Rpt. at 26:16-17.

Two years later, during an interview with the chief prosecutor and two homicide detectives shortly before trial, Ms. Jimenez described the shooter as: "Male Black, tall, young looking, thin, and ugly." Ex. A43 at 3.[8] As this Court found, her two statements to police described the shooter as someone "inconsistent with" Mr. Gay's appearance but "consistent with Raynard Cummings's." *People v. Gay*, 42 Cal. 4th at 1224.

2. Mr. Gay takes exception to the finding that the trial court may have given CALJIC 2.20.1 and that the age of the eyewitnesses was a circumstance that weighed against their presentation.

Mr. Gay takes exception to the referee's finding that the likelihood the trial court would give CALJIC 2.20.1 ("Evaluation of Testimony of Children Ten Years of Age or Younger") was a circumstance weighing against calling Ejinio Rodriguez or Martina Jimenez. *See* Rpt. at 41:19-22. The instruction was not promulgated until after the passage of Cal. Penal Code section 1127f in 1986, following the conclusion of Mr. Gay's trial in 1985. It, therefore, would not and could not have been a factor influencing the decision to call a child witness.

Mr. Gay similarly takes exception to the referee's findings to the extent they suggest that the youthful age of the additional eyewitnesses was a circumstance that weighed against investigating or presenting their testimony. *See, e.g.*, Rpt. at 44:4-6 ("trial counsel must exercise caution when contemplating calling young children as witnesses"). While there may

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Subject could not recall the clothing worn by the male Black who shot the policeman, but described him as follows: Male Black, tall, young looking, thin, and ugly.

be special considerations involved in the decision whether to present the testimony of young witnesses, the referee found that each of *these* four eyewitnesses – irrespective of their age – was able to perceive, recollect, and report their observations they made that day.

Furthermore, age was not a categorically disqualifying criterion in this case. At trial, the prosecution called fourteen-year-old Oscar Martin and thirteen-year-old Shannon Roberts to testify about their observations the day of the shooting. *See* 67 RT 7354:16-17, 69 RT 7777. The prosecution's reliance on these witnesses would have eliminated any imagined reluctance to call thirteen-year-old Irma Esparza, 13 EH RT 1697:6; twelve-year-old Walter Roberts, 09 EH RT 1268:22; eight-and-a-half-year-old Ejinio Rodriguez, 10 EH RT 1326:25-28; and eight-and-a-half-year-old Martina Jimenez, 11 EH RT 1377.

This was especially true of thirteen-year-old Irma Esparza. She was the same age as the prosecutor's principal eyewitness, Oscar Martin. Equally important was the detailed statement she gave the police the day after the shooting, which corroborated Martin's testimony that Cummings was the *only* shooter. Her testimony therefore would have provided strong refutation of the prosecutor's tactic of using just a portion of Martin's testimony for the "first part" of the shooting – to inculpate Cummings – while disavowing his description of the "second part" – which exculpated Mr. Gay and explained that Cummings, alone, exited the car and shot the officer.

Moreover, consistent with this Court's observation about the significance of Ms. Esparza's testimony, even in the absence of eyewitness expert evidence, Ms. Esparza would have provided factual support for an explanation of how witnesses who saw Mr. Gay retrieve the gun mistakenly concluded that he must have been the shooter. *See People v. Gay*, 42 Cal. 4th 1195, 1224 (2008).

3. Mr. Gay takes exception to the finding that the parents of Martina Jimenez, Irma Esparza, and Ejinio Rodriguez may have been reluctant to allow their children to testify.

Mr. Gay takes exception to the referee's suggestion that the reluctance of the parents of Martina Jimenez, and the parents of siblings Irma Esparza and Ejinio Rodriguez, constituted a circumstance weighing against investigating or presenting their testimony. *See* Rpt. at 40:22-26 (speculating to an "extreme" reluctance of Ms. Jimenez's parents, but not citing anything in the record to support the finding); Rpt. at 41:16-17.

First, the potential reluctance of a witness to testify – a not uncommon phenomenon – does not logically constitute a circumstance weighing against either investigation or attempts to present the evidence. Had there been any reluctance, Shinn could have subpoenaed these witnesses, particularly given their powerful eyewitness observations.

Second, even if the record here indicates the witnesses' parents may have expressed some "reluctance," the evidence also unequivocally shows that, in fact, the witnesses nevertheless would have testified at Mr. Gay's trial. Martina Jimenez – at the time of the shooting in 1983, at the time of trial in 1985, and at the time of the reference hearing in 2014 – voluntarily participated in the proceedings when asked. *See* Ex. A43 at 1 (Ms. Jimenez gives statement to police on June 2, 1983); *id.* at 5-8 (Ms. Jimenez attends line-up days later with her mother); *id.* at 3 (Ms. Jimenez speaks to police in 1985); 11 EH RT 1376 (Ms. Jimenez appears at the reference hearing voluntarily in 2014). Further, Martina Jimenez explicitly stated that she would have testified about her observations if Daye Shinn called her as a witness in 1985. Ex. A27 at 2 ("Had I been contacted I would have been willing to testify to what I saw").

Similarly, the referee notes that Irma Esparza and Ejinio Rodriguez's parents urged Irma Esparza not to get involved hours after the shooting. Rpt.

at 42:17-19. But their parents' initial apprehension was not an absolute prohibition against participation because Irma Esparza in fact went to the police station the following morning and reported in detail what she saw to Detective Moreno. *See* Ex. A149 (Esparza detailed police report given the morning after the shooting).

In turn, both Irma Esparza and Ejinio Rodriguez testified unequivocally before the referee that they *would* have testified if called as witnesses by Shinn, despite their parents' initial reluctance hours after the shooting that they get involved. *See* 13 EH RT 1702-03 (Irma Esparza); Ex. A24 at ¶ 10 (Ejinio Rodriguez). These two witnesses also appeared voluntarily in the 2000 retrial proceedings to testify about their observations the day of the shooting. *See People v. Gay*, 42 Cal. 4th at 1216-15 (both witnesses were present at the 2000 retrial to testify to their observations that day). The two witnesses again appeared voluntarily before the referee in 2014.

4. Mr. Gay takes exception to the referee's mischaracterization of Douglas Payne's opinion about Martina Jimenez's potential testimony.

There is no substantial evidence to support the referee's finding that Douglas Payne believed Martina Jimenez's *testimony* was not helpful to the defense. Rpt. at 40:20-21. The evidence, detailed here, compels a contrary finding.

As this Court found, in the hours after the shooting, Ms. Jimenez described the shooter's complexion "as inconsistent with [Mr. Gay] but consistent with Raynard Cummings's." *People v. Gay*, 42 Cal. 4th at 1224; Ex. A43 at 1 (describing shooter as "male negro, poss. about mid-twenties, about 5'10, medium to thin bilt [sic]"). Similarly, the referee noted that Ms. Jimenez's initial descriptions more strongly pointed to Cummings as the shooter. Rpt. at 26:16-17. When the District Attorney and officers

interviewed Ms. Jimenez again on the eve of trial in 1985, she again described the shooter as someone consistent with Raynard Cummings: "male black, tall, young-looking, thin and ugly." Ex. A43 at 3. In 2003 when interviewed again, Ms. Jimenez again described the shooter as "very dark-complected and ugly." Ex. A27 at ¶ 4. At the hearing before the referee, Ms. Jimenez identified the shooter as "just black male, dark," 11 EH RT 1379:28, and when shown booking photographs of Raynard Cummings and Mr. Gay side-by-side, identified the photograph of Raynard Cummings as the person who shot the officer, *id.* at 1401:9. The defense never interviewed Ms. Jimenez, and she did not testify at the 1985 trial. Ex. A27 at ¶ 6; 11 EH RT 1381.

At the reference hearing, respondent's counsel gave Douglas Payne Ms. Jimenez's 1985 police report (describing the shooter as a "male black, tall, young-looking, thin and ugly") and directed his attention to language in the report that refers to the shooter "get[ting] out of the passenger side of the car." 3 EH RT 220:20-22. Respondent's counsel later paraphrased the report as describing "the *right front* passenger getting out of the car and shooting the officer." 3 EH RT 221:15-16 (emphasis added).[9] Payne acknowledged that, as paraphrased, the report was not "helpful" to the defense. 3 EH RT 221:18-20. Respondent's counsel then asked "[w]ouldn't it be in your best interests, you being the defense of Mr. Gay, to keep her off the stand if possible?"; and Payne answered: "That's never my decision." *Id.* at 21-24.

Thus, Payne never opined that Ms. Jimenez's *testimony* was not helpful

[9] The report summarized Ms. Jimenez's statement as referring only to the shooter getting out of the "passenger side" of the car. Ex. A43 at 3. Thus while the general location of the black male who shot the officer as described in the non-verbatim summary of Ms. Jimenez's statement was not affirmatively consistent with the defense theory, it did not pinpoint him as being the "right front" passenger.

to the defense, only that the 1985 police report, as further modified by respondent's question, did not appear readily helpful. Neither Shinn nor Payne could have evaluated Ms. Jimenez's potential testimony because Shinn did not authorize the necessary funding for Payne to travel to Baja California and interview her. Likewise, as Michael Burt explained at the reference hearing, reasonably competent counsel know that a witness's testimony is never discounted out of hand based on the contents of a police report. 12 EH RT 1533:17-24; *see also In re Hall*, 30 Cal. 3d 408, 426 (1981) (defense counsel had "independent obligation to determine the usefulness" of witnesses located by police, and his "adoption" of investigating officers' results without contacting witnesses constituted "an inexcusable delegation of his duty").

A review of Ms. Jimenez's four separate, consistent descriptions of the shooter from the night of the murder through the 2014 reference hearing which all resemble Raynard Cummings, demonstrates that her testimony would have been helpful. Nor did her statements as reported by the police provide any reasons not to pursue a routine investigation of her testimony.

It is also noteworthy that, despite the reportedly unhelpful aspect of the statement that the prosecutor and homicide detectives obtained from Ms. Jimenez in 1985, the prosecution did not call her to testify at the guilt phase; and it was respondent's counsel who successfully moved to "keep her off the stand" at Mr. Gay's penalty-phase retrial. *See People v. Gay*, 42 Cal. 4th at 1224.

5. Mr. Gay takes exception to the finding that "discrepancies" in Irma Esparza's reported observations call into question the value and weight of her testimony.

The referee found that "discrepancies" in Irma Esparza's descriptions call into question the value and weight of her testimony. Rpt. at 43:9. Mr.

Gay respectfully submits that Irma Esparza's meticulous recall of details the day after the shooting is anything but problematic; rather, her reported observations are congruent with prosecution testimony and forensic data supporting a conclusion that Mr. Gay did not participate in the murder of Officer Verna.

As the referee found, Irma Esparza described the shooter to police as a "male Negro, dark skinned, twenty-five years old with a three to four inch afro" (consistent with Raynard Cummings), and described the front seat passenger who got out of the car only to retrieve the gun as "male Negro, twenty to twenty-five years old, with light skin wearing a white long sleeved shirt" (consistent with Mr. Gay). Rpt. at 42:21-25. However, the referee found her description of events "problematic" for three reasons:

1) Ms. Esparza saw two other persons in the car;

2) she saw what looked like the driver punching the officer in the face; and

3) she saw the driver shooting the officer in the neck before continuing to shoot him at close range. Rpt. at 42:25-43:2.

These factors are not "problematic," but actually strengthen the value and believability of Ms. Esparza's observations.

First, that Ms. Esparza thought she saw two people in the backseat is inconsequential and not unique to Ms. Esparza. Prosecution witness Rose Perez also claimed to have seen two additional people in the car as the officer was shot. Ex. A41 at 1. Walter Roberts also reported seeing a possible fourth person in the backseat of the car. Ex. 751. Prosecution witness Marsha Holt also did not accurately identify the number of people in the car. 68 RT 7550-51 (testifying to only two people, Pamela Cummings and Kenneth Gay, being in the car). Prosecution witness Shannon Roberts reported seeing two separate men in two separate cars: the light-skinned man who shot the officer, and a dark-skinned black man who drove up in a different car to retrieve the

gun. 3 CT 719:25-26. At bottom, Ms. Esparza's description of the "dark-skinned" "male negro," emerging from the driver side of the car to shoot and continue shooting Officer Verna is compelling exculpatory evidence regardless of her placement of an ambiguous fourth person in the car.

Second, Ms. Esparza's reported impression of the officer being punched in the face is part of her extremely detailed account that is consistent with and corroborated by other witness testimony, as well as the physical evidence at the scene. Ms. Esparza described seeing the officer bent forward toward the driver door, apparently speaking with people inside the car. Ex. A13 at 1. She then observed the officer "stand straight up," in what looked like the officer's reaction to being "punched in the face." Ex. A13 at 1. It is undisputed that Officer Verna was first shot as he was bent forward, leaning into the car, which, to a witness situated at a distance, looked very much like the officer being "punched" backwards from a bent position. This observation was similar to prosecution witness Oscar Martin's observation. *Compare* 13 EH RT 1716:17-26; Ex. A13 at 1 (Esparza's statement that the officer leaned into the car, but then "stood straight up" as if the driver "punched the officer in the face") *with* 1 Supp. CT 252 (Oscar Martin's grand jury testimony 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 by pushing open the car door). Therefore, Ms. Esparza's description of the officer being "punched" back while bending forward into the car is fully consistent with the effect the first shot had on him.

Third, Ms. Esparza's recollection that the dark-skinned black man "pulled the officer's gun from its holster and shot the officer in the neck" is again, fully consistent and congruent with other witness observations and the medical evidence in this case. Prosecution witness Oscar Martin also described the dark-skinned black man as appearing to reach in the area of the officer's holster. *Compare* 13 EH RT 1717:2-15; Ex. A13 at 1 (Esparza

recalls 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"). While it is undisputed that Raynard Cummings did not actually unhook the officer's gun, the close proximity of Cummings to Officer Verna observed by both Oscar Martin and Irma Esparza is corroborated by the physical evidence that the second and third shots were delivered within feet of the officer. *Compare* 13 EH RT 1717:2-15; Ex. A13 at 1 (Irma Esparza recalls that the driver and shooter were so close that it appeared that the driver pulled the officer's gun out of his holster when standing outside the car) *with* Ex. A30 at 3 (Dr. Guinn's report that the shots were delivered within one to two feet from the officer).

Likewise, Ms. Esparza's clear recollection – both in her contemporaneous statement to the police and at the reference hearing – that the officer was first "shot in the neck" is corroborated by the autopsy findings that the first gunshot wound was inflicted to the decedent's neck. *See* 13 EH RT 1717:2-9; Resp. Ex. 741 at 12-14; Resp. Ex. 739 at 3284 (Dr. Sherry testifying that bullet No. 6 went into the neck).

The referee also fails to acknowledge the further corroborated details of Ms. Esparza's statement to police and reference hearing testimony, including her observation that the officer was "holding a little white card" just before he was shot. Ex. A13 at 1; 13 EH RT 1715:9-14. Crime scene photographs clearly depict the card, which the officer dropped after being shot. 1985 Trial Exhibits KKK-1, KKK-2 (trial exhibit of crime scene on June 2, 1983 with a white card on the ground next to the officer's motorcycle).

Mr. Gay respectfully submits that, on balance, any minor inconsistencies between Ms. Esparza's testimony and the reports of other eyewitness testimony were not circumstances that reasonably militated against investigating her clearly exculpatory statement and presenting her

testimony. As demonstrated at trial, the prosecution had no qualms about presenting witnesses whose observations did not fully support its theory of the case. For example, this is precisely the tack the prosecutor took with Oscar Martin (who only saw a dark-skinned Raynard Cummings shoot the officer) in arguing that Martin correctly recalled seeing Cummings fire the initial shot and begin to emerge from the car, but neglected to see any other aspect of the crime that supported the prosecution's claim that Mr. Gay also participated in the shooting. *See* 95 RT 10886.

Even if Shinn had done no more than read the police reports, he would have known that Ms. Esparza was the *only* independent witness who correctly recalled the sequence of events in which a single, dark-skinned suspect (Cummings) shot the officer and a light-skinned suspect (Mr. Gay) later retrieved the gun. This was also the version of events that Pamela Cummings described to the police and her sister, substituting Milton Cook for her husband, Raynard Cummings, in the role of the dark-skinned shooter.

INMATE WITNESSES

> **James Jennings** had his own robbery and murder charges pending at the time of the 1985 trial and was later convicted and sentenced to 28 years to life in prison. Jennings stated he sought out police detectives in hopes of receiving help on his own case. Rpt. at 44:8-11. The prosecution clearly had no interest in calling Jennings as a witness. *Id.* at 45:1-2
>
> Jennings' testimony would be subject to scrutiny because he sought to speak to police detectives in search of some help on his own cases and his own prior felony criminal record. Adding to the normal level of skepticism inmate testimony receives is the prior relationship between Jennings and petitioner and petitioner's family and the bias that might suggest. Jennings' testimony would not have been reasonably available to Shinn if Jennings was uncooperative. Rpt. at 45:3-8.
>
> Shinn would have faced difficulties calling Jennings as a

witness. If Jennings' own charges were still pending and no plea bargain had been made with the prosecution, it is unlikely Jennings' trial counsel would have allowed him to testify and be cross-examined by the prosecution. Because Shinn could not offer Jennings any benefit from cooperating, Jennings would have the option to refuse to testify, to refuse to be sworn as a witness . . . . Defense counsel do not have the range of benefits to offer cooperative witnesses that are available to prosecutors such as charge or sentence reductions, housing assignments or recommendations to parole boards. Jennings would have no incentive to testify as a defense witness for petitioner. The prosecution clearly had no interest in calling Jennings as a witness. Rpt. at 44:11-17, 44:23-45:2.

As with other inmate or snitch witnesses not called by the prosecution, Shinn had no incentive to offer Purnell in exchange for his testimony. Rpt. at 45:16-17.

Norman Purnell testified that while in the showers a fellow inmate known to him as 'Slim' stated he had shot a police officer, and that if he were going down for the crime, he was going to take his "crimie" down too. Assuming Shinn could establish "Slim" and Raynard Cummings were one in the same, the statement attributed to Raynard Cummings is vague and lacking in any significant detail as to who fired the shots that killed Officer Verna. As of 1985 Purnell had an extensive felony record with which he could be impeached. [RT 1598]. Rpt. at 45:9-16. The prosecution was proceeding on a theory both petitioner and Raynard Cummings shot and killed Officer Verna. Raynard Cummings designating petitioner as his crime partner is consistent with the prosecution theory and not helpful to petitioner's defense Raynard Cummings fired each and every shot. Purnell's statement was also cumulative to that of Gabriel [sic] Gutierrez. Gutierrez's testimony had the added advantage that it included petitioner's statement that he had not shot anyone and Raynard Cummings' statement he was 'cool' with the fact the authorities were mistakenly pinning the shooting on petitioner. *Id.* at 45:17-26. Purnell did not receive any benefit from making the statement to investigators. Rpt. at

30:20-21.

John Jack Flores was interviewed by District Attorney Investigator Robert Tukua on 11 July 1983, approximately five weeks after the murder of Paul Verna. The five page single spaced typewritten statement contains significant detail including conversations between the participants before, during and after the shooting. Raynard Cummings admits to Flores he fired each of the shots that struck and killed Officer Verna. Tukua's report includes a conversation between Raynard Cummings and petitioner during the traffic stop where Raynard Cummings asks petitioner whether petitioner wants to shoot the police officer, and petitioner responded, "Yes, if it comes to it." By agreeing to and encouraging the shooting of Officer Verna, petitioner made himself an aider and abettor. Rpt. at 46:1-16 (citing CALJIC 3.01). Shinn already had in hand the testimony of Gabriel [sic] Gutierrez. It would not make sense to call a witness who would present the District Attorney with a theory of prosecution independent of whether petitioner actually fired any of the shots that killed Officer Verna. *Id.* at 46:17-20.

SWORN PEACE OFFICERS

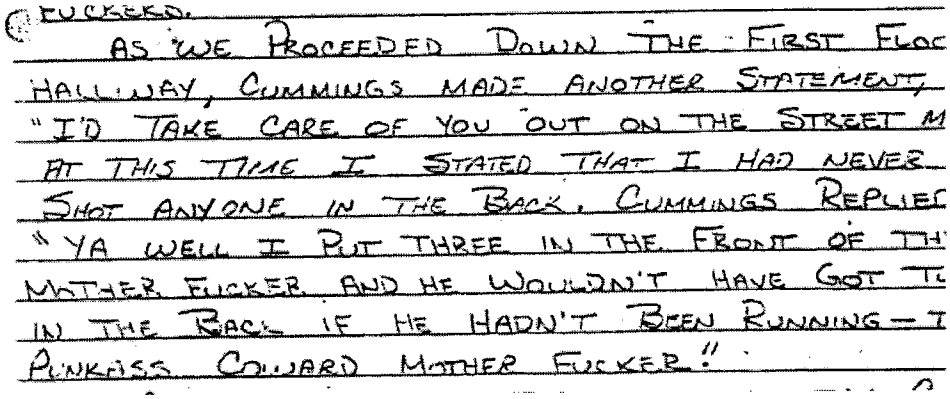
Deputy Sheriff **William McGinnis'** testimony before the jury would have been helpful to petitioner but was lacking in detail as to the identity of the shooter. It was also cumulative to the testimony of Michael McMullan and Rick McCurtain. Rpt. at 46:22-25.

Sergeant **George Arthur's** testimony would have been cumulative to that of Deputy Sheriff Michael McMullan who did relate the subject statement made by Raynard Cummings to Sergeant Arthur. Rpt. at 46:26-47:2.

6. Mr. Gay takes exception to the finding that Deputy Sheriff McGinnis's testimony was "lacking in detail as to the identity of the shooter."

In light of the referee's finding that Deputy McGinnis's "testimony

before the jury *would have been helpful* to petitioner," any purported lack of detail is not a circumstance weighing against investigating or presenting it. Rept. at 46:22-23. Nor does the record support the referee's finding that the testimony was "lacking in detail" as to the identity of the shooter. Rpt. at 46:23. As explained earlier, substantial evidence demonstrates that Deputy McGinnis's report (written contemporaneously to Cummings's statement) makes it clear that Raynard Cummings admitted to shooting Officer Verna at least three times in the back before the officer retreated, and that Cummings then continued firing. Ex. A167:


EXCEEDED.
AS WE PROCEEDED DOWN THE FIRST FLOC
HALLWAY, CUMMINGS MADE ANOTHER STATEMENT,
"I'D TAKE CARE OF YOU OUT ON THE STREET M
AT THIS TIME I STATED THAT I HAD NEVER
SHOT ANYONE IN THE BACK. CUMMINGS REPLIEC
"YA WELL I PUT THREE IN THE FRONT OF TH
MOTHER FUCKER AND HE WOULDN'T HAVE GOT TC
IN THE BACK IF HE HADN'T BEEN RUNNING — I
PUNKASS COWARD MOTHER FUCKER!"

7. Mr. Gay takes exception to the finding regarding speculative difficulties in calling inmate witnesses.

The referee found that Shinn could have, but failed to present the testimony of four additional inmate witnesses whose testimony tended to exculpate Mr. Gay. Rpt. at 29-31 (James Jennings, Norman Purnell, John Jack Flores, David Elliott). The referee also found that the only investigative step Shinn needed to take to find this "exonerating" evidence would have been to read their police reports. Rpt. at 37:8-12.

Mr. Gay takes exception to the referee's further speculations, however, that Shinn *may* have "faced difficulties" actually calling these witnesses because their defense counsel would have prevented them from testifying, and Shinn, as a defense attorney was unable to offer them any "benefits" or

assistance in exchange for testifying. Rpt. at 44:13-45:1 and 45:7-8, 16-17 (speculating that "if [an inmate witness] was uncooperative .... Shinn "could not offer [inmates] any benefit" such as "charge or sentence reductions, housing assignments, or recommendations to parole boards," as an "incentive" to testify for Mr. Gay). Strictly speaking, the barriers Shinn might have faced in actually presenting the testimony are not circumstances that reasonably weighed against investigating or attempting to present such evidence. As the referee found above, the only "investigation" Shinn needed to conduct was reading the exculpatory statements provided to him in discovery.

Nor could Shinn reasonably have concluded that it would have been futile to call the witnesses. There is no factual or legal basis for the referee's concerns that either the witnesses or their defense counsel had any unbridled authority to prevent them from testifying or even "to be sworn as a witness." Rpt. at 44:12-17. At worst, the inmate witnesses could have followed their attorneys' advice, if any, to invoke their Fifth Amendment privilege against self-incrimination. There is, however, no "unqualified right to exercise the privilege against self-incrimination" and refuse to be called as a witness. *People v. Ford*, 45 Cal. 3d 431, 440-41 (1988). Rather, the witness must *first* "be put under oath and the party calling him be permitted to begin his interrogation." *Id.* at 441. The presiding judge then determines on a question-by-question basis whether the witness meets the burden of demonstrating that he or she might be incriminated by giving answers to the specific questions. *Id.*

Here, the referee does not explain, nor is it readily apparent, how the inmate witnesses' report of Cummings's custodial admissions would have exposed them to the risk of self-incrimination. Nor is there any basis to conclude that the judge presiding at Mr. Gay's trial would have allowed unlimited cross-examination on wholly collateral issues, such as the factual

allegations in the witnesses' own criminal cases, so as to needlessly trigger Fifth Amendment concerns.

Thus, having been provided the exculpatory statements, Shinn needed only to subpoena the witnesses who either would have confirmed their statements to the prosecutor's investigators or would have been impeached with the substance of those statements.[10] There is, therefore, no basis for the referee to suggest that all potentially exculpatory testimony from inmates was "unavailable" to the defense by virtue of the witnesses being in custody.[11]

Equally important, the referee's post-hoc speculation is at odds with the uncontroverted evidence of the inmate witnesses' willingness to testify.

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[10] The parties stipulated at the reference hearing that, if necessary, the investigating officers who took the reports (Holder and Takua) were available and could have been called as defense witnesses, authenticated their reports, and impeached the inmates with their prior statements. 8 EH RT 1133-34 (Takua stipulation); 12 EH RT 1617 (Holder stipulation).

[11] Even if it had been necessary to subpoena Purnell or Jennings (Penal Code § 1326(3)), and they demanded immunity or some prosecution deal before testifying for the defense, it does not necessarily follow that the prosecutor would have unfairly exercised his power in a way that selectively assisted those inmate witnesses whose testimony supported his case (in-custody prosecution witnesses Gilbert Gutierrez, Alfred Montes, Billy Sims, Pamela Cummings), while withholding similar protection for those defense witnesses whose testimony undermined his case. *See Connick v. Thompson*, 563 U.S. 51, 66 n.8 (2011) (explaining that within the prosecutor's *Brady* obligation, a prosecutor "should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."); *see also* U.S. Const. amend. VI (compulsory process clause guarantees same compulsion techniques as those available to the prosecution to obtain witnesses). If Jennings or Purnell made such a demand and the prosecution refused, Shinn also could have moved the trial court to judicially confer immunity. *People v. Hunter*, 49 Cal. 3d 957, 974 (1989), *as modified on denial of reh'g* (Feb. 1, 1990) (opining that judicially conferred use immunity might possibly be necessary to vindicate a criminal defendant's rights to compulsory process and a fair trial).

James Jennings testified affirmatively that he would have spoken with Shinn or Payne if either had come to interview him, and that he would have testified truthfully to Cummings's inculpatory statements if called as a witness. 10 EH RT 1306:6-13. Similarly, Norman Purnell stated that if someone had come to interview him in 1984, he would have spoken with them, and if called, he would have testified truthfully in front of a jury that Cummings admitted that he was the one who killed Officer Verna, but that he was going to make his crime partner (Mr. Gay) take the fall along with him. 12 EH RT 1589:13-23 (also admitting that if someone came to interview him thirty years ago, his memory would have likely been better than it was in 2014). This evidence was not disputed by respondent at the hearing. As an added precaution, the parties stipulated at the reference hearing that if the inmate witnesses were subpoenaed and refused to testify to Cummings's inculpatory statements on the witness stand, the investigating officers who took the reports (Holder and Takua) could have been called as defense witnesses, authenticated their reports, and impeached the inmates with their prior statements. 8 EH RT 1133-34 (Takua stipulation); 12 EH RT 1617 (Holder stipulation).

Therefore, there is no evidence to support the referee's speculation that these witnesses may not have cooperated absent some *quid pro quo* on Shinn's part; and the witnesses' credible, undisputed testimony is expressly to the contrary.

8. Mr. Gay takes exception to the finding that Raynard Cummings's reference of Mr. Gay as his "crime partner" was not helpful to Mr. Gay's defense.

The referee finds that – assuming Shinn could establish that "Slim" was Raynard Cummings – Norman Purnell's testimony that "Slim's" reference to Mr. Gay as his "crime partner" would not have been helpful because it is

consistent with the prosecution's theory of the case that both men fired at the officer. Rpt. at 45:17-21. For at least three reasons no substantial evidence supports these findings or suggests this was a circumstance weighing against investigating and calling Purnell.

First, this Court need not speculate whether Shinn could establish "Slim" was Raynard Cummings because Norman Purnell affirmatively identified a photograph of Raynard Cummings as "Slim" at the reference hearing. 12 EH RT 1586:1-4. Further, by September 1984, Cummings's counsel had conceded that Cummings was in fact the person identified by Purnell as "Slim." *See* 5 CT 1435, 1438; Ex. A61.

Second, in context, it would have been clear to the jury that "crime partner" was jailhouse vernacular for one's co-defendant or co-accused. To the extent there was potential for confusion of the issue or prejudice to Mr. Gay, however, the trial court could have ordered another word to be substituted for that specific term in Purnell's account of Cummings's admission. Cal. Evid. Code § 352.

Third, irrespective of how Cummings characterized Mr. Gay, the statement was fully exonerating: Cummings made clear that he was going to make Mr. Gay take the fall for murdering Officer Verna even though Mr. Gay did not participate in the shooting. 12 EH RT 1588:22-24. Regardless of whether Mr. Gay was Cummings's "crime partner," the context of Cummings's entire statement was not vague, but rather explicit that Mr. Gay did not shoot the officer.

9. Mr. Gay takes exception to the finding that John Jack Flores's testimony would have been evidence Mr. Gay was an aider and abettor.

Raynard Cummings boastfully admitted to Jack John Flores, an inmate in the Los Angeles County Jail, that he shot Officer Verna from inside the car

and then emptied his gun into the officer while shouting, "Oh, you want more motherfucker!" Ex. A173. As the referee found, Flores was interviewed by District Attorney Investigator Robert Tukua on July 11, 1983, approximately five weeks after the murder of Officer Verna. Rpt. at 46:1-6 (Flores gave a five-page, single-spaced typewritten statement containing significant detail of Cummings's version of the shooting). Even though Shinn had the report and failed to interview or call Jack John Flores, the referee found that it would "not make sense" to call him because his testimony may have provided an aider and abettor theory of the case to the prosecution because Cummings told Flores that Mr. Gay allegedly agreed to shoot Officer Verna "if it [came] to it." Rpt. at 46:8-9; *id.* at 17-20.

There is no legal basis to support the referee's finding because the alleged statement was attributed to Mr. Gay by Raynard Cummings, a nontestifying co-defendant, and thus, would have been inadmissible against Mr. Gay. *See* Cal. Evid. Code § 1223; *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, 127 (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."). Shinn could have successfully moved to have any reference to Mr. Gay's name or his alleged statement redacted from Cummings's confession and to present Mr. Gay's jury with only Cummings's confession that Cummings "emptied his gun" into Officer Verna. *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).

10. Mr. Gay takes exception to the finding that juror skepticism of inmate witnesses was a circumstance weighing against investigation or presentation of their testimony.

The referee suggests that a factor that may have affected the value of testimony from the inmates who heard Cummings admit to shooting and killing Officer Verna was their inmate status, given that juries are skeptical about witnesses in custody. Rpt. at 45:5-6; *id.* at 44:8-10 (Jennings's priors and custody status); *id.* at 45:15-16 (Purnell, same). There are at least three reasons why the inmates' status did not reasonably countenance against the presentation of this evidence.

First, the criminal histories of potential guilt-phase witnesses could not have influenced any purported decision by Shinn, because substantial evidence shows that Shinn was unaware of such evidence. 3 EH RT 249:15-16 (Payne did not run criminal background checks on any witnesses).

Second, the fact that potential witnesses had criminal backgrounds would have had limited impeachment value because several of the prosecution witnesses also had lengthy criminal records. 64 RT 6956, 6961 (prosecution lead witness, Gilbert Gutierrez, pending capital murder case); 64 RT 7022 (prosecution witness Alfred Montes, pending burglary case); *see also* 64 RT 7010-11 (Montes listing his prior felony convictions); 65 RT 7063-65 (prosecution witness, Michael Kanan, chronic heroin addict in custody on a fugitive state warrant for a Texas criminal case). These prosecution witnesses further testified that their motivation for reporting Cummings's statements was to obtain lenient dispositions of their own pending charges. 64 RT 6957:11-16; *id.* at 6961:1-18 (Gilbert Gutierrez); 64 RT 7023 (Alfred Montes). Thus, the inmate status and criminal background of other prisoners who had exculpatory evidence was not a circumstance that weighed against presenting their testimony, because Shinn could have

pointed out that the prosecution's lead witnesses had similar status and histories.

Third, if Shinn had called James Jennings, Norman Purnell, Jack John Flores, and David Elliott their testimony would have been more credible than the prosecution inmate witnesses because the defense witnesses would not have received a deal or leniency in exchange for their testimony. The prosecution witnesses testified that they sought and received deals on their cases in exchange for their testimony. *Compare* 12 EH RT 1589:27 (Purnell did not receive any deal or assistance) *and* 10 EH RT 1323:17 (Jennings did not receive any benefit) *with* 64 RT 6958 (prosecutor wrote a letter on Gilbert Gutierrez's behalf in his sentencing) *and* 91 RT 10361 (Detective Holder promised Alfred Montes help at his sentencing hearing). Inmate witnesses whose testimony was untethered to any promised deal or benefit would have been viewed as more, and not less, credible.

11. Mr. Gay takes exception to the finding that additional, exculpatory evidence would have been "cumulative" of evidence presented by the prosecution against Mr. Gay.

Mr. Gay objects to the referee's suggestion that a factor weighing against Shinn interviewing and presenting the testimony of three sworn police officers and four inmate witnesses – all of whom exculpated Mr. Gay – was that it may have been "cumulative" of *prosecution* evidence of Mr. Cummings's sole responsibility for the homicide. *See, e.g.*, Rpt. at 45:22 (finding Purnell's testimony cumulative of prosecution witness Gilbert Gutierrez); *id.* at 46:17 (finding Flores's testimony cumulative of Gilbert Gutierrez); *id.* at 46:24-25 (finding McGinnis's testimony cumulative of prosecution witnesses McMullan and McCurtain); *id.* at 47:1 (finding Arthur testimony cumulative of prosecution witness McMullan). Mr. Gay takes exception for three reasons: 1) the evidence is not cumulative; 2) to the extent

it constituted even *more* evidence of Mr. Gay's innocence, that was not a factor weighing against investigating and presenting it; 3) different sponsors of similar evidence make the body of evidence more, and not less, credible.

First, the evidence was not cumulative. For example, the prosecution called only one Deputy Sheriff, Michael McMullan, who testified that Cummings admitted that he alone fired all six shots at the victim. 65 RT 7149-50. A second Deputy Sheriff, Rick McCurtain, however, testified without objection from Shinn that Cummings said he fired two shots and "[t]hen *we* put four more" into the victim. 66 RT 7219 (emphasis added). A third Deputy Sheriff, David La Casella, was then called by the prosecution to testify that Mr. Gay failed to say anything in response to Cummings's comment that he fired only the first shot. 76 RT 8611. Thus, the testimony of the law enforcement witnesses left it ambiguous as to whether Cummings in fact admitted sole responsibility for the homicide. Evidence of Cummings's repeated admissions to other jailers and inmates would have resolved any uncertainty regarding his role as the only shooter. These additional witnesses were not the source of "cumulative" reports or admissions; they did not involve the same confession at the same time to multiple people. These are six, separate instances Cummings boasted and bragged in varying degrees of detail about shooting and killing Officer Verna that Shinn failed to investigate and present.

Second, the referee's characterization of this evidence as "cumulative" of other exonerating evidence underscores the fact it would have supported a defense that Mr. Gay did not participate in Officer Verna's murder, and would have been virtually unimpeachable given the congruence with the prosecution's evidence against Mr. Cummings (but not Mr. Gay) at trial. For example, if Shinn had called Deputy McGinnis in the defense case-in-chief, the prosecution would have a difficult time arguing that Deputy McGinnis's recounting of Cummings's confession to him was not credible, but

Cummings's confession on a different day to prosecution witness Deputy Michael McMullan was credible.

There was no tactical downside to presenting more evidence that someone other than the defendant admitted to being the only perpetrator of the charged offense, particularly if the only exculpatory evidence on the record is supplied by the *prosecution*. 85 RT 9705-86 RT 9829 (Shinn did not call a single witness to testify to Cummings's in-custody, inculpatory statements); *see also* Rpt. at 45:2 (referee noting that "the prosecution clearly had no interest in calling Jennings as a witness"). That three of these additional witnesses were law enforcement officers whose testimony exculpated Mr. Gay would have been highly credible given that they would have all testified with the imprimatur of the state. No law enforcement officer would lie or make up a statement that would potentially let a person accused of killing a fellow law enforcement officer go free, unless that statement were true.

Next, the referee's suggestion that this evidence was cumulative and may have excused Shinn's failure to locate and interview these exculpatory witnesses is illogical and contrary to case law. In *Wiggins v. Smith*, the Supreme Court found counsel was ineffective for limiting the scope of investigation to a "narrow set of sources," given that the information revealed in those limited sources should have prompted further investigation. 539 U.S. 510, 524 (counsel was ineffective after abandoning any further investigation into mitigating evidence after "acquiring only a rudimentary knowledge" of petitioner's social history given the wealth of other sources of evidence like medical history, educational history, employment history, family and social history, etc. that existed). Worse here, Shinn did more than "limit" his investigation to a narrow set of sources; he conducted no investigation at all of these exculpatory witnesses' statements that were given to him by the prosecution.

Cummings's six separate admissions of guilt to various people would have strengthened Mr. Gay's defense that he did not participate in the shooting of Officer Verna. Different types of sponsors of similar evidence bolster the credibility of the evidence overall. While salient features may be the same (here, Raynard Cummings's in-custody confessions), the different angles by which the evidence is introduced (via inmates, via sheriff deputies, via police reports) provides a more powerful reason to credit the testimony of the individual witnesses because they all reinforce each other. The need for Shinn to present this additional evidence is even more critical given the only sponsor of Raynard Cummings's in-custody confessions were *prosecution* witnesses, introduced against both Mr. Gay and Raynard Cummings.

To the extent the referee's findings suggest that it would have been reasonable not to do anything to investigate or present a list of exculpatory law enforcement and inmate witnesses because the prosecution intended to use selective bits of their testimony against *both* Raynard Cummings and Mr. Gay at trial, the suggestion falls below the line of reasonable practice. *C.f. Rompilla*, 545 U.S. at 390. Therefore, the referee's finding that this evidence was "cumulative" weighs in *favor* of presenting the additional exculpatory evidence, and not against it.

IMPEACHMENT WITNESSES

> **Donald Anderson**. Shinn discussed with Payne misgivings about the admissibility of Anderson's testimony. [RT 208] In assessing the decision not to call Anderson as a witness one must consider the chronology and detail of Marsha Holt's observations as reported to the police very early in the investigation. On 2 June 1983 when interviewed by an Officer J. Morris at 1730 hours, Holt described the driver as a female Caucasian with blonde hair and the passenger and shooter as a "*Possible male Latin or White/Negro mix . . .* " Later that same day at 2124 hours Marsha Holt described the shooter: "*M,*

MIXED MEX & CAUC OR BLK + CAUC, DRK BRN JERR CURLS WITH A PART ON THE LT SIDE, 5-9/6-1, 150 [??] SLENDER, 30/35 YRS, THIN MUSTACHE, CLEAN SHA[??] WHT LONG SLEEVE BUTTON SHIRT, BLK PANTS, BLK SHOES." Marsha Holt also gave detailed descriptions of the female Caucasian driver and what she described as a late model 1980's Cutlass two-door vehicle. Rpt. at 47:14-48:1.

Deborah Cantu, Pamela Cummings' sister and a civilian employee of the Los Angeles Police Department, was a witness to a number of statements:

1) Raynard Cummings stated he would use his gun to resist arrest; however, at trial Pamela Cummings denied hearing this statement by her husband. [TT 8761] The prosecution later impeached her with her tape recorded statement. [TT 8806]

2) Pamela Cummings told her Milton Cook had shot a police officer; however, Pamela Cummings admitted on cross-examination by Shinn that she had lied about the presence and participation of Milton Cook. [TT 8222, 8705]

3) Pamela Cummings told her Raynard Cummings had been in the car, a fact not disputed by petitioner.

4) Pamela Cummings told her petitioner had shot the police officer.

5) Pamela Cummings told her it was petitioner who told her to say it was to say it was Milton Cook who shot the police officer.

Each of these statements could be offered as prior inconsistent statements of Pamela Cummings pursuant to Evidence Code §1235. Rpt. at 48:2-17.

Robin Gay: both the prosecution and petitioner sought to have Robin Gay testify as a witness. The prosecution discussed with court and counsel whether to grant her immunity and the trial court conducted a hearing pursuant to Penal Code §1324. Despite an offer of total immunity Robin Gay declined to testify. Shinn and petitioner requested and were given the opportunity to speak privately with Robin Gay and thereafter Shinn stated to the court: "*Your Honor, Mr. Gay and I decided*

we will not use her at this time as a witness." [TT 8640] Robin Gay did testify before the grand jury; however, this testimony did not qualify as prior recorded testimony as defined by Evidence Code §1291. Rpt. at 48:18-26.

12. Mr. Gay takes exception to the finding that Marsha Holt's reported observations of events were a circumstance weighing against calling Don Anderson to impeach her.

Nothing about Marsha Holt's description of the purported shooter, or female driver, constituted a circumstance that weighed against calling Anderson to testify that Holt admitted she did not see the shooting. Rather, the physical and clothing description given by Holt to officer Morris closely matched the description given by Irma Esparza of the suspect she saw alight from the car *after* the shooting to retrieve the gun. *See* Ex. A13 at 1-2. The fact that Holt could describe Mr. Gay's (or Pamela Cummings's) appearance proved nothing more than that she witnessed events only after the shooting was brought to her attention by Gail Beasley.

In turn, this Court has already found that Daye Shinn's only reason for not calling Donald Anderson as a witness was because Shinn erroneously believed that Anderson's testimony about his wife's admissions would have been inadmissible hearsay. *See In Re Gay*, 19 Cal. 4th at 820. Therefore, this Court should not infer any other reasonable strategy given that there is already a finding regarding Shinn's uninformed failure to present this additional evidence.

13. Mr. Gay takes exception to the finding regarding Pamela Cummings's statements to Deborah Cantu inculpating Mr. Gay because they omit mention of critical timing, sequence, and context of the different statements.

The referee found that Deborah Cantu could have testified about Pamela Cummings's chronology of statements about what happened in the

hours, days, and weeks after the shooting. Pamela first told Cantu and reported to the police within hours of the shooting that Cummings's look-a-like, Milton Cook, was the sole shooter. Ex. A136 (Pamela's anonymous call to 911 that it was Milton Cook); Ex. A134 at 5 (Pamela told Cantu that Milton alone did it). The referee found that Pamela Cummings changed her story and told Cantu that Mr. Gay had 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.

The referee, however, omits mention of the significant timing of these last two statements. The substantial evidence demonstrates that Pamela shifted blame to Mr. Gay (both as the shooter and the person who instructed her to blame Milton Cook), only *after* Milton Cook established an alibi post-arrest and only *after* Raynard and Pamela Cummings were arraigned on murder charges. Ex. A137 at 15 (Pamela told Cantu it was no longer Milton Cook, but Mr. Gay alone, who shot the officer after everyone was arrested). Mr. Gay highlights to this Court that there were no circumstances that weighed against presentation of Cantu's testimony (even with these last two statements) given that 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. It would have been entirely reasonable (and persuasive) for Shinn to argue that Pamela Cummings, in the hours and days after the shooting, was trying to place the blame on Milton Cook to protect her husband, and only after everyone was arrested (including Milton Cook, who had a broken foot at the time and later established an alibi), lied and shifted the blame to Mr. Gay for both the murder and the Milton Cook plan. Cantu's testimony to support this argument was critical.

14. Mr. Gay takes exception to the finding that Robin Gay's grand jury testimony would not have been admissible pursuant to Evidence Code § 1291.

Mr. Gay respectfully submits that Robin Gay's grand jury testimony was admissible against the prosecution at Mr. Gay's trial in light of Ms. Gay's invocation of her Fifth Amendment privilege against self-incrimination. Pursuant to Evidence Code section 1291(a)(1), "[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and . . [t]he former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion." In turn, a witness is "unavailable" for purposes of section 1291(a)(1) if he or she is "[e]xempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant." Cal. Evid. Code § 240(a)(1).

Ms. Gay's grand jury testimony met these criteria. Her former testimony had been offered by the prosecution at the grand jury proceedings. Because her invocation of her Fight Amendment privilege rendered her unavailable to Mr. Gay at his trial, he could have introduced the former testimony against the prosecution, *i.e.*, the "same person" who introduced the testimony at the grand jury. Accordingly, the referee's finding that the testimony did not qualify as former testimony pursuant to section 1291 is erroneous.

EXPERTS

> **Eyewitness Identification**. The precise issue relevant to this case is event memory, a sub-set of the study of human memory and a study separate from eyewitness identification. The parties agree upon the physical presence of petitioner, Raynard Cummings and Pamela Cummings on Hoyt Street in the late afternoon of 2 June 1983. The prosecution at trial persuaded the jury it was Raynard Cummings who fired the first and perhaps the second shot from the rear seat of the 1979

Oldsmobile Cutlass and petitioner who emerged from that car to fire the remaining shots.

The admissibility of expert testimony is subject to the sound discretion of the trial court. Definitive guidance on the issue of eyewitness identification experts was less than a year old. The Court's November 1984 opinion in *People v. McDonald, supra* at 377, focused upon those cases where eyewitness testimony was the only evidence connecting the accused with the crime. Rpt. at 49:2-14 (citing *People v. McDonald*). Petitioner's connection to the murder of Officer Verna was corroborated by his fingerprints on items inside the glove box of the stolen Oldsmobile, petitioner's possession of Officer Verna's police service revolver upon his arrest the next day, his identification by accomplice Pamela Cummings [footnote omitted] and his own admissions. The Court also observed: " . . . *we do not intend to 'open the gates' to a flood of expert evidence on the subject.*" *People v. McDonald,* supra at 377. The prosecution could have objected to the admissibility of such expert testimony and the trial court would have been within its discretion to deny the petitioner's offer.

In the 7 September 1988 deposition of Shinn [footnote omitted], [Petition Exhibit 9, at page 101] while discussing the decision not to call a psychologist on the issue of eyewitness identification Shinn states: "*I don't know. I think that was maybe one of the tactical reasons why we didn't do it because we felt that maybe at that point we felt the jury may be now confused as to who shot the police officer. So we didn't want to bring in the psychologist and psychiatrist on our case. Maybe they would be weaker witnesses than the prosecution witnesses. Then that would hurt our case.*"

The two defense counsel for co-defendant Raynard Cummings, neither of whom have been subjected to the level and type of criticism heaped upon Shinn, also did not present any expert testimony concerning eyewitness identification or event memory. Indeed, exploitation of the confusion amongst the various eyewitnesses was a valid trial strategy and Shinn did

argue contradicting identifications as a clear basis for reasonable doubt. Based upon the unique facts and circumstances of this case it was a viable strategy to exploit the confusion rather than to explain it. Rpt. at 49:20-50:21.

Human Vision Expert. During the 1985 trial the prosecution offered photographs and diagrams to allow the jury to contemplate who could see what from where. During the 2000 penalty phase retrial Dr. Paul Michel offered his expert opinion concerning the factors impacting the quality of observations made by the witnesses at 12127 Hoyt Street – Marsha Holt and Gail Beasley. Rpt. at 50:23-51:2.

The factors impacting the quality of the observations of the trial witnesses were apparent: Full late afternoon summer lighting, distances from 50 to 250 feet, foliage and fences obstructing lines 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.

Biomechanics Expert. The time and speed calculations regarding the testimony of Shequita Chamberlain and Rose Perez would likely have been admissible as basic mathematics where the distance was measured and known. The admissibility of the experiments timing the egress from the Oldsmobile rear passenger seat out the driver's door and from the front passenger seat out the driver's door would have been subject to the discretion of the trial court. Rpt. at 51:16-23. The act of getting in and out of an automobile is a common everyday human experience. As one does not need a weatherman to know which way the wind blows [footnote omitted], one need not resort to rocket science to conclude it might be difficult but not impossible for a large and highly motivated man to quickly exit out the driver's door from the rear seat of a two door Cutlass Supreme. Likewise it might be difficult but not impossible for a similarly motivated yet slightly smaller man to quickly exit from the front passenger seat out the driver's door . . . . the witness descriptions of the time elapsed varied greatly . . . too greatly to merit much

confidence in such experiments. Rpt. at 52:3-14.

The referee observed a similar demonstration for the purpose of this hearing. The results of the demonstrations performed by Dr. Solomon and by respondent for this hearing, often differing by just seconds or fractions of seconds, were both inconclusive on the issue of who was the outside shooter. *Id.* at 52:15-18.

The Truth Chart produced by Dr. Solomon, Petition Exhibit A017A, while perhaps useful as a guide to counsel for argument, strayed too far into the jury's area of responsibility and would not have been admissible at trial. *Id.* at 52:19-21.

Medical Examiner. The parties stipulated to the testimony of **Dr. William Sherry** from the 2000 retrial. Dr. Sherry agreed with most of Dr. Cogan's findings with the exception of the exit points for Gunshot Wounds 4 and 5. The medical forensics issue for petitioner during the 1985 trial was whether the autopsy findings supported the contention Raynard Cummings fired at Officer Verna from inside the Oldsmobile. The nature of Gunshot Wound 6, its point of entry and path through Officer Verna's neck suggested so if one assumed the officer was leaning into the driver's door and the shot was fired from Raynard Cummings' position in the rear seat. The gunshot wounds to the back of Officer Verna do not suggest who fired those shots, nor do the gunshot wounds to the chest. Rpt. at 52:22-53:8.

Firearms Ballistics. Dr. Marvin L. Fackler, Jr. was a well-known and widely published expert in the area a gunshot wound ballistics. The referee found him to be unavailable for this hearing due to illness. Dr. Fackler died on 23 May 2015. Dr. Fackler was a full time member of the United States military, both the Navy and later the Army, and did not begin his career as an independent consultant until his retirement from the military in 1991. He would not have been available to Shinn during the 1985 trial. Rpt. at 53:10-16.

15. Mr. Gay takes exception to the finding that Shinn's statements during a deposition on September 7, 1988, identified his purported tactical "decision not to call a psychologist on the issue of eyewitness identification."

Mr. Gay respectfully submits there is no reasonable basis to credit Shinn's post-hoc rationale for his failure to call an eyewitness expert. The only basis for the referee's finding is the transcript of Shinn's self-serving answers to questions about his performance posed during a deposition in Mr. Gay's capital habeas proceedings before this Court. *See* Rpt. at 50:6-13 (citing Petition Ex. A9 at 101). Shinn admitted that in answering the question he, at most, was only "think[ing]" or "assum[ing]" he discussed the issue with a psychologist or with Payne. Ex. A9 at 97:26-98:2; 99:22-23. Shinn was unable to name any expert or say whether he allegedly spoke to a psychologist personally, or delegated the task to Payne. *Id.* at 98:6-11. Shinn explained that Payne "does all the running around, talks to witnesses and so forth." *Id.* at 98:13-14. He then added, "I *didn't have time* to talk to a psychologist. I was preparing for trial, getting ready for trial *the next day* and so forth." *Id.* at 98:19-21 (emphasis added).

Thus, Shinn could not have had any informed basis for his post-hoc ruminations about the possible weakness of any expert witnesses because he never spoke to any. The record is also clear that whatever "running around" Shinn thought Payne may have been doing it did not involve contact with any eyewitness experts. Payne's sworn, unrefuted testimony at the reference hearing established that Shinn failed to follow up his suggestion to consult with a forensics laboratory, or Dr. Shomer, regarding eyewitness testimony. 3 EH RT 200:16-201:21, 207:24-208:8, 209:8-211:9, 212:8-10, 288:8-13, 303:18-304:4. Nor is there any documentation, such as a request or an order for reimbursement pursuant to Penal Code section 987.9, to indicate that Shinn consulted such experts.

By now, the record in this case is also replete with findings by every other fact-finder to hear or review Shinn's testimony that he lacked credibility and was attempting to "conceal his misconduct and/or to avoid criminal prosecution and culpability in these proceedings," Ex. A33 at 54, 58-59 (disbarment proceedings); and he intentionally gave answers that were "evasive, inconsistent, and often nonresponsive." *In re Gay*, 19 Cal. 4th 771, 808 and n.17 (1998).

There is therefore no factual or credible basis to conclude that Shinn made a tactical decision, informed or otherwise, not to call an eyewitness expert.

16. Mr. Gay takes exception to the finding that an eyewitness identification expert may not have been admitted by the trial court.

There is no logical or legal ground for the referee's suggestion that the trial court would not have admitted eyewitness expert testimony in light of the evidence that "corroborated" Mr. Gay's presence in the car at the time of shooting. Rpt. at 49:20-50:1 (pointing to Mr. Gay's fingerprints on items in the car, Mr. Gay's possession of a gun, and Mr. Gay's statements that he was in the car that day). There was never any dispute that Mr. Gay was in the car at the time of the shooting. Eyewitness expert testimony would not help the jury determine whether or not Mr. Gay was present, but rather who did what. The question concerns who in the car – the light-skinned Mr. Gay in the front seat or the dark-skinned Raynard Cummings in the backseat – exited the car to shoot the officer. As this Court explained, given the number of eyewitnesses and the variations in their descriptions of events, eyewitness expert testimony would have assisted the jury in evaluating the evidence, including "understanding the inconsistencies in the identifications made by Robert Thompson and other prosecution witnesses." *People v. Gay*, 42 Cal.

4th at 1215.

17. Mr. Gay takes exception to the suggestion that Cummings's counsel decision not to call an eyewitness expert at trial excuses Shinn's failure in not calling a similar expert.

Similarly unsupported is the referee's finding that because defense counsel for Raynard Cummings did not present an eyewitness memory expert, Shinn's failure to call an eyewitness memory expert may be excusable. Rpt. at 50:14-20 (finding that exploiting the confusion amongst the witnesses was a viable trial strategy). But counsel for Raynard Cummings would not have a real need for an eyewitness expert given that three of the four prosecution eyewitnesses (Marsha Holt, Shannon Roberts, Gail Beasley) described a light-skinned black man (Mr. Gay) exiting the passenger door, walking around the front of the car, and shooting the officer from the front of the car. This evidence is arguably helpful to Raynard Cummings, and counsel for Cummings would have no interest in challenging their observations via an eyewitness expert.

It was Shinn who needed an eyewitness expert whose opinions would have allowed the defense to convincingly refute the witnesses who initially reported seeing the shooter exit the passenger door and walk around the car to shoot the officer (Marsha Holt, Gail Beasley, Shannon Roberts, and Rose Perez), and corroborate the greater number of witnesses who initially reported seeing a dark-skinned black man exit the backseat of the car and shoot the officer (Oscar Martin, Robert Thompson, Irma Esparza, Shequita Chamberlain, Pamela Cummings, Walter Roberts). Further, an eyewitness expert's analysis on unconscious transference and distraction would have provided a basis for Shinn to argue that the witnesses who initially reported seeing the shooter exit the passenger door and walk around the car to shoot the officer (Marsha Holt, Gail Beasley, Shannon Roberts) likely observed Mr.

Gay's exit from the passenger door and walk around the car to *retrieve* the gun before speeding away, and not the shooting itself.

18. Mr. Gay takes exception to the finding that an accident reconstruction, human factors, and biomechanics expert opinion would have been "inconclusive" on identity of the outside shooter.

Mr. Gay respectfully takes exception to the referee's finding that the results of the events reconstruction performed by Dr. Solomon, as well as by respondent at the reference hearing, "were both inconclusive on the issue of who was the outside shooter." Rpt. at 52:18. It is undisputed that witness accounts and medical and firearms evidence upon which Dr. Solomon relied shows that all six shots were fired at close range in relatively quick succession. Respondent did not introduce any evidence to refute the fact that the elapsed time between the first and second shots was a maximum of 2.5 seconds, and the entire sequence of shots occurred within a span of seconds. This was, in fact, the prosecution's theory at trial. *See, e.g.*, 58 RT 6212 ("Paul Verna was shot in a very, very short period of time. Just seconds.").

Biomechanical and human factors analysis available through an expert such as Dr. Solomon would have been conclusive in assisting a trier of fact to determine which of three possible scenarios was more probable: 1) the dark-skinned man exited the driver's door from the backseat; 2) the light-skinned man in the white shirt climbed across the driver's seat and exited the driver-side door from the front passenger seat; or 3) the light-skinned man exited the passenger door and walked around the front or back of the car to shoot the officer. *See* 5 EH RT 546:19-27. The first scenario supported Mr. Gay's innocence, the second and third scenarios were based on alternate description of events proffered by the prosecution.

First, the fact that the referee found that respondent's attempts to replicate Dr. Solomon's reconstruction of events produced results "often

differing by just seconds or fractions of seconds" served to validate the defense expert's reported conclusions. *See* Rpt. at 52:17-18.

Second, these congruent results demonstrated that there was no factual or logical basis to support the prosecution's "pass the gun" theory – that Raynard Cummings fired the first and maybe second shot before becoming entangled in the seatbelt and then passed the gun back to Mr. Gay to continue shooting the officer – upon which the second and third scenarios depended. Dr. Solomon's independent experiments and analyses yielded a calculation that Raynard Cummings could have fired the first shot and emerged from the backseat of the car to fire the remaining five shots within a total elapsed time of 3.5 seconds. Ex. A17 at 9. By comparison, respondent's replications of the experiment, using an individual who was taller, heavier and older than Cummings, yielded *faster* elapsed times 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).

Thus, neither Dr. Solomon's nor respondent's reconstruction of events – using nearly identical automobiles – identified any obstacles that likely would have prevented Cummings from making a rapid exit from the car and completing the fatal assault on Officer Verna. In turn, respondent's own expert (whom the referee does not mention) testified that a person in Cummings's state of anticipation and preparation would be expected to execute his intended actions with increased speed. *See* 17 EH RT 2210:13-2211:8.

The congruent test results also demonstrated that the version of events as recalled by the three witnesses who (mistakenly) identified Mr. Gay as walking around the front of the car before shooting the officer would have taken far longer than the time during which the events actually occurred. Shannon Roberts, Gail Beasley, and Marsha Holt all described the shooter as

exiting the passenger side, walking around the front of the car and firing from the front driver's side fender. As confirmed by respondent's reenactments, that process would have required a prohibitive lapse of time. *See* 6 EH RT 770 (9.75 seconds); *id.* at 771 (12 seconds); *id.* at 772 (11.5 seconds); *id.* at 773 (10 seconds). In turn, the referee elsewhere acknowledges 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.

Similarly, respondent's reenactments of events to account for the prosecution's theory that Cummings became ensnared upon exit and needed to "pass the gun" to Mr. Gay, who allegedly climbed across the driver's seat and exited the car, also produced elapsed times considerably longer than 2.5 seconds between the first and second shots.[12] *See* 6 EH RT 765-66 (5.2 seconds); *id.* at 767 (6.5 seconds).

The physical and scientific evidence was thus all consistent with Raynard Cummings's admission, and Pamela Cummings's initial description of the offense, that Cummings was the only shooter; and inconsistent with Mr. Gay being involved in the homicide.

An expert with Dr. Solomon's qualifications would have been able to support these exculpatory findings with explanations of various scientific factors such as human movement, physics, and response times in the context of the scientific methods, theories, and approaches with which to critically evaluate the prosecution's "pass the gun" theory. *See, e.g.*, Ex. A17 at 5 (explaining how gunshot residue analysis, trajectories of shots, and human

[12] This was the version of events proffered by Pamela Cummings after she realized she could not frame Milton Cook (Raynard Cummings's look-alike) as being the shooter.

factors calculations support a finding that the maximum time between the first and second shot was 2.5 seconds); 6 EH RT 804:11-15 (startling effect of a person positioned inside a car where a gun is fired is within one wavelength of the gunshot, putting that person in a high state of disorientation). Even without the timed experiments, an expert such as Dr. Solomon would have been useful for Mr. Gay's jury.

Mr. Gay's Post-Hearing Brief further delineates several of the ways in which the record supports Dr. Solomon's findings and how they would have assisted Mr. Gay's defense. *See* Pet. Br. at 62-75; *see also* Ex. A17 (report of Dr. Solomon). This evidence, however, is largely untouched by the referee.

As Dr. Solomon opined, event reconstruction can highlight errors in witness observations. 5 EH RT 573:19-28 (explaining that "witnesses can make statements which violate physics"). An expert like Dr. Solomon, coupled with the experiments run at the reference hearing, would have demonstrated to Mr. Gay's jury that the objective scientific data supported the greater probability that Raynard Cummings, alone, fired all six shots within seconds. An expert like Dr. Solomon, coupled with the experiments, would have further proven that the pronounced length of time it would have taken Mr. Gay to recover from the startling effect of a loud gunshot, receive the gun from Cummings, exit the passenger side, walk around the front of the car, and stand at the front fender to shoot the officer (as attested to by Holt, Beasley, and Roberts) was not a credible version of events. Dr. Solomon's opinion would have been further buttressed by the data, as confirmed by respondent, that there would have been no evident need for Cummings to "pass the gun" in the first place.

19. Mr. Gay takes exception to the finding of Dr. Fackler to the extent the unavailability of Dr. Fackler personally is meant to extend to all gunshot wound ballistics experts.

Dr. Martin Fackler's expert testimony on gunshot wound ballistics was presented at the reference hearing. Ex. A78 at 21-26 (using testimony to support the argument that no forensic evidence supports the conclusion that Officer Verna was shot from over eight feet away as Marsha Holt, Gail Beasley, Rose Perez, and Shannon Roberts reported). The referee found that Dr. Fackler would not have been personally available to Daye Shinn during the 1985 trial due to Dr. Fackler's military service at the time. Rpt. at 53:10-16. While Mr. Gay does not object to the referee's finding that Dr. Fackler personally may not have been available to Daye Shinn, substantial evidence exists to find that the underlying science and methods that Dr. Fackler relied on were available at the time of Mr. Gay's trial. See Pet. Br. at 50, n.11 (collecting court cases reflecting the use of wound ballistics in criminal cases prior to 1985); see also Ex. A145 (1984 California Expert Witness Manual) (identifying potential wound ballistics experts for defense attorneys to call to testify in courts prior to 1985).

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

In response to this Court's Question 3, Part 2, the referee made no findings that any evidence rebutting Mr. Gay's additional evidence reasonably would have been available to the prosecution at trial. Mr. Gay does not take exception to the absence of such findings.

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

In response to this Court's Question 4, the referee made the following specific findings:

OSCAR AND MARJORIE DANE

> Daye Shinn represented Oscar and Marjorie Dane against the City of Santa Monica in an eminent domain case decided by the Los Angeles Superior Court in February of 1979. The court determined the Dane's property to be worth $200,000, minus a lien of $1,376.52 owed the California Franchise Tax Board. Rpt. at 55:9-13.
>
> The trial court ordered Shinn to keep the funds in an interest bearing trust account for the benefit of the Danes. Shinn deposited the funds into a series of bank accounts and certificates of deposit. From the Dane's monies Shinn loaned $50,000.00 to one Jack Hannig. Shinn wrote a check for $2,000 to one Eiko Shinn. Shinn also used a large portion of the Dane's monies to make restitution to another eminent domain client, the Korchins.
>
> In early 1984 Oscar and Marjorie Dane appeared at the Major Frauds Division of the Los Angeles County District Attorney's office and asked to report a fraud: the theft of their home by the City of Santa Monica. The matter was assigned to Deputy District Attorney Albert MacKenzie who determined there may be criminal activity afoot when he learned the Danes had not received any compensation. Upon examining the eminent domain court file MacKenzie learned the court had ordered Shinn to place the whole judgment, minus the Francis Tax Board lien, into a trust account. Based upon Oscar Dane's statement that he and his wife had not received any of the monies, MacKenzie enlisted the aid of Los Angeles County

Sheriff's Department Detective Charles Gibbons of the Forgery Fraud Division and opened a criminal investigation targeting Shinn. [RT 1980] Shinn explained Oscar Dane was so bitter and angry he wanted the monies returned to the county treasurer. Oscar Dane wanted his home back. The tenor of Shinn's comment does not suggest concern about criminal prosecution.

On 1 March 1984, and during the pendency of the capital charges against petitioner, MacKenzie and Gibbons met with Shinn at the Criminal Courts Building in downtown Los Angeles. MacKenzie asked Shinn about the fee agreement with the Danes and did not believe Shinn's statement it was a one-third contingency fee arrangement. MacKenzie also asked Shinn for an accounting of the Dane[s'] funds. Shinn much later produced a handwritten accounting which did not satisfy MacKenzie, causing MacKenzie and Gibbons to seek search warrants for Shinn's bank records after Shinn refused to consent to the disclosure of his bank records. Rpt. at 55:16-24-56:1-23 (footnotes omitted).

Shinn was on notice of the investigation when MacKenzie asked Shinn to produce an accounting of the Dane monies; however, there is no evidence in the trial record indicating the trial court or petitioner were aware of the Dane investigation during the 1985 trial. It is also clear that the Danes were difficult clients who refused to take the award funds for the six year period between 1979 and 1985. Shinn misappropriated the funds entrusted to him in violation of the Rules of Professional Conduct. See generally ***In the Matter of Shinn*** (1992) 2 Cal. State Bar Ct. Rptr. 96. Rpt. at 60:5-13.

The referee finds credible MacKenzie's assertion he would have vigorously pursued criminal charges against Shinn had sufficient evidence been available within the appropriate statute of limitations. The referee finds credible Gibbons' declaration that in his opinion criminal charges should have been filed against Shinn. [Petition Exhibit 80] Rpt. at 60:24-61:2.

The referee finds no evidence of any agreement or understanding suggesting the Los Angeles County District Attorney's Office declined to prosecute Daye Shinn in exchange for the surrender of petitioner's case at trial. The referee finds Shinn's handling of the Dane[s'] monies was unprofessional and in violation of the judge's orders and the Rules of Professional Conduct; however, it did not constitute a viable criminal between Shinn, the Office of the District Attorney or petitioner's 1985 guilt phase interests. Rpt. at 61:3-10.

ALEXANDER AND REBECCA KORCHIN

While engaged in the task of tracing the Dane[s'] funds, MacKenzie learned Shinn had used $70,000.00 of the Dane[s'] monies in July of 1981 to make restitution to another eminent domain case client, the Korchins. Detective Gibbons located and interviewed Alexander Korchin, and learned Alexander Korchin had given Shinn over $100,000.00 for the purpose of avoiding taxes and hiding it from Rebecca Korchin during divorce proceedings. When the Korchins reconciled and Alexander Korchin demanded the return of his monies, Shinn was not able to satisfy the Korchins, who complained to the State Bar.

In 1987 Shinn was disciplined by the State Bar for his misappropriation of $119,775.00 received on behalf of the Korchins in 1978 and 1979. MacKenzie testified the Korchin matter would have been a viable criminal prosecution which did not come to the attention of the Los Angeles District Attorney's Office until after the statute of limitations had already expired. [RT 2087]

The referee finds Shinn's handling of the Korchin[s'] monies was not a viable criminal prosecution when discovered by MacKenzie and did not constitute the basis for an actual conflict of interest between Shinn, the Office of the District Attorney or petitioner's 1985 guilt phase interests. Rpt. at 61:12-62:4.

THE MURDER OF LEWIS JONES

> Question 4 directs the referee to examine the District Attorney's investigation of allegations Daye Shinn had engaged in acts of embezzlement. The prosecution of Linda Sue Jones for the 27 February 1984 murder of her husband Lewis Jones involved Shinn because Lewis Jones was either Shinn's law partner or law office tenant. In addition, Linda Sue Jones was charged with and found guilty of the theft of the check for $145,285.88 representing the Dane[s'] monies Shinn was scheduled to bring to a meeting with MacKenzie, the 'dog ate my homework' episode. Petitioner suggests Shinn refused consent to the examination of his bank records because he feared the records would reveal other misconduct and criminal activity involving Shinn's law practice. See generally ***People v. Linda Sue Jones*** (1984) Los Angeles Superior Court case A088857. Shinn was not investigated as a suspect in the murder of Lewis Jones or the thefts from the law practice of Lewis Jones. Rpt. at 62:6-18

Mr. Gay respectfully takes the following exceptions to the foregoing findings regarding Question 4:

1. Mr. Gay takes exception to the finding that Oscar and Marjorie Dane reported a fraud in "early 1984."

The referee found that Oscar and Marjorie Dane appeared at the Major Fraud Division of the Los Angeles County District Attorney's Office and asked to report a fraud in early 1984. Rpt. at 55:22-24 (no citation to the record to support the finding).

Mr. Gay respectfully submits that the substantial evidence shows that Oscar and Marjorie Dane appeared at the Major Frauds Division in late 1983. As the testimony of the Danes', Deputy District Attorney McKenzie, and Detective Gibbons in the State Bar proceedings shows, it was "[i]n or about November 1983, [when] Dane met with Los Angeles County Deputy Al McKenzie and Los Angeles County Deputy Sheriff Charles Gibbons regarding, among other things, [Shinn's] handing of the proceeds from the

eminent domain proceeding." Ex. A33 at 31:14-20 (citations omitted).

2. Mr. Gay takes exception to the finding that the criminal investigation of Shinn for embezzling the Danes' money did not give rise to an "actual" conflict of interest.

Mr. Gay respectfully submits that the evidence as summarized by the referee demonstrates that the District Attorney's criminal investigation of Shinn for embezzling the Danes' money created a potential conflict of interest, which became an actual conflict of interest (*i.e.* adversely affecting Shinn's representation of Mr. Gay) at least by the time Shinn failed to disclose the conflict while fraudulently securing his appointment in this case. The referee's finding to the contrary is erroneous as a matter of law for at least four reasons.

First, the referee was not aware of, and failed to consider, the "clear guidance" provided by this Court, and other "appellate courts," that a conflict of interest arises when "the client has been formally charged by a prosecution agency and the attorney is under investigation by that same prosecution agency." Rpt. at 59:26-60:4. By the time of the reference hearing, and the date of the referee's Report, this Court had provided such clear guidance. *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. Similarly, in *People v. Hung Thanh Mai*, 57 Cal. 4th 986, 1010 (2013), this Court observed that "as the cases require," the trial court appointed independent counsel and inquired into a potential conflict of interest arising where state defense counsel might have been implicated in a *different* law enforcement agency's investigation of the defendant for plotting to kill a witness.

Other "appellate courts" have provided similarly "clear guidance." As the court observed in *People v. Almanza*:

> We have 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.

233 Cal. App. 4th 990, 1002 (2015) (emphasis added).

The recognition that a potential conflict arises under these circumstances rests on the principle that 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").[13]

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[13] 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

Second, as the referee observed, "[k]nowledge or notice of an investigation should trigger a professional duty to disclose to the client and the trial court." Rpt. at 60:4-5. In context, it is not clear whether the referee meant this as a correct statement of the law (which it is) or an aspirational goal of appellate court guidance. In either event, it is unquestionably a black letter command of the Sixth Amendment: "defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court *at once* of the problem." *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978) (emphasis added). Shinn failed to honor his constitutional obligation 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 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).

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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).

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.

Third, the record further demonstrates that Shinn's ongoing concealment of the conflict adversely affected his representation at trial, including persuading Mr. Gay to confess to the robberies as a result of his "incompetent performance." *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 1233, 1319 (1993). 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.

Fourth, the referee's conclusion that there was no conflict because there was no "viable criminal prosecution" is erroneous as a matter of law and fact. As a matter of law, a prosecuting agency's ultimate decision whether to pursue charges does not retrospectively eliminate the conflict that existed during the *ongoing* criminal investigation. During that period the attorney and his or her interests are under the *threat* of criminal action, and it is that *threat* that gives counsel an incentive to curry favor with the prosecution by pulling punches. Under the referee's rationale, a criminal investigation would never give rise to a conflict so long as counsel successfully curried favor with the authorities and avoided indictment. Mr. Gay respectfully submits that is not the law.

Rather, 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. Thus, in contrast to the referee's retrospective analysis, protection of both a defendant's 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.

As a factual matter, contrary to the referee's view, Shinn's misappropriation of the Danes' money exposed him to "a viable criminal prosecution." *See* Rpt. at 61:8. The only serious question regarding Shinn's theft of the Danes' money was how much of it he stole. In the Danes' eminent

domain case, 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 directed Shinn to hold it 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. Contrary to the court's order, Shinn almost immediately 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.

Out of the $198,623.48 awarded in the Danes' case, Shinn wrote a check for $190,000, made payable to "cash," and moved the money into another account. *Id.* Over the course of the next twelve months he moved the Danes' 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 958:10-20; Ex. A33 at 11-15; Ex. A119 at 2. Between February 1980 and February 1985, approximately five years after Shinn took possession of the Danes' money, he ran it through five different bank accounts, which he used to skim off interest. *See* 7 EH RT 958:3-9, 960:28-961:22, 964:3-10, 991:17-26, 17 EH RT 2288:12-18; Ex. A119 at 2-5. On February 22, 1985, approximately one week before the jury was sworn to try Mr. Gay's capital murder charges, Shinn gave Marjorie a cashier's check for $178,287.93. 7 EH RT 965:23-26.

As the referee noted, this was "substantially" less than they would have received if Shinn had followed the superior court's order. Rpt. at 58:16-17. Martin G. Laffer, a Certified Public Accountant who specializes in forensic accounting, identified $65,515.43 in "errant," or unaccounted for funds that were removed from the Danes' money in the period between February 1980 and February 1985. 7 EH RT 928:7-23; 966:1-7. 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 968:28-969:1-2.

Both Laffer and the State Bar Court judge who recommended Shinn's disbarment, however, acknowledged that, 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).

Thus, the evidence shows that up until the commencement of the guilt phase, Shinn was helping himself to somewhere in the neighborhood of $100,000 to over $200,000 of the Danes' money and had used at least *$70,000* of it to pay back money he had embezzled from other clients. *See* Rpt. at 61:12-14. As the referee implicitly acknowledges by quoting Penal Code section 503, this is the definition of embezzlement: "the fraudulent appropriation of property by a person to whom it has been entrusted." Rpt. at 54:18-19. Although the district attorney eventually allowed the statute of limitations to expire before charging Shinn, his *ongoing* activities exposed him to prosecution throughout his representation of Mr. Gay. Moreover, as the referee's citation to Penal Code sections 512 and 513 demonstrates, Shinn's repayment of some of the stolen money did not terminate his liability for prosecution on the basis of the past embezzlements. In turn, the District Attorney did not close the investigation until 1987. Indeed, Shinn betrayed

his fear of prosecution through the time of his 1990 disbarment proceedings, as he continued to lie about his actions in an "effort to conceal his misconduct and/or to avoid criminal prosecution and culpability." Ex. A33 at 54.

Further, Mr. Gay respectfully submits that the referee does not identify any basis for explaining why Shinn's conduct constituted a violation of the superior court's order, professional standards and Rules of Professional Conduct, but did not violate any law against thievery. Rpt. at 61:6-8.

Mr. Gay therefore submits there is no substantial evidence or legal authority to support the referee finding that the Los Angeles District Attorney's ongoing investigation of Shinn's misappropriation of the Danes' money did not create a conflict of interest.

3. Mr. Gay takes exception to the finding that Shinn's embezzlement of the Korchins' money did not provide the basis for an "actual" conflict of interest.

Mr. Gay respectfully takes exception to the referee's finding that because Shinn's embezzlement of the Korchins' money would not support a viable criminal prosecution by the time it was discovered by the District Attorney, it did not give rise to a conflict of interest affecting Mr. Gay's "1985 guilt phase trial interests." Rpt. 62:1-4. Shinn bilked the Korchins out of $130,000 and had repaid only $70,000 of it (in stolen Dane funds) as of July 27, 1981. Although the statute of limitations may have expired by the time the District Attorney uncovered the theft in the course of investigating the Dane embezzlement, there was no such bar at the time the District Attorney and Detective Gibbons initiated their criminal investigation of the Dane embezzlement in November 1983 and interviewed Shinn in person in March 1984. Shinn's exposure to criminal prosecution for the Korchin embezzlement also remained viable through his fraudulently engineered appointment to represent Mr. Gay on July 18, 1984.

During the criminal investigation into Shinn's embezzlement of Oscar and Marjorie Dane's money, Deputy District Attorney Albert MacKenzie uncovered evidence of what he determined to be another "perfectly good attorney embezzlement case," involving Shinn's theft of money from his client Alexander Korchin. 15 EH RT 2099:19-2100:2. MacKenzie would have prosecuted Shinn for it, but the statute of limitations had expired by the time he became aware of the facts. 15 EH RT 2100:2-6.

According to Korchin's complaint to the State Bar, which he filed in July 1981, he had received over $90,000 in an eminent domain proceeding. Ex. A163 at 1. Shinn convinced Korchin to entrust him with the money 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.* Soon afterward, Korchin and his wife reconciled and asked for the return of his money. After two and a half years, 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. 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.

The approximately $70,000 Shinn paid Korchin in an effort to forestall his complaint to the State Bar was money Shinn had stolen from Oscar Dane. 7 EH RT 950:15-17; 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").[14] Even with that payment, as of July 1981, Shinn was liable for

[14] The cashier's check used to pay Korchin was purchased with Dane's funds

the embezzlement of approximately $60,000 of the Korchins' money.

During Shinn's contacts with MacKenzie and Gibbons in 1983 and early 1984, as well as in July 1984 – when he fraudulently engineered his appointment in Mr. Gay's case – he must have known it was inevitable that MacKenzie would uncover evidence to conclude that "the Korchin case looked like an excellent criminal case against [him]. Everything [MacKenzie] found pointed to what would appear to be a good criminal filing." 15 EH RT 2099:8-11.

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 additional adverse impact on Shin's purported representation of Mr. Gay.

4. Mr. Gay takes exception to the finding that Shinn was not investigated as a suspect in the murder of Lewis Jones or the thefts from the law practice of Lewis Jones.

The substantial evidence demonstrates that Shinn refused to disclose his banking records to Detective Gibbons because he feared investigation by the District Attorney for involvement in the murder of his law partner Lewis Jones and/or the embezzlement activities at their firm. Ex. A34 at 148:10-23.

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on the same date Korchin filed his State Bar complaint. See 17 EH RT 2286:18-2287:8 (forensic accountant Martin Laffer explaining that on July 27, 1981, Shinn used $70,000 of Dane's money to purchase the check for Alexander Korchin, "the other client whose monies he took"); and Ex. A-163 (Korchin State Bar complaint, signed and stamped "RECEIVED," July 27, 1981).

On February 28, 1984, Daye Shinn's law partner, Lewis Jones, was murdered. The case was initially investigated by Los Angeles Sheriff's Department homicide investigators Scully and Olsen. Ex. A140 at 3. Lt. Robert Flemming of the Sheriff's Department Forgery Division informed the two homicide investigators that Jones was also named as the victim of an embezzlement/forgery that Flemming was investigating. 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.* Flemming also advised the homicide investigators that Sergeant Rod Lyons of the Sheriff's Department Forgery Division would be assigned to assist them in the homicide investigation. *Id.* Deputy Charles Gibbons, who was investigating Shinn's embezzlement, also worked with 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. According to Mott and Ramey, the signature of one of Aetna's employees, Carol Rheaume, had been forged to checks received by Jones's office on behalf of Aetna, which were then deposited in Lewis Jones's trust account without Aetna's knowledge. Ex. A139 at 1.

In the course of Sgt. Lyons's investigation of the Jones murder, he was approached by Daye Shinn, who asked to speak privately with him. Ex. A154 at 17. Shinn appeared to be extremely nervous and told Sgt. Lyons that there was no need to check Shinn's bank accounts in the course of the investigation. *Id.* Sgt. Lyons thought Shinn's statement was strange because Sgt. Lyons had not done anything to indicate to Shinn that he was interested

in examining Shinn's accounts. *Id.*

Further, contrary to the referee's Report (at 62:13-14), it was not merely Mr. Gay's "suggest[ion]" that Shinn also refused to disclose his bank accounts to Deputy Gibbons out of fear he might be linked to the homicide. Shinn *testified* that he was aware of the dual investigation into his own embezzlement case, as well as the Jones murder and embezzlement case, and 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, Linda Jones's defense attorney, also suspected that 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, 1818:18-27; *see also* Ex. A148. Braun understood from the prosecution's evidence that, beginning in at least 1981, 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, 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.[15]

Shinn testified as a prosecution witness in the Linda Jones murder trial, providing evidence that she stole the check for $145,000 check he was preparing to deliver to the Danes. 14 EH RT 1817-18; Ex. A66 (Shinn testimony).

Braun was not aware that at the time Shinn testified in the Jones trial

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[15] Another way of describing Lewis Jones's fraudulent movement of funds was the method well known to Shinn of "robbing Peter to pay Paul." *Compare* 14 EH RT 1829:10-12 *with* 15 RT 2087:15-22 (MacKenzie describing Shinn's embezzlement of the Dane funds to cover the embezzlement of Korchin's funds).

he was the target of a criminal investigation by the Los Angeles County District Attorney. 14 EH RT 1820:25-1821:1. He was also unaware that the investigation was being conducted by the same fraud investigator who simultaneously investigated the Lewis embezzlement and murder case; and that the District Attorney and Los Angeles Sheriff's Department Fraud Division had seized Shinn's banking records from numerous accounts.[16] 14 EH RT 1833:1-27; 1849:18-28, 1850:3-12.

During Shinn's testimony, he lied under oath "about only having known Lew Jones for six or seven months as a tenant in the office space" before Jones was murdered. 14 EH RT 1834:20-1836:2; *id.* at 1837:12-1837:5. 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, 1838:2-17, 1840:16-28, 1841:10-1842:5.

Shinn also lied under oath 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. A98A at 1, 30, 48.

Shinn also gave misleading testimony that he was merely a tenant in Lewis Jones's law offices and not one of his partners. 14 EH RT 1846:18-24. In fact he later acknowledged he was Jones's partner. 14 EH RT

[16] By the time Shinn testified in the Jones trial in 1986, Deputy Gibbons had executed at least five search warrants on Shinn's bank accounts. *See* Ex. A154; Resp. Ex. 767.

1846:12-24.

Shinn's testimony was also likely false in his claimed lack of 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.

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 the Jones 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.

Based on what Braun knew about the evidence in the Jones murder trial, he concluded that the foregoing information, including the untruths in Shinn's testimony, might provide cause for doubting Shinn's story that he did not author the letter directing disposition of the allegedly stolen check. 14 EH RT 1854:5-14. Braun was further of the opinion that some of this information also "could have been useful at a trial" on the question of "who murdered Lewis Jones." 14 EH RT 1854:21-1855:1.

The information would have been helpful on the question because it demonstrates that Shinn had grounds 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 Deputy District Attorney MacKenzie testified, Shinn told "many lies, which [MacKenzie] would consider a consciousness of guilt." 16 EH RT 2113:16-18. Likewise, Braun's conclusion that the foregoing information provided a reason to reconsider Shinn's possible involvement in the Jones murder/embezzlement offenses is a further indication that Shinn reasonably feared that the information he knew, but lied about under oath, exposed him to criminal prosecution.

I. *Question 5.* If This Conflict Of Interest Existed, Did It Affect Trial Counsel Daye Shinn's Representation Of Petitioner? If So, How?

In response to this Court's Question 5, the referee, having decided that no conflict of interest existed, nevertheless addresses "*Arguendo*" what the referee characterizes as Mr. Gay's assertion that "the looming criminal prosecution for embezzlement arising from Shinn's handling of monies belonging [to] Oscar and Marjorie Dane and perhaps Alexander and Rebecca Korchin, resulted in an actual conflict of interest as demonstrated by several instances of inadequate performance by Shinn in defense of petitioner. Petitioner maintains this inadequacy was motivated by Shinn's desire to curry favor with the Office of the District Attorney." Rpt. at 62:23-63:2.

1. Mr. Gay takes exception to the referee's failure to address Shinn's concealment of the conflict as constituting an adverse effect on his performance.

Pursuant to this Court's decision in *People v. Doolin*, 45 Cal. 4th 390, 418 (2009), the determination whether a conflict of interest adversely "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 *People v. Cox*, 30 Cal. 4th 916, 948-49(2003)). As both this Court and the United States Supreme Court have recognized, this inquiry is necessarily hampered 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; *see Holloway*, 435 U.S. at 491 ("the evil – it bears repeating – is in what the advocate finds himself compelled to refrain from doing"). Instead, reviewing courts may draw the 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.

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

First and foremost among the things Shinn found "himself compelled to refrain from doing," *Holloway*, 435 U.S. at 490, was disclosing the existence of the criminal investigation to the lower court. An attorney whose vigorous representation was not compromised by a conflict would have

discharged his or her "obligation . . . to advise the court at once of the problem." *Holloway*, 435 U.S. at 485. "[A]s the cases require," *Mai*, 57 Cal. 4th at 1010-11, the trial court then would have conducted an appropriate inquiry and determined whether the criminal investigation and threat of prosecution created an actual conflict.[17]

There was no legitimate tactical reason "that might have caused any such omission." *Doolin*, 45 Cal. 4th at 418. Rather, respondent contended on the basis of the evidence adduced at the reference hearing that "any failure on the part of Shinn to disclose a possible conflict was the result of Shinn's desire to earn fees" in Mr. Gay's case. Resp. Br. at 186:4-6. But, Shinn was motivated to accumulate fees as part of his efforts to pay off his embezzlement victims, and thereby avoid or lessen his criminal liability. Thus, Shinn's concealment of the conflict was directly related to his advancement of his own interests in the embezzlement investigation.

Although Mr. Gay explicitly raised this adverse effect as a basis for finding an actual conflict, the referee does not address it.

2. Mr. Gay takes exception to the finding only that the "trial record" does not support a finding that Shinn slept during trial.

As the referee notes, Shinn's investigator, Douglas Payne, and one of co-defendant Cummings's attorneys, Howard Price, both testified at the reference hearing that Shinn slept during trial. Rpt. at 63:4-8; *see* 3 EH RT 203:21-205:27 (Payne); 11 EH RT 1415 (Price). Payne recalled that it was

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[17] The duty to make such disclosures was evident to John Watson, the prosecutor in the case, who testified at the reference hearing that if he had been aware of the ongoing criminal investigation, he would have had the "legal obligation as an attorney and an officer of the court" to apprise the trial court on the record of the investigation. 14 EH RT 1895:24-1896:13, 1898:21-1899:1-9.

"embarrassing," and Price testified that it made Shinn "the butt of" jokes. 3 EH RT 267; 11 EH RT 1415. The referee does not reject the witnesses' credibility on this point. Instead, the referee points out merely that the trial prosecutor, John Watson, testified at the reference hearing "that he did not *observe* Shinn sleeping during court proceedings," and that the trial record does not reflect an expression of concern about Shinn sleeping by the judge, jurors, other counsel, or Mr. Gay. Rpt. at 63:6-16 (emphasis added). The referee then explains that he "has examined the 1985 guilt phase trial record and finds the record does not support a finding Shinn slept during the trial." Rpt. at 63:24-64:1.

The relevant question, however, is whether the substantial evidence adduced at the reference hearing supports a finding that Shinn slept during the trial. It does. Based on the referee's familiarity with Mr. Price, he acknowledged him to be an "excellent" lawyer, thereby giving no indication that he was worthy of disbelief. Neither would someone with such a stellar professional reputation have any incentive to diminish it by giving untruthful testimony.

Nor does the absence of observations reported on the record that Shinn was sleeping constitute reliable evidence that such observations were not made. As this Court noted, "the trial court erred in failing to order all matters reported," *People v. Cummings*, 4 Cal. 4th at 1333, n.70, which resulted in over 100 unreported proceedings, including over 70 bench conferences in court. *See People v. Gay*, Los Angeles Super. Ct. No. A392702, *Application to Correct, Augment and Settle the Record on Appeal* at 28 (July 24, 1986). Accordingly, the failure of the trial court to comply with Penal Code Section 190.9 has deprived Mr. Gay of fair and complete appellate proceedings, including potential evidence that his trial counsel was sleeping during his trial. Moreover, if even a fraction of those unreported proceedings included Mr. Gay's complaints or the trial judge's admonishment to Shinn to stay

awake, that would constitute significant evidence of counsel's inattention to the trial. Yet even a complete record containing no such evidence would not preclude the fact that Shinn did in fact sleep during trial. Rather, courts have found that habeas proceedings – which allow for the development of extra-record facts – are precisely the proper forum for development and presentation of this evidence. *See, e.g., Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (developing and presenting claim that trial lawyer slept through petitioner's trial through state postconviction proceedings in the absence of any evidence on the trial record).

In light of the referee's failure to make an explicit finding, Mr. Gay respectfully requests this Court to find that substantial evidence supports the fact that Shinn did sleep during trial.

3. Mr. Gay takes exception to the finding that no financial incentives influenced Shinn's failure to retain experts.

The referee concludes that because Penal Code section 987.9 funds were available to pay for experts, no financial incentive existed for Shinn to forego consulting with experts or using them at trial, therefore the failure to retain experts cannot be attributable to any conflict. Rpt. at 64:12-14. The referee's analysis is erroneous as a matter of fact and law.

First, as this Court already has found, as part of the illegal capping operation, "in cases," such as Mr. Gay's, "in which [Shinn] had been introduced to the client by McBroom, Shinn did not consider retaining experts other than Weaver." *In re Gay,* 19 Cal. 4th at 796. Thus, the fee-splitting arrangement that led to Shinn getting into Mr. Gay's case effectively precluded him from using other mental health expert witness. As this Court is also aware, Shinn's purported mental health expert, Dr. Weaver, was reluctant to expend much time preparing to testify. *In re Gay*, 19 Cal. 4th at 797-98. Having retained Weaver to testify in the penalty phase, Shinn could

not venture outside the capping ring to consult with other experts, even if he had been inclined to do so. Thus, as respondent conceded, Shinn's motivation for failing to consult other experts "was to avoid the disclosure of Shinn's capping scheme." Resp. Br. at 188:1-2.

Second, the referee's analysis fails to offer any explanation for Shinn's failure to consult with *any* other experts. Under this Court's *Doolin* inquiry the question is "if the conflict doesn't explain Shinn's failing then what does?" There is no dispute that at the time of Mr. Gay's trial, prosecutors and criminal defense attorneys routinely presented testimony from eyewitness experts. *See People v. McDonald*, 37 Cal. 3d 351 (1984); 12 EH RT 1515:12-28, 1526:6-27. Nor is there any quarrel with the principle that "before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation." *In re Marquez*, 1 Cal. 4th 584, 602 (1992). Thus, Shinn's failure even to consult experts in the first instance was explainable only as manifesting his practice to "not consider retaining experts other than" those involved in the capping scheme. *In re Gay*, 19 Cal. 4th at 776.

The substantial evidence, and the only logical explanation, supports the finding that Shinn's failure to consult other experts was attributable to the conflict of interest created by the embezzlement investigation and his illegal capping scheme.

4. Mr. Gay takes exception to the referee's failure to acknowledge the extent of Shinn's prejudicial incompetence in misleading Mr. Gay to make a confession to charged and uncharged robberies.

Mr. Gay respectfully takes exception to the referee's characterization of Shinn's action in persuading Mr. Gay to confess to the robberies as constituting merely a "failure to have a clear agreement and understanding

with the prosecution before he allowed petitioner to be interviewed." Rpt. 64:16-18. In fact, Shinn had *no* agreement and understanding with the prosecution, but misled Mr. Gay to believe he had, assuring him that the confession "could not be used against him if the prosecutors decided not to use him as a witness." *In re Gay*, 19 Cal. 4th at 791. Shinn continued to urge Mr. Gay to confess to the prosecutor despite the explicit advice that "the prosecution *intended* to use Gay's statement at trial." *People v. Cummings*, 4 Cal. 4th at 1318 (emphasis added; footnote omitted). "Shinn's failure to preserve petitioner's privilege against self-incrimination" was, at best, "incompetence." *In re Gay*, 19 Cal. 4th at 827, 829. At worst, Shinn "acted as a second prosecutor." *Id.* at 793.

It is inconceivable that application of the *Doolin* analysis would show that such total and prejudicial abandonment of a client's interests plausibly could be explained as the action of an unconflicted attorney in pursuit of a reasonable tactical goal. Nor does the referee offer such an explanation. Instead he notes that "defense counsel must always consider case settlement." Rpt. 64:20-21. As authority for this proposition, the referee cites Mr. Gay's "expert Michael Burt." *Id.* The referee, however, omits mention of Mr. Burt's further admonition that if counsel advised his or her client to make a statement in an attempt to settle the case, prior to engaging in those negotiations, it was imperative that there be "an explicit understanding" of how the prosecutor would use the statement. 12 EH RT 1536:16-1537:10. The referee's lengthy description of the difficult legal position Mr. Gay was in compared to Pamela Cummings, Rpt. 65:1-21, serves only to underscore the *unlikelihood* that Mr. Gay would improve his situation by confessing to charged and uncharged robberies. The Report does not identify any legitimate tactical reason for which a conflict-free attorney would have acted in the manner Shinn did.

5. Mr. Gay take exception to the finding that "[t]he assertion Shinn's goal was to solely milk petitioner's case for fees is not supported by this record."

The referee offers three rationales for concluding that Shinn's personal enrichment was not his sole motive for obtaining appointment in Mr. Gay's case. Rpt. at 66. None withstands analysis.

First, the referee notes that none of Shinn's payment requests was rejected as unreasonable or unsupported, and his "billing of an average of 5 hours per court day during trial does not support the allegation of bill adding." Rpt. at 66:11-14. In fact, whether seeking compensation for time purportedly spent in or out of *trial*, or even in or out of *court*, Shinn's billing reflected not just an *average*, but a remarkably consistent rate of *exactly* 4.0 or 5.0 hours per day, day in and day out. *See, e.g.*, 7 CT 1827 *et seq.* Out of 655 hours Shinn clocked for pre-trial work, a total of 557 hours (85%) were billed to "preparation & research" and "motions." *See* Resp. Br. at 29:3-8. The motions upon which Shinn was purportedly expending such a considerable amount of hours, however, were unintelligible, cut-and-paste products. Shinn filed an unintelligible, generic Motion to Suppress Identification Testimony that did not mention a single eyewitness by name. 4 CT 1096:22-25. Shinn's Motion for Change of Venue curiously cites the wide media publicity of the "method of penetration and perpetrators" as a reason to change Mr. Gay's venue, when Mr. Gay's case involved no apparent penetration. 4 CT 1109. During pre-trial proceedings, counsel for Raynard Cummings presented witnesses and offered extensive argument on various pre-trial motions; yet, at the conclusion of counsel's argument on nearly every motion, Shinn simply "joined" in their motion. *See, e.g.*, 8 RT 707 (Shinn summarily joins Cummings's Motion to Strike); 8 RT 739 (Motion to Sever Counts, same); 08 RT 754 (Motion to Sever Co-Defendants, same); 47 RT 4899 (Motion for Change of Venue, same); 32 RT

3162 (Shinn nonsensically "joins" Cummings's motion to disallow Shinn from questioning Cummings's jurors in voir dire because Shinn is "antagonistic and hostile").

Similarly, when Raynard Cummings's confessions were introduced before Mr. Gay's jury, Shinn failed to object to the parts that inculpated Mr. Gay, reflecting his lack of understanding of the *Bruton/Aranda* rule. *See* Ex. A9 at 47:25-48:5 ("No, [I don't understand what the Aranda rule is].")[18]

Second, the referee notes that "*had Shinn been successful*" in obtaining a settlement of Mr. Gay's case in exchange for his testimony against Cummings, Shinn's billing opportunities would have been significantly reduced. Rpt. 66:15-20. This, however, presupposes Shinn was actually attempting to settle the case rather than effectively surrender his client to the prosecution. If Shinn had been intending to selflessly secure a favorable disposition for Mr. Gay, there was no reason for him to fail to obtain an explicit understanding limiting the use of Mr. Gay's confession to the robberies. Shinn's manner of proceeding, however, made no tactical sense from the perspective of an unconflicted attorney. That is why the prosecutor was frankly "baffled," and "couldn't understand" what Shinn was doing. 58 6257, 6260. It did, however, make sense from perspective of an unscrupulous attorney who wanted to curry favor by giving the prosecutor a tactical advantage *and* ensure that the client would not be able to negotiate a settlement because he had admitted to the one thing – motive – the prosecution needed to prove premeditated, deliberate murder and special

[18] For this reason alone Shinn's fraudulent misconduct in engineering his appointment in this case had an adverse impact on Mr. Gay's right to effective representation because it denied him the assistance of counsel with "those skills and legal knowledge which we can reasonably expect from any member of the bar." *People v. Cook*, 13 Cal. 3d 663, 672-73 (1975) *overruled on other grounds in People v. Doolin*, 45 Cal. 4th 390, 420 (2009)).

circumstances.

Third, one of the referee's more astonishing suggestions appears to minimize the fraudulent method Shinn used to obtain his appointment in this case by likening it to the not "uncommon practice" of lawyers exploiting this Court's decision in "*People v. Harris* [sic] (1977) 19 Cal. 3d 786" to seek appointment in superior court in cases they had agreed to handle for a nominal fee in the municipal court. Rpt. 66:22-26, 1-3. As far as Mr. Gay's counsel have been able to determine, Shinn's disreputable conduct in this case is (happily) unprecedented, and certainly bears no resemblance to the practices or ethical standards of counsel who routinely accept appointment in criminal cases. Nor did Shinn's behavior implicate any of the issues addressed by this Court in *Harris v. Superior Court*, 19 Cal. 3d 786 (1977). There, the Court held that where a local public defender is unable to represent an indigent client, the trial court, upon timely request, should give consideration to certain objective factors supporting the defendant's request for particular counsel. Neither *Harris* nor the defense bar remotely condones the criminally fraudulent behavior engaged in by Daye Shinn.

Accordingly, the referee does not cite any substantial or reliable evidence to find that Shinn was not financially motivated when he perpetrated fraud on the court and his client to obtain his appointment.

6. Mr. Gay takes exception to the finding of "no prejudice shown by this record from the failure to call petitioner as a witness."

Mr. Gay respectfully submits that the prejudice of Shinn's actions in failing to call Mr. Gay to testify derives from several related, prejudicial acts: first, in his opening statement Shinn promised the jurors that Mr. Gay would testify and give them "his version of what occurred." 58 RT 6299:26-28. This, as Shinn reasonably should have known, was a foolhardy, tactically

inane move because at that point, the trial court already had ruled that Mr. Gay's confession to the charged and uncharged robberies would be admitted. As the referee acknowledges, calling Mr. Gay to testify would not have been 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. The latter two sources of impeachment were, of course, created by Shinn. Moreover, all of these tactical considerations that clearly weighed against calling Mr. Gay were known to Shinn when he promised the jury they would hear Mr. Gay's testimony.

Second, rather than make good on his promise and call Mr. Gay, Shinn called Detective Holder who opined that during Mr. Gay's statement to the police he had truthfully admitted the robberies and falsely denied committing the homicide. Thus, courtesy of Shinn, the prosecution was given the benefit of otherwise inadmissible opinion evidence from a police detective that Mr. Gay had essentially confessed to murder.

Third, in his closing argument, Shinn *reminded* the jurors that Mr. Gay did not testify, vouched for the professionalism of Detective Holder, and professed himself uncertain whether Mr. Gay lied during his tape-recorded statement to the police. 95 RT 10929:12-17, *id.* at 10983:26-28, *id.* at 10986:11-28. In so doing, Shinn actively defended his own role in the events leading up to Mr. Gay's confession, while emphasizing that Detective Holder thought Mr. Gay had lied, which in the context of Detective Holder's testimony referred to Mr. Gay's denial that he committed the homicide. 95 RT 10984-85.

In short, it is difficult to imagine what more Shinn could have done to be of service to the prosecution in so thoroughly exploiting the confession, discrediting Mr. Gay and any exculpatory evidence, and affirmatively

proving his guilt. In answer to the second aspect of the inquiry mandated under *Doolin*, there is and cannot be any legitimate tactical explanation for Shinn's action. Accordingly, it should be attributed to his conflict of interest.

7. Mr. Gay takes exception to the referee's failure to assess the prejudice and absence of any conflict-free tactical decision for Shinn's introduction of Detective Holder's testimony that he believed Mr. Gay untruthfully denied committing the murders.

Shinn called homicide investigator Jack Holder to testify in front of Mr. Gay's jury that he, his partner John Helvin, the prosecutor John Watson, Shinn and Mr. Gay "had a little meeting" to discuss "a possible deal for Mr. Gay." 85 RT 9736. They specifically "discussed the fact that after talking to Mr. Gay, that there would be a possibility that Mr. Gay would be testifying for the State," as a witness "for the robbery and for the murder cases" that involved "Mr. Cummings." 85 RT 9735-36. The two homicide investigators and the prosecutor were going to ask Mr. Gay questions and decide "whether or not Mr. Gay was telling the truth." 85 RT 9738:11-12.

Shinn established that Holder, Helvin and 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." 86 RT 9744:19-22. Holder "thought he was telling the truth" about the robberies to which he confessed on tape. *Id.* at 9744:23-25. 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.

The referee passively acknowledges the basic facts of Shinn's introduction of this stunningly inculpatory, prejudicial and – but for Shinn's sponsorship – completely inadmissible evidence. Rpt. at 68:19-26, 69:1. The referee, however, offers no findings as to whether there is any conceivably legitimate reason for Shinn's actions.

Once again, Shinn's actions were those of a "second prosecutor," who was single-handedly responsible for "creating the evidence that led to petitioner's conviction." *In re Gay*, 19 Cal. 4th at 793. These are not the actions of a conflict-free attorney, and could not possibly have served any "tactical reason (other than the asserted conflict of interest)." *Doolin*, 45 Cal. 4th at 418.

8. Mr. Gay takes exception to the referee's stated inability to discern which incriminating statements attributed to Raynard Cummings were introduced in violation of the *Aranda/Bruton* rule.

The gravamen of Mr. Gay's complaint regarding Shinn's admitted ignorance of the *Aranda/Bruton*[19] rule was that it prevented him from objecting to the introduction of Cummings's inculpatory statements to the extent they implicated Mr. Gay, and further disabled Shinn from making tactical decisions, if he were otherwise able regarding the introduction of redacted statements from inmates to whom Cummings confessed. *See* Ex. A9 at 48 (Shinn answering "No," when asked if he understood what the *Aranda* rule is).

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[19] *Bruton v. United States*, 391 U.S. 123 (1968); *People v. Aranda*, 63 Cal. 2d 518 (1965).

The referee does not address the second category of evidence and professes an inability to determine the statement by Cummings to which Mr. Gay refers, while citing this Court's discussion of the related issue. Rpt. at 69:20-25 (citing *People v. Cummings*, 4 Cal. 4th at 1288).

In *People v. Cummings*, 4 Cal. 4th at 1288, and n.27, the Court resolved any potential *Aranda/Bruton* issues on the ground of harmless error. As augmented by the additional evidence of Mr. Gay's innocence, the current record demonstrates the prejudice of any error. Additionally, the current record also establishes that Shinn's failure to object was attributable to his ignorance of the law, which in turn demonstrates the adverse impact on counsel's representation as a result of Shinn's intentional concealment of his conflicts of interests.

Accordingly, the substantial evidence supports a finding that by engineering his appointment to Mr. Gay's case, Shinn deprived him of his right to the assistance of counsel who possesses "those skills and legal knowledge which we can reasonably expect from any member of the bar." *Cook*, 13 Cal. 3d at 672-73 (1975) *overruled on other grounds in People v. Doolin*, 45 Cal. 4th 390, 420 (2009).

9. Mr. Gay takes exception to the finding that Shinn's cross-examination of Robert Thompson and Officer Lindquist demonstrate Shinn's familiarity with Thompson's catalog of varied statements and demonstrated his ability to highlight them before the jury.

Mr. Gay respectfully submits that, contrary to the referee's view, the record does not reflect Shinn's familiarity with the evidence available to impeach Thompson, Shinn's preparation to "aggressively cross-examine" him, or Shinn's goal "to win the trial at the guilt phase." Rpt. at 72:19-24.

Thompson testified at trial that he first saw the dark-skinned person in the backseat holding the gun, but when he looked again, he saw *Mr. Gay* exit

the car from the driver side and repeatedly shoot the officer. 68 RT 7593-97. This version of the shooting was not Robert Thompson's first, uncontaminated version of events; it was his third. *See* Ex. A107. Shinn failed to take advantage of available evidence that could have been used to challenge Thompson's newly manufactured testimony in at least three ways.

First, Thompson's most exculpatory version of events was the one he gave to Officer Eric Lindquist on the night of the offense. As the referee notes, this version described *only* the dark-skinned suspect exiting the car while firing, continuing to fire as he approached the fallen officer, and putting the last round into the victim's body. Rpt. at 72:13-18. Shinn, however, *never* cross-examined Thompson about the substance of the initial description of events that he gave to Lindquist.

Second, the examples of Shinn's purportedly "aggressive" cross-examination cited by the referee actually *harmed* Mr. Gay's defense. For example, "Shinn established Thompson failed to made a selection at the live lineup just a few days after the shooting." Rpt. 70:26-71:1. Not helpful. In fact, Thompson identified two *dark-skinned black men* as the possible shooter at the two live line-ups. *See* Ex. A45 at 10-11 (identifying two dark-skinned black men in lineups #8 and #9). This fact would have reinforced the fact that at the earliest points in the investigation Thompson knew that the *only* shooter was a dark-skinned African-American. Instead of underscoring this fact, Shinn prejudicially led the jury to conclude that Thompson had not identified *anyone* at the live line-ups.

Similarly: "Shinn established Thompson did not select any photos before the grand jury." Rpt. at 71:1-2. Also not helpful. In fact, at the grand jury, Thompson again repeatedly described the only shooter as being a "medium shade black" man in the backseat of the car. *See, e.g.*, 2 Supp. CT 460:5 (grand jury testimony that the shooter was a "medium shade black" man). As is well established by now, the critical issue to be determined with

eyewitness testimony was not whether the witnesses necessarily could identify a particular suspect, but which role they ascribed to the dark-skinned versus light-skinned suspect. Shinn again undermined Thompson's initial, consistent descriptions misleading the jury to believe that Thompson had not made any identification at the grand jury.

Likewise: "Shinn then asked Thompson about his testimony at the preliminary hearing where Thompson said he could have selected a photo [at the grand jury] but did not want to, despite being under oath." Rpt. at 71:2-4. Extremely unhelpful. Thompson testified that the photo "he could have selected" was a picture of Mr. Gay. Shinn then devoted an excruciatingly prejudicial amount of time cementing the notion that Thompson could have identified Mr. Gay all along but was frightened to do so. *See, e.g.*, 69 RT 7664:14-20 ("Q: Well, in other words, you are telling us you could and you could [sic] identify somebody that was at the scene on June 3, 1983? You knew you could recognize people. You could identify people, but you didn't want to do that? Is that what you meant? A: Yes."). Thus the effect of Shinn's assault on Thompson's veracity – much touted by the referee – served only to explain that Thompson failed to disclose Mr. Gay's identity only because he was fearful, not mistaken in his identification of the shooter. *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).

For good measure, Shinn made no effort to use, by way of either cross-examination or a motion to strike, Thompson's further testimony that made it clear that his identification of Mr. Gay was a newly manufactured "memory" produced by the highly suggestible police walk-through. Counsel for Cummings elicited evidence on cross-examination that Thompson's 180-degree change in testimony was a result of a "walk-through" Thompson had with Detective Holder at the crime scene prior to Mr. Gay's trial. *See* 68 RT

7608-09. Thompson admitted on cross-examination by Cummings's counsel that he changed his testimony from the dark-skinned backseat passenger (Raynard Cummings) to the light-skinned front seat passenger (Mr. Gay) as the outside shooter "because of the walk-through that [Detective Holder and I] went through on the photograph session." 68 RT 7609:15-17; *see also* 68 RT 7610:21-24 (admitting that the walk-through with Detective Holder influenced his present memory). Because Thompson's newly manufactured memory identified Mr. Gay as the outside shooter and shifted blame away from Cummings, Cummings's counsel asked no further questions about the walk-through with Detective Holder.

During Shinn's cross-examination of 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. Thompson admitted on cross-examination that his conversation with Detective Holder was the cause-in-fact reason for the change, and when it came time for Shinn to ask him questions about it, Shinn asked none. Shinn did not move the trial court to strike Thompson's in-court identification of Mr. Gay by arguing that the identification was born out of a corrupting suggestive identification procedure and entirely unreliable. *See Manson v. Brathwaite*, 432 U.S. 98 (1977). Shinn simply ignored it entirely. But perhaps most egregious is that in Shinn's closing argument to Mr. Gay's jury, he endorsed Detective Holder as a decent police officer, incapable of any nefarious behavior. *See* 95 RT 10929:12-17 ("Well, Mr. Holder here – a very good officer, been a homicide officer for 20 years, very experienced – sitting here with us for about the last two, three months. Very good detective. I like the fellow . . . . He is a good officer."). As a result of failure to impeach Thompson on his suggestive

identification and move the trial court to strike Thompson's identification of Mr. Gay, Thompson's identification of Mr. Gay as the outside shooter went virtually unimpeached.

10. Mr. Gay takes exception to the finding that Shinn had a legitimate tactical motivation to explain his own conduct in creating Mr. Gay's confession; and that Shinn's closing argument was comprehensive, logical and organized.

Mr. Gay respectfully submits that, as was the case throughout Shinn's purported representation of Mr. Gay, his principal focus in closing argument was on defending his own interests. Shinn devoted a significant portion of his argument to justifying and excusing his incompetent action in persuading Mr. Gay to give a tape-recorded confession, while simultaneously questioning the veracity of his own client. Contrary to the referee's view, Shinn had no motivation to "clearly explain his own conduct." Rpt. at 73:19-20. Rather, he attempted to hide his profound failings and abandonment of his client behind baseless claims that he was the victim of "the unfairness of the police detectives and the prosecutor." Rpt. at 73:20-21. Even if there had been some reasonable, factual basis for Shinn to believe the authorities had violated an "implicit" understanding about using the taped statement (which there was not) there is no reason to believe Shinn's airing of his grievances would produce some benefit for Mr. Gay. The jurors certainly were unlikely to acquit Mr. Gay as a penalty for the prosecution's perceived "unfairness" toward Shinn.

In turn, Shinn did everything he could to ensure there would not be an acquittal. Beginning with Shinn's complaint about the supposed "unfairness" of the prosecutor, the following is a taste of Shinn's "comprehensive, logical and organized" argument on the topic of Mr. Gay's confession to robberies *and* murder.

> I said did you notify my office. He said no. Did Mr. Watson notify my office? He said I don't know. What does that show you? No one notified my office. Underhanded stuff they are doing.
>
> So now they say we got him and now we are going to use that evidence. They played the tape, but we don't know whether the tape is true or not. We don't know whether or not Mr. Gay said he was involved in those robberies or not.
>
> Some of those robberies, one was acquitted. He wasn't involved in that one, so I think when it got to the murder that Mr. Gay said *I was not involved in the murder.*
>
> It's a good thing that he said he wasn't involved in the murder. He said he wasn't involved in the murder. If he said he was not involved in the murder they would have got that tape and said Mr. Gay lied and said now the deal is off.
>
> You can imagine what would have happened. Like I said, I thought I was dealing with gentlemen. Anyway, we don't know, do we? *We don't know whether or not Mr. Gay was telling the truth on that tape.*

95 RT 10986 (emphasis added).

It is difficult to imagine how Shinn could have argued this to do more prejudice to Mr. Gay then he did. First, Shinn began by making explicit what had been prejudicially implicit: that Mr. Gay had told the truth about committing the robberies, but lied about not committing the murder. Lest any juror miss it, Shinn said it three times. Then he appeared to suddenly reverse course and say *if* Mr. Gay had denied involvement in the murder, the "unfair" prosecutor would have accused him of lying and said the deal was off. But, of course, that is precisely what happened, as Shinn made sure the jurors had no doubt: the prosecution believed Mr. Gay had been truthful in admitting the robberies but lied in denying the murder. Then as a parting shot, Shinn left the jurors with the thought that, in any event, "we" cannot believe anything Mr. Gay says.

The devastatingly prejudicial impact of these comments necessarily swept away Shinn's formulaic bloviating about reasonable doubt and burden of proof.

11. Mr. Gay takes exception to the referee conclusion that any evidence fairly supported the prosecutor's invitation to the jury to "imagine" a conspiratorial conversation between Cummings and Mr. Gay.

Mr. Gay respectfully submits there is no evidence that fairly suggested, "strongly" or otherwise, that during the traffic stop Mr. Gay had a conversation with Cummings and formulated a plan to kill the victim. Rpt. at 75:8-12. Indeed, in making the prejudicial and inflammatory argument, the prosecutor said there was no evidence of any discussions at the crime scene, but nevertheless assured the jurors they could "imagine" what Mr. Gay and Cummings were going to do, including engage in a fictitious conversation about killing and "that kind of thing." 95 RT 10877:4-7. The prosecutor told the jury, with nothing to support his comments, that there "could have been conversation that occurred in the car." *Id.* Urging the jurors to engage in such admittedly unsupported speculation to provide proof of the crucial elements of premeditation and deliberation, as the prosecutor did, cannot be excused as merely "a poor choice of words." Rpt. at 75:8-9; 95 RT 10877. Upon proper objection, which Shinn was either unable or unwilling to make, the rank misconduct would have been corrected. *See People v. Hill*, 17 Cal. 4th 800, 828 (1998) (prosecutorial misconduct to refer to facts not in evidence).

Accordingly, Shinn's failure to protect Mr. Gay's interests by timely objection is another indication of his "pulling punches" and currying favor with the prosecution.

CONCLUSION

For the foregoing reasons, Mr. Gay respectfully asks that this Court adopt the foregoing findings with the noted exceptions.

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 these Exceptions contain 37,164 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 Exceptions to Referee's Report and Findings of Fact**

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

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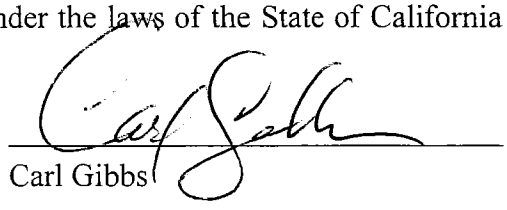
As permitted by Policy 4 of the California Supreme Court's *Policies Regarding Cases Arising from Judgments of Death*, counsel intends to complete service on Petitioner by hand-delivering the document(s) within thirty calendar days, after which counsel will notify the Court in writing that service is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

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

Date: June 24, 2016



Carl Gibbs