In the Supreme Court of the State of California

In re

KENNETH EARL GAY,

On Habeas Corpus.

CAPITAL CASE

Case No. S130263

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

EXCEPTIONS TO REPORT OF THE REFEREE AND BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

This is a habeas corpus proceeding arising from crimes petitioner Kenneth Earl Gay committed over 30 years ago.

On June 26, 2013, this Court referred the matter to the Los Angeles County Superior Court to take evidence and make findings of fact with respect to five specified questions and related subsidiary questions. After the Referee's report was filed on November 17, 2015, the Court invited the parties to submit exceptions and simultaneous briefing on the merits.

The Referee overwhelmingly rejected a factual basis for petitioner's various claims. With the sole exception identified below, regarding potential child witness Martina Jimenez Ruelas, the Referee's report is fairly and fully supported by the record. Relief should therefore be denied. Petitioner cannot meet his burden of establishing error, much less prejudice, as to any of the claims presented in the petition.

II. QUESTIONS PRESENTED

Reference Question 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?

Reference Question 2:

What additional evidence supporting the 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?

Reference Question 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?

Reference 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.

Reference Question 5:

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

III. BACKGROUND

Petitioner and his crime partner, Raynard Cummings, shot and killed Los Angeles Police Officer Paul Verna on June 2, 1983, in the Lake View Terrace section of the San Fernando Valley region of Los Angeles. The murder occurred just after Officer Verna had stopped the car in which they were passengers for a traffic infraction. Officer Verna was unaware that the pair had recently committed a string of violent armed robberies in the area. Officer Verna was also unaware that petitioner and Cummings were in a stolen car, with separately stolen license plates, and that both were on parole.

The prosecution's trial theory was that petitioner and Cummings, passing one gun between them, shot and killed Officer Verna so as to avoid arrest for violating parole, car theft, and the robbery spree that they, along with Pamela Cummings (the then-wife of Cummings) and Robin Gay (the then-wife of petitioner), had committed in Los Angeles County in the weeks preceding the traffic stop.

After a joint trial before separate juries in the Los Angeles County Superior Court, petitioner and Cummings were convicted of first degree murder. The juries found that Officer Verna was intentionally killed while

engaged in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)),[1] that the murder was committed for the purpose of preventing a lawful arrest (§ 190.2, subd. (a)(5)), that a principal was armed (§ 12022, subd. (a)) and that each principal personally used a firearm in the commission of the murder (§§ 12022.5, subd. (a), 1203.06, subd. (a)(1)). Each jury returned a penalty verdict of death.

On direct appeal, this Court reversed petitioner's convictions for robbery, attempted robbery, and conspiracy to commit robbery because of instructional error but otherwise affirmed the judgments against both defendants, including the death judgments. (*People v. Cummings* (1993) 4 Cal.4th 1233.) While that appeal was pending, petitioner filed a petition for writ of habeas corpus. After issuing an order to show cause on the claim of ineffective assistance of counsel at the penalty phase and ordering a reference hearing to resolve disputed questions of fact, this Court determined that petitioner had not received constitutionally adequate representation, granted the petition, and remanded for a new penalty trial. (*In re Gay* (1998) 19 Cal.4th 771.)

Upon retrial, a jury again returned a verdict of death, and the trial court entered judgment accordingly. On appeal, this Court found that the trial court erred at the penalty retrial in barring petitioner from offering significant mitigating evidence concerning the circumstances of the murder—in particular, evidence that Cummings fired all of the shots—and in instructing the jury not only that a prior jury had found petitioner guilty of murdering Officer Verna by personal use of a firearm, but also that it had been "conclusively proved by the jury in the first case that this defendant did, in fact, shoot and kill Officer Verna" and that the jury was to "disregard any statements . . . and . . . any evidence to the contrary during

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[1] All undesignated statutory references are to the Penal Code.

the trial." This Court concluded that the errors were prejudicial and that the judgment of death should again be reversed and the cause remanded for a second retrial on the issue of penalty. (*People v. Gay* (2008) 42 Cal.4th 1195.)

On August 4, 2008, this Court ordered respondent to show cause why petitioner is not entitled to relief because trial counsel's alleged conflict of interest prejudicially affected his representation at the guilt phase and he allegedly failed to adequately investigate and present evidence tending to show that petitioner did not participate in the murder of Officer Verna. The proceedings in petitioner's penalty phase retrial have been stayed pending further order of this Court. (See *Gay (Kenneth Earl) on Habeas Corpus*, Case No. S130263, Amended Order to Show Cause filed August 4, 2008.)

As explained above, this Court ordered a reference hearing on five questions set forth in the order dated June 26, 2013. The questions relate to the adequacy of defense counsel Daye Shinn's representation of petitioner at the 1985 guilt phase trial, as well as an alleged conflict of interest.

IV. STANDARD OF REVIEW FOLLOWING REFERENCE HEARING

This Court has articulated the rules for examining a Referee's findings on numerous occasions. The Court independently reviews a Referee's resolution of legal issues and mixed questions of law and fact (*In re Johnson* (1998) 18 Cal.4th 447, 461), but will "give great weight to those of the Referee's findings that are supported by substantial evidence" (*In re Thomas* (2006) 37 Cal.4th 1249, 1256-1257 [citing cases]). "Deference to the Referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the Referee has the opportunity to observe the witnesses' demeanor and manner of testifying. [Citations.]" (*Ibid.*) Nevertheless, "the Referee's

findings are not binding on this Court. [Citations.]" (*Thomas, supra*, 37 Cal.4th at p. 125; *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1013 ["In a given case an appellate court might, within its proper role, hold that such a finding was not supported by substantial evidence in the hearing record."].) Rather, this Court must "make the findings on which the resolution of [petitioner's] habeas corpus claim will turn [Citations]." (*Ibid.*)

Moreover, "[I]t is the *petitioner* who bears the ultimate burden of proving the factual allegations that serve as the basis for his or her request for habeas corpus relief. [Citations.]" (*In re Serrano* (1995) 10 Cal.4th 447, 456; accord, *In re Avena* (1996) 12 Cal.4th 694, 710; *People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Sassounian* (1995) 9 Cal.4th 535, 546.)

As demonstrated below, petitioner has failed to meet his burden to show that he is entitled to relief on his claims.

ARGUMENT

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

In Claim 3, petitioner claims his conviction is the result of ineffective assistance of trial counsel. (Pet. 59-130.) After being given the opportunity to prove his claim at the reference hearing, petitioner failed to meet his burden to show either deficient performance or prejudice.

A. Legal Standard

Defense counsel's duty to investigate is well-settled: counsel has a duty to make a reasonable investigation or to make a reasonable decision that a particular investigation is unnecessary. (*Strickland v. Washington* (1984) 466 U.S. 668, 690-691 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Andrews* (2002) 28 Cal.4th 1234, 1254; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1252.) In assessing counsel's investigative decisions, a reviewing court considers the objective reasonableness thereof in light of all the circumstances, under the prevailing norms at the time of trial. (*Wiggins v. Smith* (2003) 539 U.S. 510, 521-523 [123 S.Ct. 2527, 156 L.Ed.2d 471].) The court conducts this inquiry from "'counsel's perspective at the time,'" while applying "'a heavy measure of deference to counsel's judgments[.]'" (*Rompilla v. Beard* (2005) 545 U.S. 374, 381 [125 S.Ct. 2456, 162 L.Ed.2d 360], quoting *Strickland, supra*, 466 U.S. at pp. 689, 691, internal citations omitted.) The court "must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." (*Wiggins, supra*, 539 U.S. at p. 527.)

The only relevant inquiry is whether counsel fulfilled the duty to make a reasonably "'thorough investigation of law and facts relevant to plausible options'" in order to make strategic choices. (*Wiggins, supra,* 539

U.S. at p. 521, quoting *Strickland, supra,* 466 U.S. at p. 690.) Such tactical decisions "'are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" (*Ibid.*, quoting *Strickland, supra,* 466 U.S. at pp. 690-691; see also *Cullen v. Pinholster* (2011) 563 U.S. 170 [131 S.Ct. 1388, 1406-1408, 179 L.Ed.2d 557].) The reasonableness of the investigation must be examined in light of then-prevailing professional norms and must be balanced against all the individual circumstances of the case. (*Ibid.*) There are no specific guidelines or checklists for counsel. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." (*Strickland, supra,* 466 U.S. at pp. 688-689.) The decision as to whether to call a witness is a tactical decision. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Bolin* (1998) 18 Cal.4th 297, 334.)

Shinn's trial strategy highlighted both the absence of any evidence that affirmatively demonstrated codefendant Cummings (hereafter Raynard Cummings or Cummings, as distinguished from Pamela Cummings) passed the murder weapon to petitioner, and the inconsistencies in the eyewitnesses' identifications as to whether Cummings or petitioner was the shooter. Shinn also sought to discredit Pamela Cummings's testimony identifying petitioner as the sole shooter while he emphasized the testimony of prosecution witnesses who had identified Cummings as the person who, alone, shot Officer Verna. As the Referee observed, Shinn's opening statement, cross-examination of the prosecution's witnesses and closing argument demonstrated that he was fully conversant with the weaknesses of the prosecution's case and was prepared to, and did, challenge the prosecution's case. The evidence presented to the Referee, and the

Referee's findings, establish that Shinn adequately identified and investigated the witnesses necessary to defend petitioner during the guilt phase of the trial pursuant to the reasonable strategy Shinn ultimately advanced at trial—a strategy that is effectively endorsed by the Referee's many supportive factual findings.

B. Shinn's Investigation and Trial Strategy

Daye Shinn died in 2006 at the age of 89. (Pet. Exh. A-90.) In connection with earlier habeas corpus proceedings in this case, he was deposed in 1995. At that time, a decade after the trial, the elderly Shinn recalled few details of the defense presented at trial or the pre-trial investigation of that defense. He did provide some insight into his trial tactics and the strategies he had employed at trial.

Shinn had a two-prong defense theory which formed his trial strategy: (1) no prosecution witness could or would testify to having seen Cummings pass the gun to petitioner; and (2) the prosecution's witnesses contradicted each other. (Exh. B, at pp. 40-42.) Shinn knew that police investigators had searched for a witness who saw Cummings pass the gun to petitioner but could find no one who saw that occur. (Exh. B, at p. 43.) Some witnesses had identified Cummings as the shooter who stood outside the car while other witnesses identified petitioner as the outside shooter. (Exh. B, at pp. 40-43.) Shinn identified the arguable weaknesses in the evidence, such as the fact that one of the witnesses was a woman driving 30 miles per hour through an intersection and looked up to see the killing when she was halfway through the intersection. (*Id.* at p. 43.) Shinn also highlighted witness bias, as when he challenged Pamela Cummings's credibility to show that her identification of petitioner as the shooter was a

transparent attempt by her to exculpate her husband from a murder conviction and a death sentence. (13RHT 1641-1642.)[2]

Shinn hired experienced defense investigator Douglas Payne to assist him in preparing for the guilt phase of the trial. Payne had worked for Shinn on previous cases, including capital cases. (RR 11, lines 18-21.) As noted by the Referee, after Payne became involved in petitioner's case in the summer of 1983, Shinn requested and was granted supplemental funds for Payne's investigative efforts on seven occasions between October of 1984 and May of 1985. (RR 11, lines 18-26.)

Shinn, Payne, and petitioner collaborated on the defense investigation strategy. The group effort included decisions about which witnesses would be interviewed and which witnesses would testify. Payne conducted most of the witness interviews and then prepared reports of the interviews that he then shared with Shinn. (Exh. B, at pp. 52, 97-98, 119-120; Exh. C, at pp. 58-59.) Shinn reviewed Payne's reports. (Exh. B, at pp. 1191-1120.) After Payne completed interviews, Shinn and Payne met to discuss the witnesses' statements and decide whether to call the witnesses at trial. (*Id.* at pp. 55-56.) There were occasions that Shinn accompanied Payne for a witness interview. (*Id.* at pp. 58-59.) When trial was in session, Payne conducted the interviews by himself.[3] (*Ibid.*)

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[2] "RR" refers to the Referee's Report, "RHT" refers to the Reference Hearing Transcript, "RT" and "CT" refer to the Reporter's and Clerk's Transcripts of 1985 in case number A392702. Reference to exhibits refers to exhibits introduced at the reference hearing. "GJ" refers to the transcript of the Grand Jury hearings. "PHT" refers to the Preliminary Hearing Transcript. All of the foregoing materials were available to the Referee.

[3] Shinn's contemporaneous billing records also rebut petitioner's allegation that Shinn did little and only employed a "hands off" approach. (4CT 1119-1123; 7CT 1827-1832, 1871-1875; 8CT 1976-1979; 9CT 2389-2393.) At the reference hearing, a summary was admitted documenting the (continued...)

Well before the trial, Shinn represented petitioner at an eight-day preliminary hearing in this case, where Shinn had the opportunity to hear the witnesses' testimony, observe their demeanor, and become familiar with their accounts of the murder. Shinn also had the opportunity to examine the 71 exhibits introduced by the prosecution at the preliminary hearing. Payne was also present during the preliminary hearing. (4RHT 240-241.) During cross-examination of the witnesses at the preliminary hearing, Shinn and Cummings's trial counsel exposed many inconsistencies in the witnesses' descriptions of the shooter and his clothing. Shinn and Payne had many conferences in the District Attorney's Office to review discovery and audiotapes. (Resp. Exh. 709, at p. 864.) According to trial prosecutor John Watson, Shinn inspected the district attorney case file no less than four times. (58RT 6272.)

Shinn's defense of petitioner was premised on the theory that Cummings was the sole shooter. As noted, *ante,* his approach was two-pronged: (1) no prosecution witness could or would testify to having seen Cummings pass the gun to petitioner and, (2) any witness who identified petitioner as the shooter was contradicted by other witnesses who identified Cummings as the shooter. Although Pamela Cummings was in the best position to see and know who shot Officer Verna—and testified that petitioner was the sole outside shooter—she was (according to Shinn) a transparently biased witness who had originally falsely accused Milton Cook of the murder. When Pamela Cummings finally admitted to her sister Debbie Cantu that Cook had not been involved in Officer Verna's murder, she also admitted that petitioner had told her to falsely accuse Cook.

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1,049.5 hours Shinn billed for his work on petitioner's case from July 19, 1984 through June 15, 1985.

Moreover, Raynard Cummings had unambiguously confessed to more than one witness that he alone shot and killed Officer Verna.

Shinn's trial strategy was more than just a basic denial of the prosecution's theory that Cummings fired first and then passed the gun to petitioner. Shinn knew there was no prosecution witness who saw Cummings pass the gun to petitioner. And it was clear to Shinn that some of the witnesses' initial descriptions of the outside shooter changed from their original statements to police, their testimony before the grand jury, and their testimony at the preliminary hearing. Shinn recognized the prosecution's ability to prove its "pass the gun" theory was dependent upon the inconsistent and contradictory testimony of witnesses of varying ages,[4] from different distances, and different vantage points, including two witnesses who allegedly observed the shooting while traveling in cars through an intersection.[5]

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

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

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

before the grand jury or at the preliminary hearing. (58RT 6295-6298.)[6] He noted how Beasley had impeached Holt's identification. (58RT 6296.)

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

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

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[6] Beasley was in her home when she saw Officer Verna stop the car. She heard two gunshots and saw a Black man with very light skin, six feet tall, with a "gericurl," holding a gun, shoot Officer Verna four times. Another man was in the backseat. Holt was in her home when she saw Officer Verna issue a ticket and heard three shots. She saw Officer Verna fall and she saw the shooter pick up Officer Verna's gun. She identified petitioner as the shooter. Thompson, another neighbor, also noticed Officer Verna giving a citation. Thompson testified that petitioner was in the front seat of the car and Cummings was in the back seat. Thompson heard a noise, saw Officer Verna clutching his chest, and saw a gun held in the hand of the back seat passenger. Thompson saw petitioner get out of the front seat with a gun in his hand, walk toward Officer Verna, point the gun at him and stand over the officer, who was now on his back. Cummings remained in the back seat. Roberts, 13, saw petitioner shoot Officer Verna four times. The trial testimony of each of these witnesses is summarized by this Court. (See *People v. Cummings, supra*, 4 Cal.4th at pp. 1261-1263.)

testimony. (58RT 6298-6299.) He told the jury that the evidence at trial would show Cummings was the sole shooter, firing the first shot and firing the last. (58RT 6299.)[7]

As the Referee recognized, Shinn's strategy of portraying Cummings as the sole shooter was also demonstrated by his cross-examination of the very first prosecution witness at trial, Gilbert Gutierrez.[8] In his cross-

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

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

Before Gutierrez spoke to Cummings, he had talked to [petitioner] three times about the events. [Petitioner] said that Cummings shot the officer with the first shot coming from the

(continued...)

examination of Gutierrez, Shinn established that Cummings had confessed to being the sole shooter. (64RT 6995.) He also elicited testimony from Gutierrez that petitioner had denied involvement: "[Petitioner] said he had never shot." (64RT 6995.) Shinn then had Gutierrez describe in detail both petitioner's version of events (with petitioner jumping out of the car and getting behind the door in case the officer started shooting back) (64RT 6996), as compared to Cummings's detailed description of the shooting. Through Shinn's questioning, Gutierrez explained that as some of the witnesses saw petitioner pick up the gun, they assumed he was the one that had done the shooting and "they were pinning it on Kenny, and that's cool." (64RT 6999.)

Shinn clearly recognized the need to impeach Pamela Cummings, in light of her vantage point from inside the car during the murder and her devastating testimony.[9] Shinn assailed Pamela Cummings's credibility

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backseat of the car, the second shots after Cummings got out of the car when Cummings shot Verna twice, after which Cummings emptied the gun.

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

[9] Pamela Cummings testified [on direct examination at trial] that Officer Verna copied information from the check cashing card she gave him for identification onto a field interrogation card. After Officer Verna learned she had no driver's license or registration for the car, and she told him that the other occupants were her husband and her cousin, Verna returned to the car. He bent down, putting his hands on his knees, and leaned in. Pamela, who was then standing near the curb, with the car between herself and the officer, heard a gunshot, saw Verna grab his shoulder, and simultaneously saw the barrel of a gun point straight across the front seat of the car and between the head rests. She could not see who held the gun as Cummings, sitting in the back, obstructed her view. [Petitioner] then got out of the car, approached Verna and fired three shots into his back as he attempted to return to his motorcycle. The officer turned back

(continued...)

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

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

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> toward his motorcycle, walked back a few feet, fell on his knees, and then turned and fell on his back. [Petitioner] stood over Verna, shot him two more times, threw the gun on his body, and picked up the officer's gun. She and [petitioner] reentered the car through the driver's side door. [Petitioner] drove up the street, made a U-turn, and retrieved the gun.

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

go to the gas chamber (73RT 8231), she admitted she had falsely accused Milton Cook of being the shooter.

Shinn likewise used his cross-examination of Oscar Martin to demonstrate that Cummings was the sole shooter.[10] Shinn had Martin admit to the jury that he had previously identified Cummings at both the grand jury and the preliminary hearing and that he had testified to seeing Cummings shoot Officer Verna four times. (67RT 7428.) Martin confirmed that no one else shot the police officer and Martin did not see Cummings pass the gun to anyone else. (67RT 7429.) In response to Shinn's questioning, Martin admitted there was no doubt in his mind that Cummings was the shooter. (67RT 7435.)

Shequita Chamberlain, who saw part of the shooting as she drove through an adjacent intersection in her car, testified about seeing a dark man next to the officer but said it was not Cummings. (68RT 7522.)[11] Shinn attempted to eliminate the possibility that petitioner was the shooter by having Chamberlain testify that the man she saw was darker skinned than petitioner. (68RT 7526.)

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

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

Shinn was aware that Marsha Holt (whose trial testimony is summarized above) had identified petitioner at the grand jury, the preliminary hearing and again at trial. During his cross-examination, Shinn challenged her identifications by reviewing her prior inconsistent statements. Shinn cross-examined Beasley (whose testimony is summarized above) at the preliminary hearing and knew Beasley had testified that Holt had not known of the shooting until Beasley told her. (74RT 8330.) In response to Shinn's questions during cross-examination, Holt admitted she had seen petitioner's picture in the newspapers. (68RT 7564.) She conceded that her memory was "hazy" after so long and could no longer remember some of the events. (68RT 7566.) She also conceded that she had been unable to identify petitioner in a live lineup only four days after the murder. (68RT 7568.)[12] Holt also testified that petitioner was not in the car when the female driver made a U-turn and came back and picked him up. (68RT 7572, 7588-7589.) A bush obstructed part of her view from the window. (68RT 7589.)

Shinn impeached Robert Thompson's testimony (whose testimony is summarized above) that petitioner was the outside shooter. Shinn confronted Thompson with his previous failures to identify petitioner at the lineup, before the grand jury, and at the preliminary hearing. Shinn introduced the theory that the police had gotten Thompson to change his mind about the identity of the outside shooter after a "walk through" of the scene with Detective Holder. Thompson admitted he had not identified anyone at the lineup, the grand jury or the preliminary hearing. (68RT 7642-7646.) He admitted his prior testimony at the preliminary hearing

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

that the media had "distorted his mind (68RT 7647), and that he testified at the grand jury that the man who had exited the car with a gun was a "medium dark" and "medium shade black." (68RT 7649-7650.) He described the passenger in the front seat as Caucasian, not a "Negro with a light shade." (68RT 7651.) Thompson did not see anyone pass a gun and did not know if the gun he saw Cummings with was the same gun that petitioner had. (69RT 7738-7739.) Shinn effectively concluded his cross-examination of Thompson by getting him to acknowledge that his testimony at the preliminary hearing was destroyed by newspapers and television, and that his mind was "destroyed" by the media at the time of the live lineup. (69RT 7740-7741.)[13]

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

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

(continued...)

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

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

Shinn argued that the first fact raising a reasonable doubt about petitioner's role in Officer Verna's murder was created by the prosecution,

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(...continued)

> know that an officer had been shot, and by Marsha's inability to identify defendant in a lineup a few days after the murder. The remaining eyewitness to the shooting, Pamela Cummings, had an obvious interest in protecting her ex-husband.

(*People v. Gay* (2008) 42 Cal.4th 1195, 1227.)

It is also significant, when assessing the reasonableness of Shinn's decisions, as to the selection of witnesses (and expert witnesses), to consider additional information that was known to Shinn at the time of the trial. Shinn knew that when petitioner was interviewed by the police and the prosecutor, petitioner had described the clothing he was wearing during the murder. And Shinn knew petitioner's description of his clothing was consistent with eyewitnesses' descriptions of the shooter's clothing. (Peo. Exhs. 804(a) [tape recording of police interview] and 804(b) [transcript of the interview].) Had Shinn called those witnesses, or an expert on identification, he ran the risk that their testimonies would be undercut by petitioner's incriminating admissions regarding his clothing.

namely, the conflicting evidence that "Mr. Cummings came out of the car and shot the police officer and in the same breath [the prosecutor] present[ed] evidence that [petitioner] got out of the car and shot the officer." (95RT 10923.) Shinn argued that Cummings fired the first shot from the backseat. (95RT 10924-10925.) He noted that if Officer Verna had seen a gun in petitioner's hands, he would have put his hands up or turned away, instead, "he was surprised from the back seat by Mr. Cummings." (95RT 10925.) Shinn noted how Robert Thompson told the police two hours after the murder that "he saw a black man, a black person from the back seat g[e]t out and shoot the police officer." (95RT 10925-10926.)

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

could be explained by the prosecution as understandable given the rapidly-moving sequence of events around the car.

Shinn next argued there was no evidence that Cummings passed the gun to petitioner and that the absence of proof on that issue was sufficient to raise a reasonable doubt and cause the jury to render a not guilty verdict. Shinn argued that the evidence "conclusively prove[d] that the gun was never passed." (95RT 10925.) He reminded the jury of his opening statement, in which he had anticipated the shortcomings of the evidence. "I read all the police reports and didn't see anything. I said there is not going to be one witness that is going to get up on the stand and testify that they saw a gun passed . . . . I knew there would be no witnesses. Not even one witness testifying." (95RT 10928-10930.)

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

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

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

Cummings's confession to various fellow jail inmates and sheriff's deputies was the sixth factor creating reasonable doubt that Shinn argued to the jury. Shinn told the jury Cummings's multiple inculpatory statements

raised a reasonable doubt that petitioner shot Officer Verna. (95RT 10938-10942.)

Pamela Cummings's lack of believability was the seventh factor creating reasonable doubt about petitioner's guilt, according to Shinn. Shinn challenged her credibility and outlined all the reasons the jury should reject her testimony: she had tried to protect her husband, whom she admitted she still loved and wanted to save from the gas chamber. (95RT 10956-10957.) She had claimed she was in shock after the shooting, but two hours later she was sufficiently composed that she could call the police to falsely implicate Milton Cook, who was dark-skinned and looked like her husband. She knew witnesses had seen the shooting and was afraid they would identify Raynard Cummings. She purposefully identified Cook to misdirect the police. (95RT 10957-10961.) After that, she made a deal with the prosecutor, was released from jail, and *then* identified petitioner as the shooter. (95RT 10962-10965.) Shin argued that seeing her testify, "with her answers and her 'I don't knows' and her 'I don't remembers'" created a reasonable doubt for the jury. (95RT 10965.)

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

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

she had seen, the same way other witnesses who identified petitioner as the shooter had done. (95RT 10946-10951.)

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

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

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

Shinn concluded his closing argument by reminding the jury of the reasonable doubts created by the prosecution, and the lack of evidence the gun was passed—"the missing link" (95RT 10989), and by emphasizing that "the most strong evidence . . . points in Mr. Cummings's direction that

he is the killer. The gun never left his hand. He shot . . . [every] shot." (95RT 10989-10990.)

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

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

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

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

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

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

(RR 13-25.)

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

C. Petitioner's Alleged Additional Evidence

As shown below, at the reference hearing petitioner did not identify any additional eyewitnesses or evidence who would have been available through investigation at the time of trial and who would have exonerated petitioner or probably caused the jury to render a different verdict.

1. Child Witnesses[14]

The first group of potential witnesses were children who were at various locations when Officer Verna was murdered. The Referee did not find that reasonable trial counsel would have called any of them as witnesses. To the contrary, the Referee concluded that "[a]s a matter of strategy, trial counsel must exercise caution when contemplating calling young children as witnesses to traumatic events." (RR 44, lines 4-6.)

a. Irma Rodriguez Esparza

Irma Rodriguez Esparza (Irma),[15] was 13 years old and pregnant at the time of the murder and was positioned more than 250 feet away from the location of the shooting of Officer Verna's on Hoyt Street. She was not in a position to see the shooter's face. She initially reported to police that she did not see the shooting and her parents did not want her to cooperate.

During the 2014 reference hearing, more than 30 years after the murder, Irma recalled her brothers playing in the front yard on June 2, 1983, when a vehicle was pulled over. (14RHT 1700.) Irma testified that when she first saw the officer, she was in her front yard seated on the grass next to the garage of her residence. (Resp. Exh. 702; 14RHT 1705-1706.)

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[14] For clarity's sake, potential child witnesses are referred by their first names.

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

She was watching her brother, Ejinio ("Choppy"), who was then only eight, play with his friends. (Resp. Exh. 702; 14RHT 1705-1706.) Irma saw the driver of the vehicle shoot Officer Verna. (14RHT 1701.) Irma described the driver as a very tall Black male. (14RHT 1701.) Irma noticed there was also a passenger in the vehicle and she believed there to be someone else in the back seat. (14RHT 1701.) The passenger was lighter skinned than the driver. (14RHT 1701.) Irma did not recall where the vehicle went after the driver shot Officer Verna. (14RHT 1701-1702.) Irma believed they made sort of a circle and came back around after the shooting. (14RHT 1702.) Irma did not recall seeing the car when it came back. (14RHT 1702.) She did remember seeing the light-skinned man when the car returned. (14RHT 1702.)

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

The Referee made a factual finding that Irma's 2014 version "differs significantly" from that of other witnesses. (RR 42, lines 20-21.) In addition, her reference hearing testimony is at odds with the physical evidence. First, her account of the traffic stop differed from several other witnesses. The day after the murder, Irma told Detective Moreno, "As the car they were in came toward the policeman, who was standing next to his motorcycle, he waved at them to pull over to the curb." (Pet. Exhs. A-149, at pp. 1-2; A-13, at p. 1.) But Pamela Cummings, along with many of the

eyewitnesses (including Robert Thompson, Gail Beasley, Shannon Roberts, and Petitioner's own witness; Martina Jimenez Ruelas) recounted that Officer Verna was riding his motorcycle when he initiated a traffic stop, using his lights and/or siren, and then parked his motorcycle behind the car. (Pet. Exhs. A-12, A-27, A-40, A-43, A-45; 2GJ 426, 485-488; 4PHT 54-56; 12RHT 13 77-13 79.)

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

Second, Irma's description of the driver was different from other witnesses. Irma told detectives, "[t]here was a male Negro driving the car. He was dark skinned, about 25 years old with about a 3-4 inch afro." (Pet. Exh. A-13, at p. 1.) This is in direct contradiction to the great weight of evidence showing that Pamela Cummings, a Caucasian female, was the driver of the grey car at the time of the traffic stop.[16] This includes

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

statements made by eyewitnesses Robert Thompson[17] and Shannon Roberts.[18] Moreover, Officer Verna was documenting the vehicle driver's name and had written down the name "Pamela Cummings" before he was murdered. (1985 People's Exhs. 31 (field identification card); 32 (18x20 photo of People's Exh. 31).) Irma never provided any type of description for the male driver's clothing, nor did she ever see Pamela Cummings, a Caucasian female, get in or out of the grey car. (Pet. Exhs. A-13, A-149.) These very significant failures of observation that would have damaged her credibility.

Third, the physical evidence contradicted Irma's account of the murder. On June 3, 1983, Irma stated that while Officer Verna was talking to the driver and writing something down on a white card, "the driver, with his right hand, punched the officer in the face. The punch made the officer stand straight up. The driver then pulled the officer's gun out of his holster and shot the officer in the neck with it." (Pet. Exhs. A-13, at p. 1; A-149, at p. 2.) However, Officer Verna was not shot with his own gun. A physical and microscopic examination and comparison conducted by Detective McCree of the bullets inside the body of Officer Verna to the bullet seized from the wall of the Horizon's House West Hotel were all fired from a gun Cummings had prior to the murder. (3GJ 586-587 and 4GJ 696 (McCree); LAPD re-interview on 6/7/83 at 1330 hours, 3GJ 511-513 and 4PHT 40-42 (Cantu); 2GJ 332-335 (Norton); 64RT 6953-6954 (Gutierrez), Pet. Exh. A-5, at p. 1 (Cummings's confession to Jennings) and Pet. Exh. A-173, at p. 2 (Cummings's confession to Flores).)

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

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

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

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

In sum, several factors could have completely impeached Irma's testimony. For that reason, the Referee made the factual finding that "discrepancies call into question the value and weight of her testimony." (RR 43, lines 8-9.) Given all these obstacles, and even assuming she would have testified at trial in the same manner that she did in 2014, Shinn would have been left to argue that Irma was correct in her memory of a dark-skinned shooter, but wrong in most of her other recollections and the great weight of the other evidence. If Shinn had called Irma as a defense witness in 1985, the prosecution would have easily challenged the accuracy and reliability of her testimony. Petitioner's expert Burt agreed that a competent attorney would take into account several factors weighing upon witness credibility in deciding whether or not to call the witness at trial, such as the witness's age, the distance from which the witness observed an event, and the accuracy (or inaccuracy) of the witness's description of the event and its participants. (13RHT 1569-1570.) Thus, even assuming Irma could provide some favorable testimony, there were good reasons for not calling her at trial.

Because Shinn had LAPD's investigation ("murder") book, which included the report of Irma's statement, he was aware of Irma's statements. Irma's parents did not want her to cooperate with the police investigation, and petitioner failed to establish that Shinn would have been able to interview her during his pre-trial investigation. It was therefore reasonable for Shinn to decline to call this witness. (See *People v. Bolin, supra*, 18 Cal.4th at p. 334 [decision whether to call a witness is tactical].)

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

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

b. Ejinio "Choppy" Rodriguez

During the 2014 reference hearing, Ejinio "Choppy" Rodriguez testified that he lived on Hoyt Street in Lake View Terrace in 1983. (11RHT 1326.) In 1983, he was eight years old, about to turn nine. (11RHT 1326.) Ejinio recalled an incident where a police officer was shot. (11RHT 1327.) At the time of the shooting, Ejinio was playing football with his neighbors Shannon Roberts, Walter Roberts and Lonnie Franklin. (11RHT 1327.) He became aware that a police officer pulled over a vehicle while they were playing. (11RHT 1328.) He paid some attention to the event until he realized he did not recognize whoever was pulled over, at which time he went back to playing. (11RHT 1328.) Later on, he heard a sound that sounded like a firecracker that drew his attention back to the traffic stop. (11RHT 1329.)

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

Like Irma, Ejinio's memory would have been impeached by his extreme youth, the traumatic impact of the murder on him, the distance he was from the shooting (235 feet away), and the fact that he did not make a contemporaneous statement to police. The first statement he made was nearly 20 years after the murder, when he was interviewed by petitioner's investigator in 2003. (Pet. Exh. A. 24.)

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

Petitioner has failed to meet his burden of proving that Shinn could have obtained any statement from Ejinio in 1985. Petitioner therefore fails under the first prong of *Strickland.* Even when Ejinio testified as an adult before the Referee at the reference hearing, the Referee found him to be "anxious and distressed" three decades after the murder. (RR 41, line 20.)

The Referee also found that Ejinio's parents would likely have objected to him testifying, and also found that trial testimony by Ejinio would have prompted a cautionary instruction to the jury. (RR 41, lines 16-21.) The Referee made no findings in favor of calling Ejinio as a witness.

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

c. Walter Roberts

Walter Roberts[19] was 11 years old at the time of the murder and 12 when he was initially interviewed. (10RHT 1268.) He saw the murder from a distance of at least 235 feet.

Walter initially reported to police that the shooter was the man in the front seat of the stopped car; the evidence showed petitioner had been sitting in the front seat. In Walter's first interview, he described the driver as shooting Officer Verna from inside the car, and then getting out and shooting Officer Verna twice more. (Resp. Exh. 751.) Walter described the driver as "male Negro, black, 6'0", 170, 25/30, Long sleeve multicolor shirt, dark pants, tennis shoes 1-2 inch afro." (Resp. Exh. 751.) But he also stated that the left-rear passenger got out, ran westbound to Gladstone Avenue, looked around, and then ran back to the car. (Resp. Exh. 751.) He described this passenger as "male, Negro, black, dark clothes, 18-20 years." (Resp. Exh. 751.) In his second interview, Walter reaffirmed that the driver was the sole shooter, and elaborated that the driver was "medium complexion," "clean shaven," and was wearing a dark blue long sleeve shirt. (Resp. Exh. 752.) He also reaffirmed that the rear passenger got out

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

and ran to the corner, further describing this person as "black" and wearing a black long-sleeve shirt. (Resp. Exh. 752.) Both suspects had a "3-4 inch afro." (Resp. Exh. 752.)

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

Compounding these problems, Walter stated that a female got out of the car from the front passenger seat. (Resp. Exhs. 751, 752.) This would have to be Pamela Cummings. But, as already discussed, Pamela Cummings was the driver, not the front seat passenger.[20] This suggests that Walter did not accurately observe or remember where the various people were in the car. In addition, three days after the murder, Walter was unable to identify either Cummings or his look-alike, Milton Cook, from their respective lineups. (Pet. Exh. A-44:4-5; Resp. Exhs. 754, 755.) He had an opportunity to identify Cummings as the shooter, but could not. Like Irma

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

and Ejinio, he could have been impeached with these facts at trial. Irma also testified that she took the boys to the garage after the shooting, and that the boys were scared and screaming. (14RHT 1713.) Therefore, Walter may not have seen all that he claimed, and instead may have conflated his account with those of the other children.

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

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

Calling Walter as a defense witness would have required Shinn to argue to the jury that Walter was accurate in one respect (a "black" man as the shooter), but inaccurate in all others, including his similar description of the other man who got out of the car. Putting on such testimony could easily have backfired: if the jury believed that Walter saw a Black man with medium complexion shoot Officer Verna from the front seat of the car, this could have incriminated petitioner, not Cummings. Unsurprisingly, neither side called Walter as a witness in 1985.

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

d. Martina Jimenez Ruelas

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

More than 30 years later, Martina testified at the reference hearing that on June 2, 1983, she was talking to Officer Verna in her front yard behind her fence. (12RHT 1377-1378.) He then left to stop a car. (12RHT 1378.) Martina was watching Officer Verna from between two palms on the side of the yard when the traffic stop took place. (12RHT 1378.) She recalled that, after the vehicle stopped, Officer Verna walked over to the car and was shot. (12RHT 1379.) When the vehicle passed by, she saw two individuals in the front of the vehicle. (12RHT 1379.) She did not remember anyone getting out of the car. (12RHT 1379.) She recalled hearing gunshots, but did not recall how many she heard. (12RHT 1379.) She did not recall what the shooter looked like other than that he was a dark-skinned, Black man. (12RHT 1379.) She also testified that she saw a man driving the car, and that she could see the driver better than the passenger. (12RHT 1395.)

Martina's account of the shooting in 2014 at the reference hearing was at odds with her statements at the time of the shooting. When first interviewed by police a few hours after the murder, she told them that she did not see the suspect's face but described him as "Negro," possibly in his mid-twenties, 5'10" to 6'0" with a medium to thin build. (Pet. Exh. 43: 1.) This height description is more consistent with petitioner than Cummings. During that initial statement, she indicated that, while she did not see who

shot Officer Verna or who was driving the car, she did see the shooter entering the passenger door of the car. (Pet. Exh. 43: 1.) On February 9, 1985, when re-interviewed by the prosecutor and police detectives prior to the start of the guilt phase evidence, Martina, then age 11, stated that there were two Black men in the car: the driver and the passenger. (Pet. Exh. 43: 3.) She "observed a male black get out of the passenger side of the car, point the gun at the policeman and shoot." (Pet. Exh. 43: 3.) She could not recall the shooter's clothing, but described him as "black, tall, young looking, thin and ugly." (Pet. Exh. 43: 3.)

Martina's 2014 account of the 1983 shooting is dramatically different than her initial statements to the police more than 30 years ago. At the reference hearing, Martina agreed that a picture of Cummings showed the same skin color as the man that she saw shoot Officer Verna. (12RHT 1401.) But her recollection was at odds with her inability to recall the shooter's appearance in 1983. At the time of the murder, she was unable to identify anyone as the suspect in any of the three lineups she attended on June 6, 1983, indicating to officers that she "couldn't remember what the people looked like when the policeman got shot." (12RHT 1391-1394; Pet. Exh. 43, at pp. 5-8; Resp. Exhs. 757, 758.) There is no plausible reason to believe her more recent recollection is the more accurate one.[21]

Martina never doubted that she gave truthful information to the police in 1983. She confirmed that when she was taken to the police station the night of the shooting, she truthfully told the officers "what [she] saw at the time." (12RHT 1388, 1396.) Additionally, when the prosecutor and

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[21] According to Dr. Pezdek, who will be described later, Jimenez's earlier statements would be more reliable.

some detectives came to talk to her in Tijuana in 1985, she told them, to the best of her ability, what she remembered. (12RHT 1389.)

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

Martina's first identification of Cummings as the shooter, made 31 years after the murder, was understandably accorded little weight by the Referee, who found that "she was anxious throughout her [reference hearing] testimony and in tears at the conclusion of her direct examination." (RR 39, lines 25-27.)[22] Just weeks after the shooting, her parents decided to move to Mexico as a result of what she had witnessed.

2. Respondent's Exception

Respondent takes exception to the Referee's finding that Martina's "initial descriptions given to the police more strongly point to Raynard Cummings than the petitioner." (RR 26, lines 16-17.) In fact, the record only allows the opposite conclusion; that her initial descriptions to police pointed to petitioner rather than Cummings. As noted above, when first interviewed by police a few hours after the murder, Martina told them that

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

she did not see the suspect's face but described him as "Negro," possibly in his mid-twenties, 5'10" to 6'0" with a medium to thin build. (Pet. Exh. 43: 1.) This description is far more consistent with petitioner than Cummings. During her initial statement, Martina also indicated that, while she did not see who shot Officer Verna or who was driving the car, she did see the shooter entering the passenger door of the car. (Pet. Exh. 43: 1.) That is also more consistent with accounts of Cummings's movement.

Regardless, the Referee delineated numerous discrepancies and inconsistencies in Martina's various accounts of the killing that would have negatively impacted her trial testimony if offered by the defense. The Referee further noted that her status as a minor and the fact that she and her family had left the country would have further complicated presenting her as a trial witness. (RR 40, lines 1-26.) And the Referee pointed out that Payne, the defense investigator, opined that Martina's testimony "was not helpful to the defense case." (RR 40, lines 22-26.) The Referee did not identify any reason why, on balance, Shinn should have called Martina Jimenez as a defense witness at trial.

a. Shannon Roberts

Shannon Roberts has consistently, over 30 years, identified petitioner as the person who shot Officer Verna outside of the car. He testified at trial that petitioner was the shooter. Shannon did not claim otherwise at the reference hearing.

Petitioner nonetheless alleges Shannon's identification of petitioner was unduly influenced by unethical police detectives during the investigation process. The claim lacks merit.[23]

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[23] Petitioner's claim of undue influence is primarily based on a declaration, purportedly from Shannon, that he signed in the early 2000's. In it, he stated that the police made him feel "special." (19RHT 2324.) He (continued...)

Officer Paniagua was the first to interview Shannon after the murder. At the time, Shannon had been called in from home and did not have any of the details about how Officer Verna had been shot. (21RHT 2473-2475.) To the best of his memory, Officer Paniagua recalled at the reference hearing that he had asked Shannon questions to the effect of, "Tell me what you saw." (21RHT 2492.) Officer Paniagua could not have influenced Shannon's account of the murder because he did not know any details of the crime. Shannon further dispelled any improper influence by credibly testifying at the reference hearing that *his* identification of petitioner was made to the best of his ability. (19RHT 2343-2345.) He affirmed that the shooter was lighter-skinned and that his identification was not a product of what the police told him. (19RHT 2341.)

The Referee rejected the allegation that Shannon was influenced by a third party, and the Referee's finding only supports the conclusion that Shannon's version of events was independent. (RR 43, lines 12-20.) During the reference hearing, Shannon testified that the outside shooter was of mixed-race ("kind of like me") which he described as "Mexican or Puerto Rican or possibly half black, half white." (19RHT 2348.) Shannon

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(...continued)
stated that the police took him to a Dodger game the night before he testified, which was the only baseball game he had been to. (19RHT 2324-2325.) Even if this were true, there is no indication that it caused Shannon to testify untruthfully, or would have been favorable to Petitioner if elicited at trial. By the time of the alleged Dodger game, Shannon had already given statements to the police and identified petitioner, so it could not have affected his identification. In any event, it is common for the police to try to establish a rapport with a young witness, especially after a traumatic event. Even so, that was also not the only reason Shannon spoke to the police; his uncle urged him to do so. He believed his uncle knew Officer Verna. (19RHT 2318.)

has repeatedly and consistently described petitioner, and not Cummings, as the shooter.

3. An Adult Neighbor - Linda Orlik

Linda Orlik operated a daycare center out of her Gladstone Avenue home. (8RHT 1018.) On the day of the murder, June 3, 1983, in the early evening hours, Orlik was in front of her home with her mother. (8RHT 1012.) At the sound of the first shot, Orlik believed she turned, ran to the house and yelled for her mother to "get in the house." (8RHT 1020-1021.) From the moment Orlik recognized the sound of a gunshot, her primary concern was the safety of herself, her mother, and the children. (8RHT 1022.) At that point in time, Orlik was not concerned with how many shots were fired. (8RHT 1022.)

Once inside the house, after Orlik told her mother how many shots she (Orlik) thought she heard, her mother said "she don't remember nothing, just noise. She remembered now that I am yelling at her. She had no recollection of any amount of shots, just shots." (8RHT 1922-1023.) Orlik's recollection was that "it was five shots in about three seconds." (8RHT 1013.) She heard three shots followed by a small pause and then two shots. (8RHT 1013.) Orlik rushed to her mother and the children and was distracted by her actions and concerns—for protecting the safety of her mother and the children. Any exact estimation of the time, or number of shots, would have been affected by her stress, thoughts, and actions.[24]

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[24] The top entry on Resp. Exh. 761 lists the name Orlik, Linda with an address at 11661 Gladstone. Next to her name are the words "Witness not home-relayed message." "She heard shots [No. 5 and No. 6], NFD." NFD is commonly used by law enforcement to stand for "no further description." Shinn may have seen this entry and believed that Orlik heard only shots No. 5 and No. 6. And, whether he believed from that report that Orlik heard between five and six shots or only shots No. 5 and No. 6, there was no reason to believe that Orlik had any additional information, such as

(continued...)

Petitioner has failed to meet his burden of proving that Linda Orlik would have provided evidence favorable to him if Shinn had offered her as a defense witness at trial. Petitioner therefore fails under either prong of *Strickland.*

4. Law Enforcement Officer Witnesses

Petitioner complains that witnesses from the Los Angeles County Jail, both law enforcement officers and inmates, heard Cummings brag that he shot Officer Verna, yet were not called as defense witnesses at trial. But the jury heard substantial evidence at the trial that Cummings had bragged about killing Officer Verna. Deputies McMullan, McCurtin, and LaCasella, as well as inmates Gilbert Gutierrez and Alfred Montes, all testified at trial that Cummings had bragged that he killed Officer Verna. As a result, additional witnesses would have been cumulative of the evidence actually offered at trial and excluded for that reason. For example, Deputies McCurtain and LaCasella testified during the guilt phase that Cummings bragged about shooting Officer Verna and made statements like, "I put six in him," "He took six of mine," and "Pow, Pow," "First two in the back, pow, pow and then walked up and four more. Pow, pow, pow, pow. That's the way it is done." (65RT 7148-7170, 7200-7228; see *Cummings, supra*, 4 Cal.4th at pp. 1265-1266.) Furthermore, inmates Gilbert Gutierrez and Alfred Montes testified at trial to similar statements made by Cummings. (See *id.* at pp. 1264-1265.) The question is what Deputy McGinnis, Sergeant Arthur, or Deputy Nutt would have added. As discussed below, the answer is nothing. The same is true as to potential

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(...continued)
sequence or pauses between those two shots, that would have been exculpatory to petitioner. Orlik did not actually see anyone firing the shots. (8RHT 1013.)

inmate witnesses. The attempt to pin excuse blame on Cummings also did not fail because too few witnesses supported it.

a. Deputy William McGinnis

During an Evidence Code section 402 hearing prior to the 1985 trial, Deputy McGinnis testified that Cummings had told him, "Yeah. Well, I put two in front of the motherfucker, and he wouldn't have got three in the back if he hadn't turned and ran. Coward punk-ass motherfucker." (65RT 7041.) Cummings never told Deputy McGinnis he alone shot Officer Verna nor did he say that he—rather than petitioner—shot Verna in the back. In fact, Officer Verna suffered four gunshot wounds to the back, not three. Cummings's statement is not inconsistent with him shooting Officer Verna while Cummings was in the car and then passing the gun to petitioner who got out and shot Officer Verna in the back as the officer attempted to retreat. And even if Deputy McGinnis's testimony incriminated Cummings alone, it was cumulative to the testimony admitted at trial.

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

b. Sergeant George Arthur

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

c. Deputy Richard Nutt

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

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

5. Inmate Witnesses

James Jennings, Norman Purnell, Jack John Flores, and David Elliot were also inmates at the Los Angeles County Jail.[25] According to petitioner, they alleged Cummings confessed to them that he was the only person who shot Officer Verna. Not only was there ample reason not to call these inmates, but a decision to present them as defense witnesses would have inevitably produced a claim of ineffective counsel, given their glaring lack of credibility. The Referee's conclusions are in accord with this view.

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[25] As already noted, other inmates testified at petitioner's trial regarding the same subject.

a. James Jennings

Jennings allegedly provided information to police about statements made by Cummings when they rode the bus together. At the evidentiary hearing, Jennings had no memory of those statements. (11RHT 1304.) He could not remember any of the words Cummings actually used. (11RHT 1314.) Therefore, he provided no proof of anything at the hearing. And even assuming Jennings had information in 1985 and was available to testify, there are many other reasons why Shinn would reasonably decline to call Jennings as a witness at trial.

First, in 1985, Jennings was facing charges (of which he was later convicted) of first degree murder and robbery. He also had a prior conviction for burglary. (11RHT 1309.)

Second, Jennings admitted his robbery-murder case was pending when he contacted the police in 1985, and that he wanted to be a "snitch" in order to help himself on his own murder case. (11RHT 1315-1316.)

Third, Jennings knew petitioner and petitioner's family well and associated with petitioner's brother. Jennings and petitioner even grew up together in the same neighborhood. (11RHT 1309.) This was an obvious sign of bias.

Fourth, and most significantly, Jennings's statement would have at least partially incriminated petitioner. Jennings's statement to the police (Pet. Exh. 5) indicated that petitioner was the one who drove away from the murder scene. (11RHT 1314-1315.) Jennings told officers, "At this point the female returned to the vehicle, got into the passenger side and the vehicle was driven by [petitioner]. After driving a short distance they returned to where the officer was on the ground, and Cummings stated he [Cummings] got out of the vehicle and got the officer's gun." (Pet. Exh. 5; 11RHT 1315.)

If Jennings were believed and Pamela Cummings was originally the driver, this statement could also mean that petitioner got out of the two-door car, and was likely the outside shooter. Such testimony from Jennings would have effectively destroyed Shinn's argument that some of the witnesses were confused in their identification of petitioner as the shooter because after the car returned to the scene, it was petitioner who jumped out and picked up the gun. By introducing testimony that it was Cummings who jumped out to retrieve Officer Verna's gun, Shinn would have invited the prosecutor to adopt the same argument: that witnesses who identified Cummings as the outside shooter were confused since they saw Cummings merely retrieve the gun after the murder.

And like the other jailhouse witnesses, Jennings was also cumulative of the other evidence offered at trial. There was no reason to call Jennings, who would have incriminated petitioner, when other credible evidence of Cummings's bragging was already offered by the prosecution.

Petitioner failed to establish that Jennings would have been available to testify in 1985. Further, Jennings would have been subject to extensive impeachment, as explained by the Referee. Jennings was facing pending murder and robbery charges (and was later convicted of those charges) and was seeking benefits in his pending cases. It was unlikely a lawyer for Jennings would even have allowed him to testify, and Shinn—unlike the prosecution—could not offer Jennings any incentives to testify. The Referee added that Jennings's testimony "would not have been reasonably available to Shinn if Jennings was uncooperative." (RR 45, lines 7-8.) And the Referee further noted that jurors would have been skeptical of Jennings's credibility in light of his prior relationship with petitioner and his apparent bias. (RR 44, line 8 - RR 45, lines 1-8.) Petitioner cannot show violation of either prong of *Strickland* as to Jennings.

b. Norman Purnell

Purnell, like Jennings, had an extensive criminal history prior to 1985. His prior felony convictions included a 1977 grand theft person, a 1983 grand theft person, a 1983 robbery, and a 1983 burglary. Since petitioner's trial, Purnell has accumulated more felony convictions: a 1988 transportation of narcotics, a 1991 felony drug possession, a 1996 transportation of narcotics, and at the time of the reference hearing he was on felony probation for possession of a controlled substance. (13RHT 1598-1602.) This does not include his numerous misdemeanor convictions for various offenses.

Second, it is far from clear that Purnell even heard the alleged statements from Cummings. Purnell was in custody from 1983 to 1985. (13RHT 1585.) Supposedly, while in the jail shower, "Slim" (presumably Cummings)[26] told Purnell that he (Slim) shot a police officer and if he was going down, his "crimie was going down, too." (13RHT 1586.) Purnell testified that he told a deputy sheriff about Slim's statement, "Who thank God wrote everything down." (13RHT 1588-1589.) But Purnell did not remember the deputy's name. (13RHT 1588-1589.) Purnell also claimed that the deputy recorded the interview. (13RHT 1607.) There is no evidence that any such notes or recording ever existed. Nor is there any other evidence Purnell ever told a deputy sheriff that Cummings stated if he was "going down," his "crimie was going down, too."

Purnell claimed to have a good memory, and testified, "I have a good memory. I can remember a long ways back."[27] (13RHT 1593.)

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[26] Purnell had never seen Cummings's photograph until coming to court for the reference hearing. (13RHT 1611-1612.)

[27] Despite his purportedly excellent memory, Purnell claimed he did not remember talking to the defense attorney just one day earlier about Slim's statements, and rather recalled only speaking about "coming to court (continued...)

Nevertheless, Purnell made an audible sigh when asked how much time passed from Slim's statement until the next time he thought about the statement. (13RHT 1610-1611.) He admitted that he had not thought about Slim's statement for 31 years. (13RHT 1611.)

Although Purnell claimed to recall what "Slim" told him 31 years ago, "Slim" did not tell him how many shots he fired, what position in the car he got out of, why he shot, what the officer looked like, where the shooting occurred, or what type of gun he used. (13RHT 1594.) Slim did not tell him whether he (Slim) was on foot, on a bicycle, or in a car. (13RHT 1595.) What Purnell did recall was that Slim said he was with his "crime partner." (13RHT 1595.)

Shinn would have had very sound tactical reasons for not introducing evidence that petitioner was "Slim's" "crime partner"—a person with whom one commits crime. Shinn was trying to defend petitioner in a series of violent robberies and attempting to disprove any involvement in the brutal murder of a uniformed police officer. Any evidence connecting petitioner with Cummings or any evidence that Cummings and petitioner were acting as "crime partners" would prejudice petitioner. It would also constitute circumstantial evidence that petitioner was heavily involved with Cummings in violent crimes, and by inference was the aider/abettor and co-conspirator with Cummings in the murder of Officer Verna.

Finally, Purnell's testimony was also cumulative of the other testimony at trial. As a result, petitioner cannot establish deficient performance under *Strickland.*

(...continued)
and getting picked up." (13RHT 1594.) It was later stipulated that Purnell spoke about the statement with petitioner's attorney before coming to court. (13RHT 1617-1620.)

The Referee found that Purnell's statement did not necessarily implicate petitioner (it was vague, and lacked details) and Purnell would have been subject to significant impeachment with his extensive felony record. The Referee also concluded Purnell did not exonerate petitioner at all, since Cummings allegedly said he acted with a crime partner. Stated another way, Purnell's statement would have helped the prosecution and further damaged the defense. The Referee also found that Purnell's statement was cumulative to other evidence Shinn presented on petitioner's behalf. (RR 45, lines 9-26.) Petitioner fails to satisfy either prong of *Strickland* as to Purnell.

c. Jack John Flores

Petitioner failed to demonstrate Flores was available to testify in 1985. Even assuming that Flores was available to testify in 1985, a competent lawyer would not have called him as a witness because Flores would have confirmed petitioner was guilty of the murder. Thus, there was no violation of *Strickland.*

In Flores's statement, he indicated that Cummings and petitioner were en route to meet Billy Jones, who was "going to get them some cocaine," when Pamela Cummings was stopped for running a stop sign. "Cummings became irate at the thought of his wife going to jail. While Pamela and Officer Verna were at the rear of the car, (petitioner) turned around in his seat and related what was happening. Cummings said that he (Cummings) told petitioner that they might be going to jail and asked petitioner what petitioner wanted to do, shoot him (Verna)? Cummings said that petitioner stated, 'Yes, if it comes to it.'" Cummings said that he asked petitioner if "[petitioner] wanted to do the shooting and that (petitioner) said 'no, the cop would see [the gun].'" Cummings also told Flores that he and petitioner had previously committed robberies together, specifically that he and petitioner previously robbed and pistol whipped the

owner of a camper shop in the San Fernando Valley and that in West Los Angeles they had robbed and shot a restaurant owner in the neck. This statement establishes that petitioner was complicit in the plot to kill Officer Verna, and helped plan the crime with Cummings. His testimony would have been devastating to petitioner's defense. As the Referee found, "[b]y agreeing to and encouraging the shooting of Officer Verna, petitioner made himself an aider and abettor." (RR 46, lines 9-11.)

Shinn had other reasons to not call Flores: Flores had a lengthy criminal history (including multiple convictions of moral turpitude felonies) (Resp. Exh. 795) and a history of informing on other inmates. Flores also claimed to have cooperated with detectives on other cases, including a murder for hire. In short, Flores was a convicted felon and a professional informant with serious credibility issues. Shinn had very sound and obvious tactical reasons for not introducing this evidence.

As the Referee points out, petitioner is incriminated in the statements of Flores. The Referee concluded "it would make no sense" for Shinn to have called Flores as a defense witness. (RR 46, lines 24-25.) As a result, there was no violation of either prong of *Strickland.*

d. David Elliot

Elliot (who died in 2013 [RR 31, line 11]) was, according to trial witness Gilbert Gutierrez, a "known informant" and a "known snitch" who taught Gutierrez how to inform on other inmates. (64RT 6987-6988.) In fact, Elliot told Gutierrez how to "curry favor from the authorities by snitching off somebody." (64RT 6988.) Elliot even gave Gutierrez a phone number to call to contact Detective Holder. (64RT 6988.) According to Gutierrez, Elliot knew who the investigators were on other inmate's cases and had access to a telephone 24 hours a day as a jail trustee. (64RT 6989.) In short, Elliot has serious credibility problems. His testimony would have been easily impeached by the prosecution as an

effort by Elliot to manipulate the system in order to curry favor on his own cases.

6. Impeachment Witnesses

a. Donald Anderson

Petitioner contends Donald Anderson would have impeached the trial testimony of Marsha Holt because Holt allegedly told Anderson that she "didn't see anything." (17RHT 2143.) The Referee flatly rejected Donald Anderson as a potential trial witness, finding him "not a credible witness for several reasons." (RR 47, line 7.) Anderson had, in the words of the Referee, "a simply horrifying adult criminal record" as a recidivist rapist, and was a longtime friend of petitioner. Shinn was aware of Anderson's potential testimony, and shared his misgivings about Anderson's testimony with the defense investigator, Payne. That alone establishes adequate performance as defined by *Strickland*. And the Referee also pointed out that Anderson's version would have been contradicted by Holt's detailed account of the murder and her description of the perpetrators. (RR 47, line 7 - RR 48, line 1.)

The Referee's conclusion is amply supported by the record. Anderson had multiple prior felony convictions: forcible rape in 1973, forcible rape in a detention facility in 1976, robbery, and grand theft person in 1981. (17RHT 2165-2166; Resp. Exhs. 796, 797, 798, 799 and 800.) He was a heavy drug user (17RHT 2167-2169) and even used drugs with petitioner (17RHT 2171-2173), whom he had known since childhood (17RHT 2173). Anderson would have been easily impeached based on his relationship with petitioner, and his testimony discounted as an obvious attempt to help a longtime friend avoid the death penalty.

In any event, Holt's alleged statement to Anderson was significant to her credibility. She allegedly told Anderson that she "didn't see anything,"

referring to the murder, while she was visiting Anderson in county jail. (17RHT 2143, 2156.) She also told him she was not going to court. (17RHT 2143.) Assuming Holt actually said this, she might well have done so to downplay her role as a witness in petitioner's case. She would not want to tell her violent husband that she was going to testify against his lifelong friend.

b. Deborah Cantu

Deborah Cantu, the sister of Pamela Cummings, was a civilian employee of the Los Angeles Police Department. Although Cantu's testimony could have been offered to undermine Pamela's believability, Shinn was aware of her statements, and decided to forego her testimony as a reasonable tactical decision, especially in light of the fact that it would have also incriminated petitioner.

Pamela Cummings attempted to shift blame for Officer Verna's death from her husband, and she repeatedly lied to her sister about Cummings's role in the killing. Pamela Cummings also falsely accused Milton Cook of being the shooter. At trial, Shinn thoroughly impeached Pamela Cummings's credibility by, e.g., highlighting the plea deal she made with the prosecution after she was charged with capital murder, having her admit her participation in 10 robberies, having her admit her love for Raynard Cummings and her hope that he would not be sentenced to the death penalty, and establishing that she had tried to frame Cook.

And there were serious risks in calling Cantu as a defense witness. When Pamela Cummings finally told Cantu that Cummings was in fact present during Officer Verna's murder, she also told Cantu that petitioner killed the officer and that petitioner came up with the plan to lay blame for the murder on a man who closely resembled Cummings.

Clearly, Shinn reasonably weighed the benefit of calling Cantu against the risk that her testimony would have been one more piece of evidence linking petitioner to the commission of Officer Verna's murder.

c. Betty Boyd

Betty Boyd is the daughter of Mackey Como. Boyd is a felon who had served a prison sentence. Marsha Holt saw the murder from Como's home. Boyd testified at the reference hearing that in May 1983 there were metal bars on all the front windows of her mother's home, as depicted in a photograph. (21RHT 2517, 2525-2526; Exh. A-113.) One of the middle windows next to the bathroom (not depicted in the photograph), had a metal screen or mesh on one side. (21RHT 2517.) The metal screen was put on the same time the bars were installed. (21RHT 2518.) According to Boyd, petitioner's Exhibit A-113 (a photograph) accurately and fairly depicted the metal screen as he remembered it. (21RHT 2519.) The Referee did not address Boyd's testimony.

Boyd's testimony about mesh on the windows was internally inconsistent. At different points she described the mesh on the right side and then on the left side. Boyd recognized Respondent's Exhibit 764, a photograph depicting her mother's home and her niece, a young girl in the pink. (21RHT 2520.) She recognized the kitchen to the left of the front door, Window No. 1, center Window No. 2, and the window on the far right as Window No. 3. (21RHT 2520.) She pointed to "the middle one (window)" and testified that the mesh was on the left side. (21RHT 2521.) She had no idea when Respondent's Exhibit 764 was taken, but would not have been surprised if the photograph was taken on April 4, 1984. (21RHT 2521.) Boyd then pointed to the left side of Window No. 2 to indicate the metal mesh. (21RHT 2521-2522.) In Petitioner's Exhibit A-113, a smaller photograph, Boyd pointed out the mesh on the right side of the window next to the bathroom and looking out from the bedroom to the street.

(21RHT 2522-2523.) Boyd viewed Respondent's Exhibits 764 (glossy photograph) and 765 (close-up of the windows and the antenna) and testified that the mesh is "on the right side" of Window No. 2 and "It's outside. The right side over there." (21RHT 2522-2523.) The right side would have been the left side if one looked out from the bedroom to the street. She then testified, "It's on the -- it's on the -- it's that -- I am not familiar with right or left. All I know is next to the bathroom." (21RHT 2523.) When asked, "Do you see mesh on any of the three windows?" she testified, "Yeah, in the middle." When asked, "What side?" she responded," Is this the right side here (indicating)?" She then pointed to the right side of the window and testified, "I can't tell on that. I can't hardly tell on this picture here." (21RHT 2524.) She then stated that the mesh is located "like right side" as we are looking at the photograph – Respondent's Exhibit 765. (21RHT 2525.)

Boyd also offered testimony that was contradicted by Mark Mynhier (who testified there was no mesh on the window) and was directly rebutted by Rosa Martin. Boyd believed the bars were first installed in 1974 and that all the way through 1983, there were bars on all the windows—the kitchen window, the bathroom window, and the three bedroom windows. (21RHT 2525.) Based on the credible testimony of Rosa Martin (14RHT 1740), Respondent's Exhibit 762 [photograph depicting the Beasley home without bars in June or July 1983].

d. Robin Gay

Shinn was also aware of the potential impeachment testimony of Robin Gay. Shinn and petitioner jointly decided to forego her testimony as a reasonable tactical matter, with Shinn saying so on the record in front of petitioner. (76RT 8640; RR 48, lines 18-26.) Moreover, petitioner has not met his burden of showing that Robin Gay was available as a witness, in light of her refusal to testify despite having been offered total immunity.

Had she testified, the prosecutor undoubtedly would have established not only her culpability in the robberies that preceded the murder but also petitioner's guilt on those robberies. Petitioner has failed to meet his burden of demonstrating that Robin Gay's testimony would have resulted in a net gain to Petitioner.

7. Expert Witnesses

At the reference hearing, petitioner presented three expert witnesses: (1) Kathy Pezdek (regarding eyewitness identification and "subconscious transference theory"); (2) Paul Michel (regarding vision and the ability of a witness to observe); and (3) Kenneth Solomon (regarding biomechanics and "human factors"). The Referee did not identify any significant benefit in any of the proffered expert testimony, and the Referee noted that Cummings's counsel likewise did not present any such expert testimony. (RR 50, lines 15-20.)

a. Eyewitness Identification

Shinn, who was familiar with eyewitness identification experts, discussed experts with his investigator Payne, billed three hours of time regarding experts, and advised the trial court that he intended to present expert testimony regarding identification experts at the trial in 1985. (RR 34.) Shinn ultimately declined to call an eyewitness expert, and for good reason.

At his deposition, Shinn explained—reasonably—that such testimony could weaken the defense case; the defense believed the jury might be confused as to who shot Officer Verna, and the defense would not be aided by "weaker witnesses than the prosecution witnesses." The Referee later expressly concurred with Shinn's assessment, as the Referee found that the defense trial tactic of "exploitation of the confusion amongst the various witnesses 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 viable strategy to "exploit the confusion rather than explain it." (RR 50, lines 17-21.)

The trial court in 1985 instructed the jury on all the factors to consider in evaluating eyewitness testimony. (95RT 10813-10814.)

Moreover, the Referee found that the trial court might have outright excluded any proffered expert testimony on eyewitness identification given the restrictions on such evidence that had been imposed by this Court. (RR 50, lines 3-5.)

In *People v. McDonald* (1984) 37 Cal.3d 351, newly decided at the time of petitioner's 1985 trial, the issue was whether a trial court had abused its discretion in precluding the defense from introducing expert testimony on the reliability of eyewitness identifications. (*Id.* at p. 361.) This Court held that the trial court had abused its discretion. "When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony." (*Id.* at p. 377.) *McDonald* did not address whether defense counsel is obliged to call such an expert.

The Referee properly described the context and reach of *McDonald. McDonald* provides no support for the claim that expert testimony must be presented by a defense attorney in every case where an eyewitness identification is uncorroborated, much less a case—as here—where eyewitness testimony is overwhelmingly corroborated.

Here, Shinn had ample reason not to call such an expert, and Shinn's approach was explicitly endorsed by the Referee. Petitioner's jury was

adequately instructed on factors relating to evaluating the reliability of eyewitness testimony, and Shinn utilized those factors in support of his argument to the jury that the identifications of petitioner were suspect. The same points apply to each of the other two so-called experts on the question of a witness's ability to perceive. Shinn was not obliged to call any such consultant, and petitioner cannot show prejudice from the absence of such purchased testimony.

The Referee also correctly observed (regarding the trial) that this Court's then-recent decision in *McDonald*, "focused upon those cases where expert testimony was the only evidence connecting the accused with the crime." (RR 49, lines 12-14.) In contrast, the eyewitness identification of petitioner at trial was corroborated by his fingerprints in the car, his flight, his possession of Officer Verna's weapon, his identification by accomplice Pamela Cummings, his suicide attempt, and his own admissions. The Referee also found that a prosecution's trial objection to proffered expert testimony in this case might reasonably have been sustained. (RR 50, lines 3-5.)

Shinn was able to effectively cross-examine every eyewitness who identified petitioner as the outside shooter and he pointed out the numerous inconsistencies in the eyewitnesses' testimony. Had Shinn called Pezdek or a comparable eyewitness critic, the prosecution could have called at least two different experimental psychologists, Dr. Ebbe Ebbesen (Chair of the Psychology Department at the University of California at San Diego) and Dr. John Yuille as powerful rebuttal witnesses. (5RHT 477.) In the 1980's, Dr. Ebbesen was called in other cases to specifically rebut Pezdek's findings. (3RHT 132.) On balance, Shinn could have reasonably decided that any potential benefit of calling an eyewitness identification expert was not worth the risk. As a result, there was no violation of the first prong of *Strickland.*

As will be shown, regardless of whether the trial court would have exercised discretion to admit generic expert testimony about eyewitness identification, none of the proffered expert witnesses in this case provide any basis to reject Shinn's reasonable approach, much less do they establish that an alternative approach would likely have been meritorious.

Pezdek, as an expert witness at the reference hearing, was thoroughly impeached as an unreliable partisan witness.[28] Pezdek could not identify a single criminal case in which she testified in Los Angeles County in 1983, 1984, or 1985. (3RHT 123-127.) Her curriculum vitae does not indicate she testified in any criminal cases in 1985 (3RHT 127) and she did not know of any capital cases in which she had testified prior to 1985 (3RHT 21, 128). Petitioner therefore failed to fulfill his burden to show an expert on eyewitness testimony would have been available and able to testify as he alleges.

On March 17, 2000, Dr. Pezdek submitted a letter to petitioner's habeas counsel listing nine conditions that may affect the reliability of the eyewitnesses and mentioned that these factors may be used for jury selection and for cross-examination. (Resp. Exh. 713; 3RHT 119.) Yet in the reference hearing, she identified 12 factors. (Pet. Exh. A-85, 3RHT 29-30.) And when working as a defense witness in a 1995 case, Pezdek offered defense counsel a five-page outline with 25 topics for the defense attorney that can be "use[d] to shape my testimony." (3RHT 120-122.) In other words, she was shown to be a partisan and unreliable witness.[29]

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[28] Pezdek's testimony has been routinely rejected in numerous other crucial cases, including capital cases. (E.g., *People v. Ochoa* (1998) 19 Cal.4th 353, 384; *People v. Fudge* (1994) 7 Cal.4th 1075, 1092.)

[29] From 1999 to August 15, 2014, Pezdek collected more than $604,000 testifying as a defense witness in Los Angeles County alone. (5RHT 501-503.) More recently, Pezdek had made between $80,000 and (continued...)

When attacking the reliability of Marsha Holt and Gail Beasley based on their alleged cocaine use, Pezdek testified on direct examination that cocaine affects selective attention and impairs one's ability to see what is happening and select what is important. (3RHT 44-47.) More specifically, she claimed drug use rendered Holt and Beasley inaccurate and unreliable eyewitnesses. (3RHT 108.)[30] However, on cross-examination Pezdek was confronted with her testimony in another case from 1985. There she had testified: "Actually, I don't consider drugs and alcohol as having a significant effect on the accuracy of eyewitness identification . . . ." (3RHT 112.) She continued, "Remembering what a person looks like does not seem to be affected by-by drugs and alcohol. . . . So I actually don't think the drugs and alcohol have an effect on a person's memory." (3RHT 112.) Her inconsistent responses in different cases indicated her bias and lack of professionalism.[31]

(...continued)
$100,000 per year testifying as an expert witness. (5RHT 499.) Pezdek testified on cross-examination, "I doubt if it [testifying more than 30 times per year] ever happened" (5RHT 503) yet she testified earlier that she had qualified as a defense witness 35 to 50 times per year *for the last 30 years*. (3RHT 19.)

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

[31] Pezdek agreed that as an "objective, neutral, non-advocate scientist" using words like "never" or "absolutely" or "certainly" is not something she should do (5RHT 470), yet she did exactly that when describing the unconscious transference theory (3RHT 42.)

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

When discussing weapon focus on direct examination, Pezdek claimed eyewitnesses may focus on a weapon which is a "salient form of distraction." (3RHT 39.) Yet on cross-examination, she admitted that weapon focus was not a sound scientific principle and the "psychological community does not have a conclusive study about weapon focus." (3RHT 132-133.) While Pezdek claimed there had been 300 to 400 studies on the double blind effect/procedures by the late 1970's, and that she testified about this and the "experimenter expectancy effect" prior to 1985 (10RHT 1190), she could not identify a single reference that used the term "double blind procedure" from 1976 to 1985.[32] (5RHT 488-489; 10RHT 1230-1237; Resp. Exh. 748.)

Pezdek recognized that petitioner and Raynard Cummings are "remarkably different looking individuals" and "certainly look very

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[32] Judging from the Referee's report, the Referee was unimpressed with experimental eyewitness research studies conducted on college students in artificial circumstances. The Referee did not rely on such studies, and for good reason. Experimental psychologists Ebbe Ebbesen and John Yuille have called into question the validity of college student studies. (5RHT 476.) Additionally, John Yuille's and Judith Cutshall's case study, the only study at the time that dealt with a real crime with real witnesses, found that witness accuracy with action details, sequenced events and descriptive details was exceptionally high. (10RHT 1246-1255.)

different."[33] (3RHT 144.) She agreed that petitioner's case is about "event memory" and not about facial recognition. (3RHT 156.) She conceded that witnesses can discern general characteristics such as race and ethnicity very quickly and that eyewitnesses looking at petitioner and Cummings would be able to easily distinguish between the two. (3RHT 143; 5RHT 480, 496.) Pezdek repeatedly agreed that witness memory is more accurate earlier in time and closer to the observed event and is more likely to be reliable early in time rather than later. (3RHT 29, 152.)

Had Shinn called Pezdek or a comparable eyewitness pundit, such testimony would only have reinforced the strongest points of the prosecution's case: that petitioner and Cummings did not look alike, and that trial witnesses who described the outside shooter as mixed race or a light skinned Black or the same height as Officer Verna were necessarily describing and identifying petitioner and excluding Cummings.[34]

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

[34] The contemporaneous eyewitness descriptions overwhelmingly pointed to petitioner and away from Cummings:

• Oscar Martin - report to police - male Negro, 20's, same height as officer

• Oscar Martin - riding in back of police car looking for suspects' car - same height as the officer; either stated or agreed with Shannon Robert's description that shooter was "Mexican or light-Black dude" or words like "a black dude that was white"

• Oscar Martin - lineup - selected #4 (petitioner) then erased it because he didn't recognize scratches on petitioner's face or the staples in petitioner's neck

(continued...)

Pezdek herself conceded that some of the facts of this case were "very damaging to the defense theory" (3RHT 163) and that an attorney's investigation and research "may be detrimental in terms of calling an identification expert" (3RHT 167). Among the points that Pezdek would have been forced to admit are:

• That the "unconscious transference theory" assumes that petitioner and Cummings were outside the car together at the same time. ("The two people who were both confused were both there at the same time, has to be.") (3RHT 165.)

• That if a bystander (innocent party) is much different looking than the shooter, the "unconscious transference theory" would be less likely.

• That "dissimilar looking people are less likely to be confused [for one another]."

• That the theory is diminished even further if a dissimilar person is not near the shooter at the time of the shooting.

(...continued)

• Rosa Martin - report to police - light complexion man got out and picked up the gun

• Shannon Roberts - report to police - either Mexican or Black/Caucasian

• Gail Beasley - report to police - male Black, light skin, 6-0

• Marsha Holt - report to police - male Latin or White/Negro mix

• Robert Thompson - report to police - composite sketch (Resp. Exh. 707) clearly looks like petitioner and clearly is not Cummings; Dr. Pezdek testified she had not seen this before and that Thompson's composite (a witness's description in words visually) is not an African-American compared to a mixed-blood, more White-looking shooter like petitioner (3RHT 169-170.)

• Rose Marie Perez - report to police - light complexion, mixed Black and White, or possibly Latin.

• That the "unconscious transference theory" would not apply if any witness saw the shooting, saw the car leave, make a U-turn, and then return and stop for petitioner to get out to retrieve the gun.

• That no witness except Gail Beasley puts petitioner and Cummings at the same time in the same space near Officer Verna and hence the "unconscious transference theory" is less likely.

• That she did not consider the physical evidence, including petitioner's fingerprints in the glove box, motive evidence, flight evidence, petitioner's arrest with Officer Verna's revolver, his suicide attempt, or his admissions.

• That witnesses can confuse clothes and colors yet recognize a person's face, especially compared to a very dissimilar looking person.

• That petitioner's changed appearance (staples in neck and scratch on face) could explain why witnesses could not identify him in a photographic or live lineup.

• That the identification studies and the factors affecting accuracy on which she relied dealt with similar looking individuals, not "remarkably different looking individuals."

• That some witnesses can be reliable and accurate.

• That if Marsha Holt was in the room from which she could view the street from the house, then her memory would be based on what she saw and "she would have seen what happened." (10RHT 1208.)

• That if Marsha Holt, Gail Beasley, and Shannon Roberts were not in the immediate line of fire, they would be less focused on a weapon and less concerned for self-preservation, and thus could have seen petitioner shoot Officer Verna.

• That the remaining 13 factors out of her 25 factors would favor the accuracy of the witnesses who identified petitioner as the outside shooter.

• That if any witness described the outside shooter as "light skinned, either Latino, Puerto Rican or mixed race, almost looking white" then that witness would necessarily be referring to petitioner and would be excluding Cummings.

• That Pamela Cummings, the closest witness and one who knew both petitioner and Cummings, would not be impacted by any of the 12 factors that could affect the accuracy of eyewitness identification.

b. Vision - Paul Michel

During the 2000 penalty phase retrial, petitioner called Paul Michel as an expert concerning the factors allegedly affecting eyewitnesses Gail Beasley and Marsha Holt, in an effort to bolster petitioner's claim that Holt's view was obstructed. (RR 50, lines 24-25; RR 51, lines 1-2.) The Referee impliedly rejected all of Michel's conclusions, as the Referee identifies none as significant. To the contrary, he describes the factors allegedly affecting the quality of the observations of those witnesses at trial as "apparent" from the Referee's visit to the crime scene and observation of the scene under comparable conditions. (RR 51, lines 11-15.)

The Referee was correct. An expert was not needed to go to the scene of the crime, look out a window and render an opinion whether a person would have been able to see what he or she said they saw.[35] It is common knowledge, and not within the unique purview of an expert, that factors including lighting, distance, field of view and eye disease can affect a person's ability to see something. Shinn's investigator, Payne, evaluated the crime scene on several occasions, (as evidenced by his billing records)

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[35] There is great discrepancy in the evidence presented at the 2014 reference hearing as to whether the mesh had even been installed on the right side of Window No. 2 prior to June 2, 1983. (14RHT 1738-1739 (Rosa Martin); 14RHT 1758-1762 (Mark Mynhier); 21RHT 2517 (Betty Boyd); 24PRT 3066 (Mackey Como).)

and never identified any obstructions on the middle window of Gail Beasley's residence at 12127 Hoyt Street. If the view from the window had been obstructed, it is reasonable to assume that Payne would have notified Shinn of this impeachment of Marsha's Holt's ability to see out of the window and identify Petitioner. (Pet. Exh. A-120; Resp. Exhs. 709 and 710; 7CT 1674-1675, 1818-1819, 1848-1849, 1975; 9CT 2387-2388.)

c. Ballistics

Marvin Fackler was an expert regarding gunshot wound ballistics. The Referee found him to be unavailable for the hearing due to illness. Fackler subsequently passed away, in 2015. As the Referee pointed out, Fackler only began his career as a ballistics consultant in 1991, and therefore would have been unavailable to Shinn in 1985. (RR 53, lines 10-16.) Petitioner therefore failed to fulfill his burden to show an expert on ballistics would have been able to testify as he alleges.

Even if Fackler or a comparable ballistics expert had been available in 1985, Shinn could have made a reasonable tactical decision not to call such a witness. During petitioner's trial, Shinn effectively cross-examined the People's coroner, Dr. Cogan, and established that entry wound 6 was consistent with the Oldsmobile's back seat passenger (Cummings) firing as Officer Verna leaned into the car. (71RT 8029-8034.) Cummings's trial counsel cross-examined Dr. Cogan. (70RT 7914-7950; 71RT 7953-7981, 7991-8029; 72RT 8101-8103.) Cummings's trial counsel also called Dr. Paul Herrmann, a qualified expert pathologist who worked with the Alameda County Coroner's Office. (80RT 9051.) Dr. Herrmann provided extensive testimony challenging some of Dr. Cogan's findings. (80RT 9051-9177; 81RT 9185-9193, 9242-9252, 9272-9275.) Shinn effectively cross-examined Dr. Herrmann and, as noted, established that wound No. 6 could have come from the backseat passenger—Cummings. (81RT 9230-9242.)

Calling Fackler or any other wound expert would not have resolved the critical issue of who shot Officer Verna. Fackler had earlier conceded that his opinion of the sequence of shots might have been incorrect; he could not conclude whether wound 1 or 3 came after the first shot (which he assumed was 6). (27RT 3564.) Nor could he determine whether 4 came before or after 5 (27RT 3582), and he could not say what position Officer Verna was in when he sustained gunshot wound 1 (27RT 3589-3590). In fact, Fackler conceded that gunshot wounds 1 and 3 may have been inflicted before or after gunshot wound 2, or whether 1 and 3 came before or after 2, 4 or 5. (27RT 3590-3591.) Because Officer Verna still had the use of his arms despite his severed spinal cord, Fackler could not tell whether he rolled over onto his ride side after falling onto his back. (27RT 3592-3593.) Nor could Fackler determine Officer Verna's speed of walking when he was initially struck by gunfire. (27RT 3594.)

In terms of relative distances between the outside shooter and Officer Verna, Fackler repeatedly testified that he "strictly relied" on Dr. Quinn's data and report, not his own. (27RT 3560, 3563, 3573.) But Dr. Quinn (whose trial testimony was not reviewed by Fackler (27RT 3573-3574) had acknowledged that "it is not feasible to make a firm estimate of each of the six muzzle-to-jacket firing distances" due to a question as to how much gunshot residue was lost from the jacket in handling prior to his tests and because he did not have the actual murder weapon or ammunition to study for comparison purposes. (82RT 9374-9375.) Dr. Quinn qualified his findings and cautioned that he was not calculating exact firing distances.[36] (82RT 9375.)

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[36] Dr. Quinn testified at petitioner's 1985 guilt phase trial about the relative distance of the shooter to the victim based on the amount of gunshot residue he recovered from Officer Verna's jacket over a year after (continued...)

Fackler could not tell the jury who the outside shooter was, and Shinn was not obliged under *Strickland* to call him or a comparable witness at trial.

d. Biomechanics

The prosecution theory at trial was that petitioner, Cummings, and Pamela Cummings were in the two door Oldsmobile when the traffic stop began. Pamela Cummings was seated in the driver's seat and got out of the car at Officer Verna's direction. Petitioner was seated in the front passenger seat and Cummings was seated in the back passenger seat. (6RHT 544.) Cummings fired the first shot and possibly the second shot from the rear seat and then handed the gun to petitioner. (6RHT 545.) Petitioner then got out of the car on the driver's side to fire four or five additional shots at Officer Verna. Cummings was 6' 6" tall and the back seat of the Oldsmobile was likely, in the words of the Referee "a tight fit" for him. Ingress and egress from the rear seat of the vehicle required the front seat to be pushed forward with the shoulder/seat belt held out of the way. (RR 35, lines 5-8.) During the guilt phase of the 1985 trial, the jurors sat in the Oldsmobile and as a result were able to observe for themselves any issues relating to ingress and egress. (72RT 8120-8122.)

(...continued)
the murder. (82RT 9343-9415.) Dr. Guinn opined that gunshots 2, 4 and 5 were fired closest together from the same distance of about a foot. (82RT 9305.) Gunshots wounds 4 and 5 were inflicted while Officer Verna was on the ground. (71RT 7971, 7984.)

If the evidence tended to show that the outside shooter was standing over Officer Verna and within a foot of his body when shots 4 and 5 were fired, then the shooter would be closer to the rear of the Oldsmobile and the front of the officer's motorcycle—giving witnesses like Marsha Holt, Gail Beasley and Rosa Perez a closer line of sight for viewing the shooter's face and clothing. The closer the shooter was to Gladstone Avenue, the less likely any obstruction by the neighbor's concrete wall or metal gate would have affected Holt's and Beasley's line of sight.

Petitioner's counsel hired Kenneth Solomon as an expert for the 2000 penalty phase retrial. Solomon, an expert in accident reconstruction and biomechanics, concluded as follows: (1) petitioner could not have physically performed the shooting as described by eyewitnesses, (2) Cummings could have easily gotten out of the car in the short amount of time between the first and second set of shots, and (3) Cummings is the only one who could have fired the shots both inside and outside the car. (6RHT 549; *People v. Gay* (2008) 42 Cal.4th 1195, 1216.) The trial court excluded Solomon's testimony as irrelevant and not a proper subject for expert testimony. (*Ibid.*)

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

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

Both the trial court and retrial court on the reference hearing understandably and thoroughly rejected Dr. Solomon's theories. Petitioner's physical agility, coupled with the effect of adrenaline, could not have been reliably replicated to resolve how petitioner got out of the car and shot Officer Verna. As Dr. Young testified at the reference hearing, "When individuals become stressed, aroused or motivated, there are changes in the body that take place due to the release of hormones, like

adrenaline, which physiologically affects how we respond and how we function." (18RHT 2210.) "Extremely stressful hyper-vigilant stages is a very difficult area for one to investigate." (18RHT 2211.)[37]

e. Dr. William Sherry

Shinn also had sound strategic reasons not to call Dr. Sherry so as to not emphasize the manner of death or highlight the fact that petitioner shot Officer Verna at close range while he lay on the ground. As the Referee found, "The gunshot wounds to the back of Officer Verna do not suggest who fired those shots, nor do the gunshot wounds to the chest." (RR 53, lines 7-8.) Hence, calling Dr. Sherry would not have established that Cummings murdered Officer Verna.

Petitioner fails to establish either deficient performance or prejudice. The 1985 jury not only convicted petitioner of the murder but further determined he was a shooter. That conclusion was based on overwhelming evidence, and not any failure in Shinn's representation of petitioner.

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[37] And Dr. Solomon's knowledge of the case facts was incomplete and indicated bias and a lack of professionalism. As of the reference hearing, Dr. Solomon had charged petitioner's counsel about $40,000. (7RHT 874-875.) He could not recall specifically what he had reviewed and admittedly did not review all of the grand jury and preliminary hearing transcripts (7RHT 871-873["I doubt I read everything."].)

II. PETITIONER HAS FAILED TO DEMONSTRATE THAT HIS COUNSEL SUFFERED FROM A CONFLICT OF INTEREST THAT ENTITLES PETITIONER TO RELIEF

In Claim 2, petitioner claims his counsel's representation was unconstitutionally burdened by multiple conflicts. (Pet. 34-59.) Again, petitioner failed to prove, after being given the opportunity to do so, that his trial counsel suffered from a conflict of interest that entitled him to relief.

A. Legal Standard

> The federal and state constitutional right to counsel in a criminal case also includes the right to representation free of conflicts of interest that may compromise the attorney's loyalty to the client and impair counsel's efforts on the client's behalf. (E.g., *Glasser v. United States* (1942) 315 U.S. 60, 69-70; *People v. Doolin* (2009) 45 Cal.4th 390, 417.) For both state and federal purposes, a claim of conflicted representation is one variety of claims that counsel provided ineffective assistance. Hence, to obtain relief, petitioner must demonstrate that (1) counsel labored under an actual conflict of interest that adversely affected counsel's performance, and (2) absent counsel's deficiencies arising from the conflict, it is reasonably probable the result of the proceeding would have been different. (*Mickens v. Taylor* (2002) 535 U.S. 162, 166; *Doolin, supra,* 45 Cal.4th at pp. 417-418, 421; see *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.)

(*People v. Mai* (2013) 57 Cal.4th 986, 1009-1010.) Even where an attorney labors under an actual conflict of interest, a defendant must show more than a "mere theoretical division of loyalties" to demonstrate deficient performance. (*Mickens, supra,* 535 U.S. at p. 171.) Prejudice is not presumed unless defense counsel was representing two or more defendants concurrently. (*Doolin, supra,* 45 Cal.4th at pp. 428-429; *People v. Almanza* (2015) 233 Cal.App.4th 990, 1006.)

B. Factual Background

1. Misappropriation of Funds - The Danes and the Korchins

As this Court has explained, at the time Shinn represented petitioner, Shinn labored under an "undisclosed potential conflict of interest—he was being investigated for misappropriation of client funds by the office of the same district attorney who was his adversary in the prosecution of petitioner." (*Gay, supra*, 19 Cal.4th at p. 828.) Specifically, Shinn had represented Oscar and Marjorie Dane in an eminent domain case, unrelated to petitioner's case, against the City of Santa Monica. The Danes were awarded approximately $200,000. The Danes, however, believed their loss was much higher, and refused the award. The Danes also reported the theft of their home as a fraud. Both the Los Angeles County District Attorney's Office and the State Bar of California investigated Shinn for the misappropriation of the Dane Award Funds.[38]

The State Bar ordered Shinn to keep the $200,000 in an interim trust account for the benefit of the Danes. But Shinn used some of the money to pay others, including $70,000 to pay another eminent domain client (the Korchins).[39]

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[38] This Court refers to this as the "second" conflict. The "first" conflict refers to the State Bar inquiry. (*Gay, supra*, 19 Cal.4th at p. 783.)

[39] Shinn also made a $50,000 loan to "Jack Hanning." He claimed the loan was authorized by Oscar Dane. (16RHT 1987.)

Shinn was entitled to a portion of the Dane funds as compensation. The Danes originally presented paperwork reflecting that Shinn had a $50 per hour fee agreement. (16RHT 1882.) Much later, Deputy District Attorney Al MacKenzie, who was investigating Shinn, discovered paperwork reflecting that the Danes had agreed to a contingency fee when they were unable to afford the hourly fee. (16RHT 1995.) When MacKenzie discussed the contingency fee agreement with Oscar Dane,

(continued...)

The District Attorney's investigation was led by Deputy District Attorney Albert MacKenzie of the Major Frauds Division. (16RHT 1966-1972.) Mackenzie determined that Shinn had taken control of the funds on behalf of the Danes, but the Danes never received any of the proceeds. (16RHT 1975-1976.) Shinn was aware of MacKenzie's investigation during his defense of petitioner.

When MacKenzie first contacted Shinn about the investigation, Shinn informed him that he had attempted to give the funds to the Danes, but that Oscar Dane had refused to accept the money. (16RHT 1981.)[40] Shinn described Oscar Dane as a "nut," and claimed he was trying to get Oscar Dane to accept the money. (16RHT 1981.) When the prosecutor was evaluating the Dane loan asked Oscar Dane if he had authorized the loan, he could not get a definitive answer from Dane. (16RHT 1988.) Oscar Dane was very angry with the City of Santa Monica and wanted to reject the award he considered inadequate. (16RHT 1981.)

Eventually, Oscar Dane accepted payment of the balance of the Dane Award Funds after conservatorship proceedings were initiated. (16RHT 2002-2003.)

After meeting with Shinn, MacKenzie disbelieved Shinn's description of the fee agreement. He had further concerns after learning about Shinn's loan to Hanning. (RR 56, lines 15-25.) Shinn was supposed to bring MacKenzie a check for the money owed to the Danes. When

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(...continued)
Oscar Dane then confirmed that Shinn was entitled to one-third of the Dane funds. (16RHT 1996.)

[40] The Referee found that "the tenor of Shinn's comment does not reflect concern about a criminal prosecution." (RR 56, lines 13-14.) The Referee also found that when Shinn spoke to investigator Payne about the Dane matter, Shinn did not express a concern about being prosecuted. (RR 57, lines 23-25.)

Shinn failed to produce the check, MacKenzie became even more suspicious. Shinn claimed the items were destroyed by a fire in his office. MacKenzie disbelieved Shinn's explanation for his failure to produce his file and a check but it turned out there had been a fire. The check, however, was stolen and cashed by Linda Sue Jones, the wife of Shinn's landlord or law partner. (RR 57, lines 6-15.)[41]

Martin Laffer, a certified public accountant, created a spreadsheet to track the movement of the funds belonging to the Danes. (8RHT 928-938.) Laffer eventually concluded Shinn was moving around money into so many different accounts that it was very difficult to determine how much money was misappropriated. (18RHT 2304.)

MacKenzie, who believed a crime may have been committed, did not file criminal charges against Shinn because Oscar Dane had mental health issues that would have affected his credibility and ability to participate in any such criminal prosecution.[42] Specifically, because Oscar Dane could not provide consistent testimony, MacKenzie determined he could not confirm the portion of the Dane award that would have been rightfully due to Shinn. (16RHT 2013.) Accordingly, no charges in the Dane matter were filed due to problems of proof. (16RHT 2018-2019.)

While tracing the Dane funds, MacKenzie determined Shinn had used $70,000 of the Dane funds to make payment to another eminent

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[41] The Referee refers to Linda Sue Jones as the wife of Shinn's tenant. In fact, she was the wife of his landlord.

[42] As noted, Oscar Dane initially refused to accept any of the funds. Dane subsequently changed his mind and agreed to accept the funds from Shinn but then changed his mind again. (16RHT 1992.) MacKenzie grew so concerned about Oscar Dane's mental health that he sought the assistance of the Public Guardian. (16RHT 1981.) At a meeting MacKenzie set up to attempt to arrange for low-income housing for the Danes, Oscar Dane went "ballistic" and physically charged at a representative of the city. (16RHT 1994.)

domain client, the Korchins. Alexander Korchin had given Shinn $100,000 in an attempt to avoid taxes and conceal it from Rebecca Korchin in divorce proceedings. When the Korchins reconciled, Alexander Korchin demanded that Shinn return the money. When Shinn failed to do so, Alexander Korchin complained to the State Bar. The Bar disciplined Shinn in the Korchin matter in 1977. (RR 61, lines 21-26.)

MacKenzie would have charged Shinn with crimes relating to Shinn's misappropriation of client funds relating to Alexander and Rebecca Korchin, but the statute of limitations for criminal charges in that matter had expired. (16RHT 2018-2019.)

Petitioner was prosecuted by Deputy District Attorney John Watson. Watson was not aware of MacKenzie's investigation into the Dane matter or the Korchin matter. MacKenzie was not aware of Shinn's representation of petitioner.[43] Watson and MacKenzie did not speak with each other regarding petitioner's case or regarding the district attorney's investigation of Shinn. Although both Watson and MacKenzie were prosecutors employed by the same large agency, they did not know each other. There was no evidence presented at the reference hearing showing that Watson, MacKenzie, or anyone else in the District Attorney's Office, had a *quid pro quo* relationship with Shinn such that Shinn would gain an advantage as a target or defendant if Shinn were to act adversely to petitioner's interests. Nor was there any evidence Shinn believed that performing adversely to petitioner would benefit Shinn in his own case.

MacKenzie and Watson testified at the reference hearing. At no time during MacKenzie's investigation of Shinn was he aware that Shinn

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[43] The Referee also found that "there is no evidence in the trial record indicating the trial court or petitioner were aware of the Dane investigation during the 1985 trial." (RR 60, lines 5-9.)

was representing any defendant in a capital murder case. (16RHT 2014.) Had Shinn ever sought leniency in his own investigation in exchange for performing poorly in any case, MacKenzie would have immediately reported Shinn to the State Bar and to the District Attorney's Office. (16RHT 2015-2016.) The Referee found MacKenzie credible when he testified he would have vigorously pursued criminal charges against Shinn on the Korchin matter but for the statute of limitations. (RR 60, lines 24-26.) At the time of the 1985 trial, Watson was unaware of MacKenzie's investigation of Shinn—Watson only learned of Shinn's wrongdoing in the newspaper after petitioner's case was over. (15RHT 1887.) Watson would not have agreed to allow Shinn to perform deficiently when representing petitioner in exchange for help from Watson in MacKenzie's investigation. (15RHT 1903-1904.)

The Referee found there was "no evidence" of any agreement or understanding "suggesting" (much less showing) the Los Angeles County District Attorney's Office declined to prosecute Shinn in exchange for "the surrender of" petitioner's case at trial." (RR 61, lines 3-5.) The Referee found that although Shinn's conduct in the Dane matter was unprofessional and a violation of a court's orders and the Rules of Professional Conduct, "it did not constitute a viable criminal prosecution and was therefore not the basis for an actual conflict of interest between Shinn, the office of the District Attorney or petitioner's 1985 guilt phase interests." (RR 61, lines 3-10.)

2. The Theft of the Dane Check and Murder of Lewis Jones

As noted above, Shinn was supposed to deliver a check to MacKenzie for the Dane funds. The check (for $145,285) went missing. Linda Jones was later convicted of stealing the check. Linda Jones was the wife of Lewis Jones, who was either Shinn's law partner or landlord. Linda

Jones was also convicted of first degree murder of Lewis Jones. (RR 62, lines 6-18.)

The prosecutor in the Lewis Jones murder and theft criminal case testified at the reference hearing, as did her trial counsel, Harland Braun. Both testified there was no evidence that Shinn was involved in either the murder or the theft of the check. (14RHT 1820; 15RHT 1861.)

C. Petitioner Has Failed to Show a Conflict of Interest

It is true that the State Bar prosecuted Shinn, and called Oscar Dane as a witness. It does not follow that Shinn could have been criminally prosecuted by the Los Angeles County District Attorney. As this Court is aware, State Bar disciplinary proceedings differ greatly from criminal prosecutions in terms of burden of proof, definition of offenses and other respects. MacKenzie lacked confidence in Oscar Dane's mental competence, and for good reason. Oscar Dane's erratic behavior—in agreeing to accept and then refusing to accept the funds, in offering different versions of the fee agreement at different times, in describing his knowledge of the $50,000 loan, and in attempting to physically attack a person—all had to be considered when deciding whether to proceed with criminal charges against Shinn. MacKenzie used his independent judgment when he evaluated Oscar Dane. That evaluation had nothing to do with Shinn or with petitioner's case. The burden on a State Bar prosecutor is to persuade an administrative officer by clear and convincing evidence, a standard considerably lower than the beyond a reasonable doubt standard of criminal trials.

Petitioner did not present any evidence that MacKenzie declined to charge Shinn with embezzlement from the Danes as a reward for Shinn's allegedly lackluster performance in petitioner's case. In the absence of any such evidence, or supportive findings by the Referee, petitioner is reduced to claiming that Shinn was operating under a conflict of interest only

because he is being investigated by the District Attorney's Office at the time he represented petitioner. But *Doolin* and *Mickens* preclude relief.

As explained in *Mickens,* an ethical violation does not necessarily establish a violation of the Sixth Amendment. (*Mickens, supra,* 535 U.S. at p. 176, citing *Nix v. Whiteside* (1986) 475 U.S. 157, 165 [106 S.Ct. 988, 89 L.Ed.2d 123] ("[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel".).) Mere investigation by a prosecutorial agency does not create an inherent conflict of interest. Shinn was not being prosecuted by the District Attorney's Office when he represented petitioner. *Harris* is therefore inapplicable. Aside from the fact that being investigated and being charged are different, reliance on *Harris* in also misplaced because *Harris* found that an actual conflict existed based on a theoretical division of loyalties—an approach rejected by *Doolin* and *Mickens.* (Compare, *Doolin, supra,* 45 Cal.4th at p. 417 ["In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance—as* opposed to a mere theoretical division of loyalties.' [Citing *Mickens*]" with *Harris, supra,* 225 Cal.App.4th at p. 1140 ["It is the *threat* that the attorney's conduct *might* be affected by the conflicting interests that give rise to an 175 actual conflict"].)

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

Nor can petitioner contend that this Court's earlier decision in his case, provides a standard requiring relief. *In re Gay* was decided almost 20 years ago, in 1998, when the standard for finding an actual conflict involved determining whether there was a "potential conflict" and then

performing an "informed speculation" analysis of counsel's performance. (*Doolin, supra,* 45 Cal.4th at p. 419.) Thereafter, in *Doolin,* this Court revisited the standard, and concluded that the concepts used under the prior analytical framework had "proven elusive" and had been "somewhat variously applied" by the courts. (*Ibid.*) Consequently, *Doolin* adopted the *Mickens* framework. In doing so, this Court expressly disapproved earlier cases that had employed a different standard. (*Id.* at p. 421.) The issue in this case, therefore, is whether petitioner's right to counsel was denied because Shinn was performing under an actual conflict of interest, i.e., a conflict that adversely affected his performance during the guilt phase of the 1985 trial. Petitioner has not met his burden to establish that a conflict of interest existed that adversely affected Shinn's performance.

This case can be contrasted with the Court of Appeal's decision in *Almanza.* There, just prior to a defense investigator being called to testify, the prosecutor threatened to prosecute both the defense investigator and the defense attorney for disclosing confidential victim information relating to an interview of witness "Jane Doe," a person whose identity was supposed to be confidential. (*Almanza, supra,* 233 Cal.App.4th at p. 1002.) In response to this threat of prosecution, defense counsel agreed not to call the defense investigator.

On appeal, the *Almanza* court held:

> "[H]ere, 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.

(*Almanza, supra,* 223 Cal.App.4th at p. 1002.)

This case, unlike *Almanza,* involves a theoretical conflict. There is no indication that either Watson or MacKenzie were scrutinizing Shinn's

performance in petitioner's case in order to determine whether to charge him with misappropriation of client funds. The Shinn investigation had nothing to do with the facts of petitioner's case. Each case was prosecuted by lawyers who did not know each other, much less did they know of Shinn's involvement in both cases. There were no cross-over witnesses, no investigation performed by the same law enforcement officers, and no overlapping evidence. The prosecutors were different, never communicated with each other, and did not even know each other. (16RHT 2014-2015.) No causal link exists between Shinn's defense of petitioner in a murder case and his role as the subject of an unrelated investigation. Any conflicting interest on the part of Shinn was theoretical, and petitioner cannot establish by a preponderance of the evidence that Shinn believed that presenting a poor defense would benefit Shinn in his status as a potential defendant. This is yet another of the Referee's findings that was overwhelmingly supported by the evidence.

The evidence of an alleged conflict, summarized above, did not demonstrate that the criminal investigation of Shinn adversely affected Shinn's representation of petitioner, much less actually prejudice petitioner. Under *Doolin,* to determine whether the Sixth Amendment was violated because of an adverse effect on counsel's performance, a court must examine the record to determine (1) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (2) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission. (*Doolin, supra,* 45 Cal.4th at p. 418.) Thus, a finding of adversely affected performance necessarily includes a finding that unconflicted counsel would not have performed in the same way, and a finding that there was no tactical reason for the deficient performance.

Here, there is no evidence establishing a link between anything that might be considered deficient performance by Shinn and the investigation of Shinn. There were multiple tactical reasons for Shinn's strategy and the choices he made in defending petitioner during the guilt phase of the 1985 trial. Petitioner has enumerated various examples of the impact of the alleged conflict on Shinn. Each lacks merit, and was therefore rejected by the Referee. As explained in detail below, petitioner has failed to meet his burden of establishing that the theoretical conflict adversely affected Shinn's performance.

D. The Allegation That the Alleged Conflict Affected Shinn's Performance Was Rejected by the Referee

Petitioner contends the alleged conflict of interest affected Shinn's representation of petitioner, as demonstrated by various examples of allegedly inadequate performance. Every allegation was rejected by the Referee, who found that none of the alleged deficiencies was related to the alleged (and unproven) conflict.

1. The Allegation That Shinn Fell Asleep during Portions of the Trial Was Not Supported by Evidence and Was Rejected by the Referee

Payne testified that at the hearing that he had observed Shinn sleeping during the trial. Trial counsel for Cummings also testified at the hearing that he saw Shinn sleeping during the trial, and that he had joked about this with Watson. Neither Payne nor Price ever made such an allegation during the trial or for years following the trial. Watson testified at the hearing that he never saw Shinn sleeping and never joked about this with anyone. The Referee noted that petitioner, who was never reluctant to interject, never alleged during the trial that Shinn had ever fallen asleep during proceedings, nor did any juror ever allege Shinn had fallen asleep. And the trial court never observed that Shinn fell asleep. The Referee

concluded that the trial record "does not support a finding that Shinn slept during the trial." (RR 64, line 1.) Petitioner did not produce any evidence even remotely supporting a bizarre claim that Shinn intentionally fell asleep to curry favor with prosecutors.

2. The Allegation That Shinn Failed to Present Expert Testimony Has Been Rebutted As a Legitimate Tactical Decision and Was Rejected by the Referee

Respondent has explained above why an unconflicted attorney would have declined to offer opinions similar to those offered by Pezdek, Solomon, Michel or Fackler, and why such decisions are tactical. (See *People v. Hart* (1999) 20 Cal.4th 546, 623-624.) Respondent incorporates those arguments in full here. When the issue is alternatively framed as an allegation of conflicted counsel, petitioner equally fails to demonstrate that Shinn's choice to forgo the testimony of any expert was motivated by, or causally linked to the investigation of Shinn.

Petitioner's theory is that Shinn decided not to present experts, in order to enrich himself. The theory was rejected as a factual matter by the Referee. The Referee correctly pointed out that since expert funding is from the trial court, Shinn would not have had any financial incentive to decline to hire experts for trial. (RR 64, lines 13-14.)

In *Almanza*, cited in response to Question 4, the defense attorney avoided criminal prosecution by foregoing the testimony of his defense investigator. None of the experts proffered by petitioner at the reference hearing had any connection with the investigation of Shinn, and there is no indication anywhere in the record that foregoing their testimony would have benefited Shinn in any way. Shinn had reasonable tactical reasons to forego the testimony of Drs. Pezdek, Solomon, Michel and Fackler or their equivalents.

3. The Allegation That Shinn Induced Petitioner to Confess to Robberies in Order to Benefit Shinn

In prior habeas corpus proceedings, a different Referee (Judge Stephen Czueleger) found that Shinn induced Petitioner to confess to charged and uncharged robberies. The Referee concluded Shinn had advised petitioner that it would be in his best interest to cooperate with the prosecution and that Shinn might be able to work out a better deal on the pending capital murder case as a result. Shinn told petitioner that his statements could not be used against him if the prosecution decided not to use petitioner as a witness. At the outset of the interview, petitioner was advised of his rights against self-incrimination and told his statement could be used against him if the prosecution decided not to use him as a witness. Neither the prosecutor nor the investigators gave Shinn any reason to believe petitioner's statement would not be used against petitioner. Shinn alleged that past experiences with the District Attorney's Office led him to believe the statement would not be used in the absence of an agreement, and that he so advised petitioner. (*In re Gay, supra*, 19 Cal.4th at p. 792.)

This Court has already addressed Shinn's failure to secure an agreement in exchange for petitioner's statement regarding the robberies, and petitioner obtained relief on the claim as an instance of ineffective representation. There is no basis for allowing petitioner to relitigate the claim, this time as a conflict of interest. Petitioner's theory that Shinn's failure exhibited a conflict rather than only ineffectiveness, is beyond farfetched. Shinn would have no rational reason to believe that if he delivered a confession to the prosecutor in the murder case, things would go better for Shinn in Shinn's case. On the contrary, the opposite is true. If Shinn intentionally sacrificed petitioner on the robberies, he would have undoubtedly been reported to the State Bar and prosecuted. And if Shinn had attempted to curry favor with the authorities by providing the State

with petitioner's confession, there would have been no reason for Shinn to then allege—as he did—that he had an agreement with the prosecution that rendered the confession inadmissible. Proffering a confession useful to the prosecution and then arguing that the prosecutor had breached an immunity agreement would not endear Shinn to the prosecution.

4. The Referee Fairly Rejected the Contention That Shinn's Billings Or Representation Reflected a Conflict of Interest, Or That Shinn's Handling of Motions Reflected a Conflict

Petitioner alleged that Shinn's conflict was evident in his handling of virtually every fact of the defense—his billing, his questioning of witnesses, his examination of witnesses, his handling of motions, his failure to object to evidence and even his closing argument—reflected a conflict of interest. The Referee found no support for any of the various allegations that Shinn performed poorly at trial because of the alleged conflict. (RR 66-75.) The Referee concluded his Report with his finding that "none" of Shinn's conduct in his representation of petitioner can "be linked to the embezzlement investigation or characterized as an attempt to curry favor with the prosecutors." (RR 75, lines 15-17.)

Petitioner raises a series of allegations, under the guise of an alleged conflict of interest, that are instead properly viewed (and rejected) as allegations of ineffective assistance of counsel. Although each claim lacks merit whether considered as an allegation of ineffectiveness or a claim of conflict, it is important to note that when, although as an alleged conflict, none of these claims is supported by a factual showing that they should be treated as conflict claim. Absent such a showing, these are merely claim of ineffective counsel that have been labeled as allegation of a conflict of interest.

5. Declining to Offer Petitioner As a Witness at Trial

During his opening statement, Shinn told the jury petitioner would testify. (RT 6299-6300.) Petitioner did not subsequently testify. Petitioner attributed his failure to testify to Shinn's allegedly conflicted state, availability that ineffective counsel would have called petitioner as a witness. But as the Referee pointed out, if petitioner had testified, he would have been subject to extensive impeachment evidence and extensive evidence of guilt.[44] In light of the significant damage that would have resulted from petitioner's testimony, Shinn's obvious reconsideration of the initial intention was reasonable.

The Referee found no evidence of a conflict regarding the decision to refrain from calling petitioner as a witness, and also found no prejudice resulted. Both conclusions are amptly supported by the record.

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[44] . . . [H]ad petitioner testified the prosecution could have sought to impeach with petitioner's felony criminal record, his parole status, his confessions to the numerous robberies, the crime partner nature of his relationship with Raynard Cummings, and his re-enactments of the shooting in front of various witnesses. Petitioner would have needed to explain how it was Officer Verna's police service revolver was recovered at the place petitioner has been hiding in Robin Gay's green Plymouth. Petitioner would have need to explain his suicide attempt and his comments to the treating physician. Watson would likely have asked petitioner about any conversations between petitioner and Raynard Cummings and asked whether petitioner had said he agreed with shooting the police officer as reported by potential inmate witness John Jack Flores. Watson would like have asked petitioner about his association with Raynard Cummings during the robbery spree and to explain his continued association even after the murder of Officer Verna.

(RR 67, line 14 - RR 68, line 1.)

6. Presenting Testimony from Detective Jack Holder

The Referee rejected petitioner's allegation that the defense testimony of Detective Jack Holder damaged the defense, and the Referee found no evidence that calling Detective Holder as a defense witness evidenced a conflict on Shinn's part. The Referee instead decided that the trial record largely did not support petitioner's claim, and that Shinn utilized Detective Holder effectively to support the defense argument that, regardless of Detective Holder's general confidence as a police officer, Detective Holder did not support the theory that Cummings passed the gun to petitioner during the shooting. (RR 68, line 5 – RR 69, line 4.)

7. Shinn's Alleged Failure to Make Better Motion or Raise Better Objections

The Referee found that petitioner failed to identify any additional and potentially meritorious motion that Shinn should have presented. (RR 69, lines 6-14, 20-25.) The Referee also rejected petitioner's claim that Shinn should have objected to evidence. (RR 74, lines 18-26.)

a. The Reenactment

On appeal, petitioner contended the trial court had erred in permitting the prosecution to conduct a reenactment of the crime. This Court rejected the appellate claim, concluding the reenactment was permissible in order to assist the jury in understanding the testimony of witnesses as to clarifying the circumstances of the crime. (*People v. Cummings, supra*, 4 Cal.4th at p. 1291.)

The Referee also rejected the claim (when styled as an example of the alleged conflict) based on this Court's rejection of the claim. The Referee was correct, and petitioner failed to present any evidence at the hearing that warranted reconsideration of the claim that had been rejected on appeal.

8. Impeachment

Petitioner claims Shinn's failure to impeach Robert Thompson's identification of petitioner as the outside shooter.

The Referee found, directly contrary to petitioner's claim, that Shinn expressly and extensively challenged the trial testimony of Robert Thompson, and the Referee also concluded there was no evidence that Shinn's cross-examination of Thompson was in any way compromised by Shinn's alleged conflict. (RR 71-72.)

Finally, the Referee concluded—as to the entirerity of petitioner's conflict claims—that petitioner had failed to establish any relationship he knew the alleged conflict and Shinn's representation of petitioner. (RR 75, lines 14-17.)

CONCLUSION

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

Dated: June 24, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General

David F. Glassman by VBW

DAVID F. GLASSMAN
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached EXCEPTIONS TO REPORT OF THE REFEREE AND BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 25,829 words.

Dated: June 24, 2016

KAMALA D. HARRIS
Attorney General of California

David F. Glassman
by VBW

DAVID F. GLASSMAN
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

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

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

On June 24, 2016, I caused one electronic copy of the **EXCEPTIONS TO REPORT OF THE REFEREE AND BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On June 24, 2016, I served the attached **EXCEPTIONS TO REPORT OF THE REFEREE AND BRIEF ON THE MERITS** by transmitting a true copy via electronic mail to:

Gary D. Sowards
Jennifer Molayem
Attorneys at Law
docketing@hcrc.ca.gov
(Attorneys for Petitioner)

Hon. Jackie Lacey, District Attorney
John Colello, Assistant Head Deputy
Darren Levine
Renee Rose
Lawrence Morrison
Deputy District Attorneys
(courtesy copy)

On June 24, 2016, I served the attached **EXCEPTIONS TO REPORT OF THE REFEREE AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Sherri R. Carter, Clerk of the Court
Los Angeles County Superior Court
for delivery to: Hon. Lance A. Ito, Judge
111 N. Hill Street
Los Angeles, CA 90012

LaQuincy Stuart, Death Penalty Clerk
Los Angeles County Superior Court
Criminal Appeals Unit
Clara S. Foltz Criminal Justice Center
210 West Temple Street, Room M-6
Los Angeles, CA 90012

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 24, 2016, at Los Angeles, California.

Irene Rangel
Declarant

Signature

DFG:ir
LA2005XH0001

SUPREME COURT COPY

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June 27, 2016

Frank A. McGuire
Court Administrator and Clerk of the Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *In re Kenneth Earl Gay, On Habeas Corpus*
Supreme Court of the State of California, Case No. S130263

Dear Mr. McGuire:

Counsel for Respondent submits this notice of errata to correct errors in the previously submitted Respondent's Exceptions to Report of the Referee and Brief on the Merits. The correction is shown in boldface.

On page 14 of the brief, the first sentence in the paragraph should read as: "Shinn clearly recognized the need to impeach Pamela Cummings, in light of her vantage point from **outside** the car during the murder and her devastating testimony."

On page 38, the sentence "That is also more consistent with accounts of Cummings's movement" should read as: That is also more consistent with accounts of **petitioner's** movement."

On page 50, in the last paragraph, the first sentence should read as "In any event, Holt's alleged statement to Anderson was **insignificant** to her credibility."

On page 53, the last sentence of the second paragraph should read as "Based on the credible testimony of Rosa Martin (14RHT 1740), Respondent's Exhibit 762 [photograph depicting the Beasley home without bars in June or July 1983 **and testimony of Mark Mynhier**]."

On page 65, in the first paragraph, the sentence should read as "In fact, Fackler conceded that gunshot wounds 1 and 3 may have been inflicted before or after gunshot wound 2, **and did not know** whether 1 and 3 came before or after 2, 4 or 5."

DEATH PENALTY

Lastly, on page 85 of the brief, in the last paragraph, the sentence should read as "Finally, the Referee concluded—as to the **entirety** of petitioner's conflict claims—that petitioner had failed to establish any relationship **between** the alleged conflict and Shinn's representation of petitioner."

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JAMES WILLIAM BILDERBACK II
Supervising Deputy Attorney General

DAVID F. GLASSMAN
Deputy Attorney General
Attorneys for Respondent

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62030658.doc

DECLARATION OF SERVICE

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

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

On June 27, 2016, I caused the original and eight (8) copies of the **LETTER RE: NOTICE OF ERRATA** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by Federal Express; Tracking Number 8989 0364 8896.

On June 27, 2016, I served the attached **LETTER RE: NOTICE OF ERRATA** by transmitting a true copy via electronic mail to:

Gary D. Sowards
Jennifer Molayem
Attorneys at Law
docketing@hcrc.ca.gov
(Attorneys for Petitioner)

Hon. Jackie Lacey, District Attorney
John Colello, Assistant Head Deputy
Darren Levine
Renee Rose
Lawrence Morrison
Deputy District Attorneys
(courtesy copy)

On June 27, 2016, I served the attached **LETTER RE: NOTICE OF ERRATA** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

Michael G. Millman
Executive Director
California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 27, 2016, at Los Angeles, California.

Irene Rangel
Declarant

Signature

DFG:ir
LA2005XH0001