IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **KENNETH EARL GAY,** On Habeas Corpus.	**CAPITAL CASE** S130263

Los Angeles County Superior Court No. A392702
The Honorable Dana Senit Henry

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

BILL LOCKYER, Attorney General
of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General
LANCE E. WINTERS
Supervising Deputy Attorney General
State Bar No. 162357

300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 576-1347
Facsimile: (213) 576-1300

Attorneys for Respondent

DEATH PENALTY

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PRELIMINARY STATEMENT

On June 2, 1983, petitioner and Raynard Cummings ("Cummings") shot and killed Police Officer Paul Verna. Pamela Cummings ("Pamela") was driving with petitioner in the passenger seat and her husband Cummings in the back seat when they were pulled over by Police Officer Paul Verna for a traffic violation. After Pamela exited the car and spoke to Officer Verna, the officer approached the car. The theory of the prosecution and the evidence at trial showed that Cummings shot Officer Verna as the officer leaned in the car; Cummings gave the gun to petitioner who exited the car and fired five more shots into the injured Officer Verna.

Petitioner was convicted of the first degree murder of Officer Verna (Pen. Code, § 187).[1/] The jury also found true the special circumstances that the murder was committed for the purpose of avoiding unlawful arrest (§ 190.2, subd. (a)(5)) and that the murder was an intentional killing of a peace officer engaged in the performance of his duties by one who knew or should have

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1. All statutory references will be to the Penal Code, unless otherwise noted.

known the officer was so engaged (§ 190.2, subd. (a)(7)). The jury also found that a principal was armed with a firearm (§ 12022, subd. (a)) and that petitioner personally used a firearm (§ 12022.5, subd. (a)). Petitioner was sentenced to death. Petitioner's murder conviction, the special-circumstance and firearm findings, and the sentence were affirmed on appeal. (*People v. Cummings* (1993) 4 Cal.4th 1233.)

On December 30, 1992, petitioner filed a petition for writ of habeas corpus in case number S030514. The Court ordered a reference hearing to resolve questions posed by the Court. While that hearing was pending, petitioner, acting in pro per, filed a second petition for writ of habeas corpus in case number S049121; the petition was filed and denied on August 28, 1995. On December 24, 1998, this Court ruled on petitioner's first petition for writ of habeas corpus and affirmed the conviction, and the special-circumstance and firearm findings, but reversed the death sentence. (*In re Gay* (1998) 19 Cal.4th 771.)[2/]

On December 28, 2004, petitioner filed a Petition for Writ of Habeas Corpus. On December 29, 2004, this Court requested an informal response, pursuant to Rule 60 of the California Rules of Court. Respondent respectfully files the instant response.[3/]

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2. A new jury trial on the penalty was held and the jury again fixed the penalty at death. The trial court sentenced petitioner to death for the murder of Officer Verna. Petitioner has filed an automatic appeal (§ 1239, subd. (b)), which is pending before this Court in case number S093765. The instant petition does not raise any claims attacking the penalty retrial.

3. Petitioner filed a subsequent petition on January 11, 2005, in case number S130598; the Court has requested an informal response to that petition as well.

ARGUMENT

I.

PETITIONER'S CLAIMS ARE UNTIMELY

In the instant petition, petitioner is only attacking his conviction for murder and the special-circumstance findings; he is *not* attacking the judgment of death rendered on December 4, 2000, after a retrial. Petitioner's conviction for murder and the special-circumstance findings were returned on May 31, 1985. (CT 2183-2185.) This Court decided petitioner's appeal from his conviction on April 29, 1993. Petitioner's first state habeas petition, which in part attacked his conviction and special-circumstance findings, was decided on December 24, 1998. Thus, petitioner took six years after his first habeas petition was denied to file the instant petition.

Despite this, petitioner contends, in a single sentence, that the instant petition is timely filed:

> Consistent with this Court's Policies, and applicable case law, this petition is timely filed within the presumptively timely period, and the claims presented herein are otherwise cognizable by virtue of petitioner's actual innocence as well as factual innocence within the meaning of *In re Clark* (1993) 5 Cal.4th 750.

(Petn. 14.)[4/]

Respondent submits the filing of this third habeas petition was substantially delayed, and petitioner fails to demonstrate either that the delay was justified by good cause or excusable under any factor recognized by this Court. In a capital case, the timeliness of a petition for a writ of habeas corpus is evaluated according to a four-pronged test set forth in *In re Robbins* (1998)

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4. Respondent will cite to the petition in the instant case as "Petn." and will refer to petitioner's first state petition, in case number S030514, as "1st Petn."

18 Cal.4th 770, 780-781. As stated in *In re Sanders* (1999) 21 Cal.4th 697, 704-705, which discusses *Robbins* and *Clark*, "In capital cases, a habeas corpus petitioner bears the burden of establishing the timeliness of his or her petition, which timeliness can be shown in one of four ways (in descending order) . . . ." First, a petition is presumptively timely if it is filed "within 180 days after the final due date for the filing of appellant's reply brief on the direct appeal, or within 24 months after appointment of habeas corpus counsel, whichever is later." (Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3, § 1-1.1.) The petitioner can also show timeliness in the remaining three ways:

> (ii) even if not presumptively timely, the petition was filed without substantial delay; (iii) even if the petition was filed after a substantial delay, good cause justifies the delay; or (iv) even if the petition was filed after a substantial delay without good cause, the petitioner comes within one of the four *Clark* exceptions.

(*In re Sanders*, *supra*, 21 Cal.4th at p. 705.) Here, petitioner has failed to establish the timeliness of the instant petition in any of the four ways articulated in *Robbins*.

A. The petition is neither presumptively timely nor was it filed without substantial delay or with good cause

As previously stated, petitioner's appeal was decided in 1993; his reply brief on appeal was filed on September 16, 1991. The instant petition was not filed, however, until December 2004, over 13 years after the deadline for presumptive timeliness. Thus, the petition is not presumptively timely.

Moreover, petitioner has not attempted to show the petition was filed without substantial delay. Delay is measured from the time petitioner knew of should have known the information supporting the claims:

> Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, *with specificity*, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time.

(*In re Robbins*, *supra*, 18 Cal.4th at p. 780, italics in original.) Here, petitioner does not make any assertions about when his claims were discovered. Therefore, he has failed to show the petition, filed 13 years after his appeal, was filed without substantial delay.

Finally, petitioner has failed to show good cause. Petitioner has the burden to establish good cause for any delay. (*In re Sanders, supra,* 21 Cal.4th at p. 722.) Petitioner does not even assert that he has good cause for any delay.

B. Petitioner has not established that any of the exceptions to the timeliness bar apply to this case

As discussed above, petitioner has not established that the instant petition is presumptively timely, was filed absent substantial delay, or that good cause exists to justify his delay. Furthermore, petitioner has also not established that any of the four recognized exceptions to the timeliness bar apply in this case.

This Court has recognized four exceptions that constitute a "fundamental miscarriage of justice" that will excuse substantial delay without good cause:

> A claim that is substantially delayed without good cause, and hence is untimely, nevertheless will be entertained on the merits if the petitioner demonstrates (i) that error of constitutional magnitude led to a trial that was so fundamentally unfair that absent the error no

reasonable judge or jury would have convicted the petitioner; (ii) that the petitioner is actually innocent of the crime or crimes of which he or she was convicted; (iii) that the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent the trial error or omission, no reasonable judge or jury would have imposed a sentence of death; or (iv) that the petitioner was convicted or sentenced under an invalid statute.

(*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781, italics omitted; accord, *In re Sanders*, 21 Cal.4th at pp. 704-705; *In re Clark*, *supra*, 5 Cal.4th at pp. 797-798.) Petitioner has the burden of establishing that an exception to the untimeliness bar applies. (*In re Robbins*, *supra*, 18 Cal.4th at p. 779; *In re Sanders*, *supra*, 21 Cal.4th at pp. 704-705.) Petitioner has not carried his burden in this case.

Petitioner claims that his petition falls within the "actual innocence" exception. (Petn. 14.)

To show actual innocence, the petitioner must provide evidence that will:

"undermine the entire prosecution case and point unerringly to innocence or reduced culpability." [Citation.] Evidence relevant only to an issue already disputed at trial, which does no more than conflict with trial evidence, does not constitute "'new evidence' that fundamentally undermines the judgment.'" [Citation.]

(*In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33; accord, *In re Robbins*, *supra*, 18 Cal.4th at p. 812.) Moreover, the petitioner bears a "heavy burden" to show innocence:

Again, the petitioner would bear a heavy burden of satisfying the court that the evidence of innocence could not have been, and presently cannot be, refuted. The requirement that a petitioner demonstrate his or

her innocence requires more than a showing that the evidence might have raised a reasonable doubt as to the guilt of the petitioner. The petitioner must establish actual innocence, a standard that cannot be met with evidence that a reasonable jury could have rejected.

(*In re Clark, supra*, at p. 798, fn. 33.) In *In re Robbins, supra*, 18 Cal.4th at page 812, petitioner failed to establish that petitioner was actually innocent where he alleged perjury by a police detective who testified to the petitioner's confession to a crime.

Here, petitioner alleges actual innocence in claim 1. (Petn. 15-34.) But he fails to meet his "heavy burden" to "undermine the entire prosecution case and point unerringly to innocence or reduced culpability. [Citation.]" (*In re Clark, supra*, 5 Cal.4th at p. 798, fn. 33.)

Petitioner relies in part on witnesses presented at trial: Shequita Chamberlain and Oscar Martin, whose testimonies allegedly suggest Cummings was the sole shooter (Petn. 17-18); and Deputy McMullan, Deputy La Casella, Gilbert Gutierrez, who all testified to admissions by Cummings that allegedly suggest Cummings was the sole shooter (Petn. 20-21). Of course, the jury already had the opportunity to view this evidence to resolve the question of whether Cummings was the sole shooter. And the jury resolved the issue against petitioner. Petitioner alleges there are additional witnesses who could offer similar testimony, that the dark-skinned Black man (Cummings) was the one who did the shooting, and that Cummings made other statements suggesting he was the sole shooter. (Petn. 18-22.) However, this additional evidence, while perhaps providing additional support for the evidence that was already presented, would not "undermine the entire prosecution case and point unerringly to innocence."

In addition, petitioner attacks the testimony of the witnesses at trial who did identify him as a shooter in the murder. Petitioner claims such witnesses:

were coerced into identifying petitioner (Shannon Roberts, Robert Thompson); made inconsistent statements and may have been under the influence of narcotics (Marsha Holt, Gail Beasley); or were biased (Pamela Cummings). (Petn. 23-31.) Again, while petitioner may be able to now provide additional impeachment of witnesses who testified at trial, such evidence does not "point unerringly to innocence."

Finally, petitioner relies on expert testimony of: Dr. Solomon, who opines that petitioner could not have physically performed the shooting as described by the witnesses; and Dr. Michel, who could offer expert testimony impeaching the reliability of the eyewitness testimony. (Petn. 31-33.) But Dr. Solomon's opinion is based on an assumption about the amount of time between the first and second shots— an assumption that a jury might easily reject. Similarly, the jury could easily reject Dr. Michel's testimony. Indeed, at Gay's penalty phase retrial Dr. Michel testified (Penalty Retrial RT 3087-3153), but the jury still returned a verdict of death. As with petitioner's other allegations, these additional witnesses would not "undermine the entire prosecution case and point unerringly to innocence." (See *In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4 [court rejected claim of innocence on the merits in prior state habeas petition].)

The Court has also said that it will consider claims of actual innocence based on newly discovered evidence notwithstanding delay. (*In re Clark*, *supra*, 5 Cal.4th at pp. 796-797.) However, petitioner does not allege anywhere in his claim of actual innocence that any of the evidence that purportedly shows his innocence has been *newly discovered*. Thus, claim 1 fails to demonstrate that petitioner falls within an exception to the bar against delayed petitions.

In sum, petitioner has failed to carry his burden to show actual innocence. He does not allege that he falls within any other exception to rules on timeliness. Therefore, because petitioner's petition is not presumptively

timely, was filed after substantial delay, does not show good cause, and does not fall within any exception to rules on timeliness, all of the claims in the petition should be denied as delayed.

II.

THE PETITION SHOULD BE DISMISSED AS SUCCESSIVE

A petitioner is not entitled to engage in piecemeal litigation by successive petitions attacking the validity of the judgment. (*In re Clark*, *supra*, 5 Cal.4th at p. 767.) Thus, new claims will not be considered in a successive petition: "The Court has also refused to consider newly presented grounds for relief which were known to the petitioner at the time of a prior collateral attack on the judgment. [Citations.]" (*In re Clark*, *supra*, 5 Cal.4th at p. 767; *In re Horowitz* (1949) 33 Cal.2d 534, 546-547; *In re Drew* (1922) 188 Cal. 717, 722.) Similarly, claims previously rejected will not be considered in a successive petition: "It has long been the rule that absent a change in the applicable law or facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected. [Citations.]" (*In re Clark*, *supra*, 5 Cal.4th at p. 767; *In re Lynch* (1972) 8 Cal.3d 410, 439, fn. 26; *In re Horowitz, supra*, 33 Cal.2d at p. 546; *In re Miller* (1941) 17 Cal.2d 734, 735.)

In *In re Clark*, *supra*, 5 Cal.4th at page 774, this Court held, "Before a successive petition will be entertained on its merits the petitioner must explain and justify the failure to present claims in a timely manner in his prior petition or petitions." Therefore, "in the future a habeas petitioner, . . . '"must show the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ."' [Citation.]" (*Id.* at p. 779.)

The instant petition is the third petition for writ of habeas corpus filed by petitioner in this Court. Yet petitioner has made no allegations as to when he discovered the facts that are the basis for any of his claims. Although most of the claims in the petition have previously been rejected by this Court in prior

petitions or on appeal, petitioner identifies no change in the law or facts. Thus, the instant petition is a successive petition.

As with delayed petitions, the only claims that will be considered in a successive petition are where the errors were a "fundamental miscarriage of justice." (*In re Clark*, *supra*, 5 Cal.4th at pp. 795-798.) As noted above, petitioner's only allegation of a fundamental miscarriage of justice is petitioner's allegation that he falls within the "actual innocence" exception. (Petn. 14.) However, as shown above (Argument I, B, *ante*), petitioner has failed to demonstrate actual innocence sufficient to excuse his successive petition. Therefore, petitioner has not shown a "fundamental miscarriage of justice," and his petition should be denied as successive.

III.

PETITIONER'S FAILURE TO RAISE CLAIMS AT TRIAL BARS THEIR CONSIDERATION ON HABEAS CORPUS

Petitioner's failure to raise several of his claims at trial bars their consideration on appeal. This Court recently clarified in *In re Seaton* (2004) 34 Cal.4th 193, 200, that the familiar rule requiring a defendant to object at trial in order to raise an error on appeal applies equally in the habeas context: "Thus, just as a defendant generally may not raise *on appeal* a claim not raised at trial [citation], a defendant should not be allowed to raise on *habeas corpus* an issue that could have been presented at trial." The only exception to this rule is "when a claim depends substantially on facts that the defense was unaware of and could not reasonably have known at trial, a failure to object at trial will not bar consideration of the claim in a habeas corpus proceeding." (*Ibid.*)

As to several of the claims raised in the petition, Petitioner could have raised the claim at trial, i.e., he was aware of the facts that were the basis of the claim, but he failed to do so. These claims are barred:

- In claim 6, petitioner claims the trial court's eight-day adjournment prior to jury deliberations violated petitioner's right to due process. (Petn. 140-141; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1306 [petitioner did not object to adjournment].)

- In claim 7, petitioner claims the presence of uniformed officers in court during trial denied petitioner his constitutional rights. (Petn. 141-143; *People v. Cummings, supra*, 4 Cal.4th at p. 1298, fn. 41 [petitioner did not object to presence of officers].)

- In claim 8, petitioner claims the prosecutor's use of misleading physical simulations denied petitioner his constitutional rights. (Petn. 143-148; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1291 [petitioner did not object to simulations].)

- In claim 18, petitioner claims the trial court's failure to give CALJIC No. 2.71.5 on adoptive admissions violated his constitutional rights. (Petn. 280-282; see RT 10218-10228 [petitioner did not request CALJIC No. 2.71.5 during discussion of jury instructions]; *People v. Carter* (2003) 30 Cal.4th 1166, 1198 [CALJIC No. 2.71.5 must be requested by defendant].)

- In claim 21, petitioner claims the failure to insure that all proceedings were on the record violated petitioner's constitutional rights. (Petn. 296-303; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1333, fn. 70 [petitioner failed to request proceedings be on the record].)

As to other claims, petitioner fails to state when he became aware of the facts supporting the claim. Therefore, these claims are also barred:

- In claim 4, petitioner claims the prosecution violated petitioner's constitutional rights by committing egregious acts of misconduct. (Petn. 130-137.)

- In claim 5, petitioner claims unconstitutional juror misconduct occurred during trial. (Petn. 137-139.)

IV.

PETITIONER'S CLAIMS SHOULD BE REJECTED AS APPELLATE CLAIMS OR BECAUSE THEY FAIL TO STATE A PRIMA FACIE CASE FOR RELIEF

Most of petitioner's claims should be rejected because they were either previously presented on appeal or could have been presented on appeal. Moreover, none of the claims state a prima facie case for relief.

A. Appellate claims are barred

Neither claims that were actually raised and rejected on appeal (*In re Waltreus* (1965) 62 Cal.2d 218, 225), nor issues that could have been but were not (*In re Dixon* (1953) 41 Cal.2d 756, 759), will be considered on habeas corpus. A claim that is or could have been raised on appeal should be brought in a petition for writ of habeas corpus only where reference to matters of substance outside the record is necessary. (*In re Robbins, supra*, 18 Cal.4th at p. 814, fn. 34; *In re Bower* (1985) 38 Cal.3d 865, 872.)

Claims barred by *Dixon* and *Waltreus* will not be considered absent "strong justification" or applicability of one or four narrow exceptions, where petitioner alleges: (1) a "clear and fundamental constitutional error which "strikes at the heart of the trial process"; (2) the court lacks fundamental jurisdiction; (3) the court acted in excess of jurisdiction; or (4) an intervening change in the law. (*In re Harris* (1993) 5 Cal.4th 813, 825-829, 836-841; *In re Clark, supra*, 5 Cal.4th at p. 765.) Petitioner does not allege that any of his appellate claims fell within an exception to the *Dixon* and *Waltreus* bars.

B. Petitioner must allege a prima facie case for relief

A habeas corpus proceeding is a collateral attack upon a criminal judgment, which, because of societal interest in the finality of judgments, is presumed to be valid. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark*,

supra, 5 Cal.4th at p. 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.) Such an attack is limited to challenges based on newly discovered evidence, claims going to the jurisdiction of the court, and claims of constitutional dimension. (*In re Clark, supra,* 5 Cal.4th at pp. 766-767.) Petitioner thus bears "a heavy burden" to plead sufficient grounds for relief. (*People v. Viscotti* (1996) 14 Cal.4th 325, 351; accord, *In re Cudjo* (1999) 20 Cal.4th 673, 687.) To satisfy this burden, petitioner is required to plead with particularity the facts supporting each claim and provide reasonably available documentary evidence, such as affidavits or declarations. (*People v. Duvall, supra,* 9 Cal.4th at p. 474.) Petitioner "must set forth specific facts which, if true, would require issuance of the writ," and a petition that fails in this regard must be summarily denied for failure to state a prima facie case for relief. (*People v. Gonzalez, supra,* 51 Cal.3d at p. 1258.) Conclusory or speculative allegations are insufficient, especially when, as here, the petition was prepared by counsel. (*Ibid.*; *People v. Duvall, supra*, 9 Cal.4th at p. 474; *People v. Karis* (1988) 46 Cal.3d 612, 656.)

A petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing the claims with facts to be developed later. (*In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.) A petitioner's obligation to provide specific factual obligations in the petition itself is not satisfied by generally "incorporating by reference" the facts set forth in the exhibits to the petition. (*In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12.)

C. Petitioner's claims should be rejected

Claim 1

In claim 1, petitioner claims he is factually innocent. (Petn. 15-34.) Petitioner raised a similar claim in his first state petition for writ of habeas

corpus. (1st Petn. 80-81, 224-28.) The Court rejected the claim on the merits. (*In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4.)

There is no United States Supreme Court case recognizing a claim for relief based on actual innocence. In fact, the United States Supreme Court refused to recognize such a claim in a capital case, in *Herrera v. Collins* (1993) 506 U.S. 390, 400 [113 S.Ct. 853, 122 L.Ed.2d 203]. There, the court found that a petitioner's remedy for actual innocence is to seek executive clemency, which California offers. (*Id.* at pp. 416-417; see *Milone v. Camp* (7th Cir. 1994) 22 F.3d 693, 700 [no writ may issue on ground petitioner is innocent in non-capital case].)

However, as noted above, this Court has said that it will consider claims of actual innocence based on newly discovered evidence. (*In re Clark*, *supra*, 5 Cal.4th at pp. 796-797.) Assuming a claim of actual innocence exists, a petitioner would have an "extraordinarily high" burden to make a "truly persuasive" demonstration of actual innocence. (*Herrera v. Collins*, *supra*, 506 U.S. at 417; see *Jackson v. Calderon* (9th Cir. 2000) 211 F.3d 1148, 1164-1165; *Griffin v. Delo* (8th Cir. 1994) 33 F.3d 895, 908; cf. *In re Clark*, *supra*, 5 Cal.4th at p. 798, fn. 33 ["heavy burden" to "undermine the entire prosecution case and point unerringly to innocence"].)

Again, as noted above, petitioner does not rely on newly discovered evidence. Nor does he meet the high burden necessary to make a "truly persuasive" demonstration of actual innocence. (Argument I, B, *ante*.) Therefore, his claim should be rejected.

Claim 2

In claim 2, petitioner claims his counsel's representation was unconstitutionally burdened by multiple conflicts. (Petn. 34-59.) Petitioner fails to plead a prima facie case.

"A criminal defendant's right to effective assistance of counsel, guaranteed by both the state and federal Constitutions, includes the right to representation free from conflicts of interest. [Citations.]" (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1009; accord, *People v. Frye* (1998) 18 Cal.4th 894, 998.) "Conflicts of interest broadly embrace all situations in which an attorney's loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. [Citation.]" (*People v. Bonin* (1989) 47 Cal.3d 808, 835; accord, *People v. Sanchez* (1995) 12 Cal.4th 1, 45; *People v. Clark* (1993) 5 Cal.4th 950, 994.)

The United States Supreme Court has held, "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 348, footnote omitted [64 L.Ed.2d 333, 100 S.Ct. 1708]; *Burger v. Kemp* (1987) 483 U.S. 776, 783 [97 L.Ed.2d 638, 107 S. Ct. 3114].)

However, "To establish a violation of the same right under our state Constitution, a defendant need only show that the record supports an 'informed speculation' that counsel's representation of the defendant was adversely affected by the claimed conflict of interest. [Citations.]" (*People v. Kirkpatrick*, *supra*, 7 Cal.4th at p. 1009; accord, *People v. Frye*, *supra*, 18 Cal.4th at p. 998.) But "a showing that the alleged conflict prejudicially affected counsel's representation of the defendant is also required. [Citations.]" (*People v. Clark*, *supra*, 5 Cal.4th at p. 995.)

First, petitioner claims his trial counsel was burdened by conflicts in that he used fraudulent means to secure his appointment. Also, he alleges counsel had an illegal capping arrangement to use certain individuals, who facilitated the fraudulent appointment, as mental health experts. (Petn. 36-42.) This claim was raised in petitioner's first state habeas petition. (1st Petn. 174-176.) The

Court rejected this claim on the merits. (*In re Gay, supra*, 19 Cal.4th at p. 780, fn. 6; see *id.* at p. 828 [noting counsel had potential conflicts of interest]; cf. *id.* at pp. 831-834 (conc. opn. of Werdeger, J.) [concluding penalty should be reversed based on trial counsel's conflict of interest].) For the same reasons, the Court should again reject this claim.

Second, petitioner claims his trial counsel had a conflict of interest in that he was being investigated by the district attorney's office, for embezzlement in one case, and arson and murder in another, at the same time he was defending petitioner. (Petn. 42-51; see *In re Gay, supra*, 19 Cal.4th at p. 828 [noting trial counsel had a potential conflict because he was being investigated for misappropriation of funds]; accord, *id.* at p. 832 (conc. opn. of Werdeger, J.).) Petitioner claims that, in order to curry favor with the district attorney's office, counsel: induced petitioner to confess to the robberies; failed to retain the necessary experts for trial; failed to investigate witnesses; failed to call witnesses at trial; elicited prejudicial evidence; and failed to join codefendant's counsel in several motions. (Petn. 54-59.)

As for the misappropriation investigation, petitioner fails to show a conflict of interest. Many of the events petitioner complains were a conflict occurred outside of time when trial counsel represented petitioner; the murder in this case occurred on June 2, 1983, and petitioner was found guilty of murder with a special circumstance on May 31, 1985 (RT 11007-11010). It appears that the investigation of counsel for misappropriation began sometime in October or November 1983, and searches for documents were still occurring as late as November 1985. (Ex. 80, ¶¶ 2, 12.) Thus, while some investigation occurred during petitioner's trial, it began before the trial and continued after the trial. Also, according to the investigator, counsel was generally uncooperative with the investigation. (Ex. 80, ¶¶ 3-12.) And finally, the investigation never lead to criminal charges because the time of the

misappropriation was so old that the statute of limitations had run. (Ex. 80, ¶ 15.)

Similarly, petitioner fails to show a conflict based on the murder and arson investigation. His assertion that counsel was a suspect is based on a single line of testimony by counsel wherein he speculated that investigator Gibbons, who investigated the misappropriation, may have thought counsel was involved: "I think at that time [Gibbons] thought I was involved with Linda Jones in killing her husband or something to take the money." (Ex. 34, at p. 730.) Petitioner provides no information from anyone in law enforcement or in the district attorney's office confirming that counsel was a suspect in the murder and arson. And although counsel was previously deposed twice in regard to his representation of petitioner (Exs. 9, 25), and he testified at the reference hearing ordered by this Court, petitioner provides no declaration or statements from counsel other than the brief statement mentioned above. Petitioner also provides no dates as to when counsel thought he was a suspect, so it is unclear whether his alleged belief that he was a suspect coincided with petitioner's trial. Petitioner has failed to sustain his burden to allege facts justifying relief.

As to both investigations by the district attorney's office, petitioner alleges his counsel tried to curry favor by his acts and omissions in this case, but there is no nexus between this case and the other investigations. That is, there is no allegation, much less documentary evidence, that the prosecutor in this case was aware of the other investigations by the district attorney's office. Nor is there any allegation that those involved with the investigations were aware trial counsel was representing petitioner in this case. Trial counsel could not "curry favor" as petitioner suggests unless the prosecutors involved in both this case and the other investigations were aware of each other and were aware of trial counsel's alleged acts and omissions. And there are no other facts alleged

to substantiate petitioner's allegation that counsel's actions were motivated his desire to curry favor. Because petitioner has failed to allege facts establishing this nexus, he has failed to plead a prima facie case. (See *In re Gay*, *supra*, 19 Cal.4th at p. 828 [whether counsel's failure to aggressively defend petitioner in the penalty phase as a result of distraction from misappropriation investigation could not be determined on the record].)

Third, petitioner claims his trial counsel had a conflict of interest in that he was being investigated by the California State Bar and was being sued by several former clients. (Petn. 51-54.) However, petitioner has alleged no nexus between the problems faced by trial counsel in these other cases and counsel's representation of petitioner. That is, counsel's loyalty was not divided between petitioner and another party as a result of lawsuits or a state bar investigation. Petitioner offers no reason to suggest why counsel would "pull his punches" in representing petitioner *as a result of* defending claims of malpractice. (*People v. Cox* (2003) 30 Cal.4th 916, 948.) While trial counsel obviously had to divide his time and energy between petitioner's case and other cases, that is true of every counsel and is insufficient to allege a conflict of interest. Petitioner does not allege that trial counsel's defense against claims of malpractice was so all-consuming that counsel did not have adequate time to represent petitioner. As a result, petitioner fails to plead a prima facie case.

Claim 3

In claim 3, petitioner claims his conviction is the result of ineffective assistance of counsel. (Petn. 59-130.) Petitioner raised a similar claim in his first state habeas. (1st Petn. 3-67, 94-181.) The Court rejected the claim on the merits. (*In re Gay*, *supra*, 19 Cal.4th at p. 780, fn. 6.)

To establish ineffective assistance of counsel, a defendant has the burden to demonstrate that: (1) counsel's representation was deficient in falling below

an objective standard of reasonableness under prevailing professional norms; and (2) the defendant was prejudiced by counsel's deficient representation, i.e., there is a reasonable probability that, but for counsel's failings, the defendant would have received a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Waidla* (2000) 22 Cal.4th 690, 718; *In re Ross* (1995) 10 Cal.4th 184, 214 [burden is on the defendant to show ineffective assistance of counsel].)

A reviewing court should be highly deferential when reviewing counsels performance. (*Strickland v. Washington, supra*, 466 U.S. at p. 689.) "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Ibid.*) "A reviewing court will not second-guess trial counsel's reasonable tactical decisions. [Citation.]" (*People v. Milner* (1988) 45 Cal.3d 227, 238.) In order to show ineffective assistance of counsel on appeal, the record must affirmatively show a lack of rational tactical purpose for the alleged erroneous act or omission. (*People v. Williams* (1997) 16 Cal.4th 153, 215; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Generally, whether to object is a matter of trial tactics, which is given deference. (*People v. Williams, supra*, 16 Cal.4th at p. 215.)

"If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1008; *Strickland v. Washington, supra*, 466 U.S. at p. 697.)

Petitioner's entire claim should be rejected because petitioner has failed to provide reasonably available documentary evidence. Although counsel was

previously deposed twice in regard to his representation of petitioner (Exs. 9, 25), and he testified at the reference hearing ordered by this Court, petitioner identifies no declaration or statements from counsel where counsel discusses what investigation he pursued or what tactical reasons he may have had. Because petitioner has failed to provide such evidence, his claim should be rejected. In addition, each of petitioner's claims of ineffective assistance of counsel fail to plead a prima facie case.

All of petitioner's claims must be viewed in light of the strong evidence of guilt. Marsha Holt, Robert Thompson, Shannon Roberts, Rose Marie Perez, Gail Beasley, and Pamela Cummings all identified petitioner as the person who got out of the car and shot Officer Verna five times. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1261-1264.) As the Court noted with respect to petitioner, "[t]he evidence of both guilt of the murder and the motive for it was overwhelming." (*Id.* at p. 1324.) Given this evidence, petitioner has a difficult burden with respect to showing prejudice.

First, petitioner claims trial counsel failed to investigate and present witnesses who would have provided evidence of innocence. (Petn. 60-72.) Petitioner must allege that counsel knew or should have known the identity of such witnesses and that such witnesses were available to testify. (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1093.) Many of these witnesses would have only been able to provide vague testimony that would not have aided in petitioner's defense: presentation of Walter Roberts's testimony that he saw the driver exit the car with the gun (Petn. 63) would not have been helpful to petitioner's defense because neither petitioner nor Cummings were identified as the driver; presentation of Gustavo Gomez's testimony that he saw an "African American" exit the car with a gun (Petn. 63) would not have been helpful to petitioner because that description could apply to petitioner; presentation of Linda Orlik's testimony that she heard the shots fired in rapid

succession (i.e., without a pause) would not have been helpful to petitioner because even if Cummings fired all the shots there would have been a pause between his first shot and later shots (see e.g., RT 7546 [Marsha Holt testified there was a pause between first and remaining shots]); presentation of Mackey Como's testimony that Cummings's mother came to see her shortly after the shooting to ask about the murder (Petn. 64-67), even if admissible, would not have been helpful to petitioner because such evidence was consistent with the prosecution theory that Cummings had shot Officer Verna, but that he only fired the first shot. While the presentation of Ejinio Rodriguez's and Martina Jimenez's testimonies that the shooter was a dark-skinned Black man and not the light-skinned man from the car (Petn. 61-62) would have been helpful to petitioner, it still would have been insufficient in light of the other evidence of guilt presented. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1261-1264, 1324.) Petitioner's assertion that counsel could have called Robin Gay to testify is incorrect; Robin Gay testified at a pretrial hearing that she would refuse to testify about the murder based on her Fifth Amendment privilege and the advice of counsel. (RT 8471.) As to numerous jailhouse informants who allegedly heard Cummings confess (Petn. 68-72), these claims also fail: Gilbert Gutierrez and Alfredo Montes did testify at trial (RT 6948-7003, 7005-7034); and there is no allegation that David Elliot, Norman Pernell, James Jennings, and Deputy McGinnis were available and willing to testify at the time of trial. The Court has already rejected a claim that counsel erred in failing to call Jack Flores, James Jennings, and Michael David Gaxiola (1st Petn. 132, 146-147; *In re Gay*, *supra*, 19 Cal.4th at p. 780, fn. 6), and the Court should do so again for the same reasons.

Second, petitioner contends his trial counsel failed to introduce evidence to impeach various witnesses. (Petn. 72-78.) But the proposed evidence generally would not have been helpful to petitioner, and many of petitioner's

assertions about the evidence are speculative. As to Robert Thompson (Petn. 73-74), petitioner's proposed evidence that Thompson was emotionally impacted by seeing the shooting is neither surprising nor helpful. His assertions that Thompson's identifications were therefore unreliable or that he was consequently more susceptible to being manipulated into making false identifications are purely speculative. As for Gail Beasley (Petn. 74-75), petitioner's proposed evidence that she was in "shock" when seeing the shooting would not have been helpful, and his assertion, unsupported by the Beasley's declaration, that she was influenced in her identifications by other witnesses' statements is purely speculative. As for Shannon Roberts (Petn. 75-76), his current recollection that he identified petitioner in the live lineup because he wanted to make the police happy is incorrect (Ex. 23); Roberts did not identify petitioner in the live lineup, the preliminary hearing, or the grand jury proceedings. (RT 7795-7802.) Generally his assertion that he identified petitioner due to a desire to please the police is highly suspect given Roberts's repeated *failure* to identify petitioner. Given these circumstances, this additional evidence would not have had any impact on the jury's view of his testimony. Aside from obvious tactical reasons for not calling Don Anderson, a convicted felon and petitioner's childhood friend (Ex. 20, at pp. 202-212, 217-219), his proposed testimony that Marsha Holt told him she did not see the shooter would be of limited value given her repeated identification of petitioner at the lineup, the grand jury proceedings, the preliminary hearing, and trial (RT 7529, 7534-7535, 7574), as well as her admission that she had previously testified that she had not seen the man with the gun (RT 7556). As for Richard Delouth (Petn. 77-78), his proposed testimony that Marsha Holt and Gail Beasley were often high on crack cocaine at the beginning of the month is extremely weak evidence. There is no allegation that Beasley and Holt actually

were high on drugs at the time of the offense, or that such intoxication impaired their ability to accurately observe and report what they had seen.

Third, petitioner claims his counsel was ineffective for failing to call an expert on eyewitness identification. (Petn. 78-84.) Petitioner previously raised this claim (1st Petn. 137-144), and relied on the same declaration by Elizabeth Loftus (Ex. 7; cf. 1st Petn. 27, citing Loftus Declaration). The Court rejected the claim (*In re Gay*, *supra*, 19 Cal.4th at p. 780, fn. 6) and should do so again for the same reasons again.

Fourth, petitioner claims trial counsel erred in failing to call a mental health expert to testify to petitioner's numerous mental illnesses. (Petn. 84-95.) In support of his claim, he relies on the declaration of Dr. David Foster (Ex. 26), whose testimony was considered as proposed penalty phase testimony at the reference hearing. (See *In re Gay*, *supra*, 19 Cal.4th at pp. 802-807 [summarizing Dr. Foster's testimony].) But there is no reasonable probability petitioner would have received a better result if Dr. Foster had testified at the guilt phase.

Dr. Foster's testimony about the effect of petitioner's mental illnesses confusingly suggested that either petitioner did not shoot Officer Verna or he did shoot Officer Verna. According to Dr. Foster, petitioner was allegedly unable to consciously control his behavior at the time of the murder (Ex. 26, ¶ 149), he was in a dissociative state (Ex. 26, ¶ 38), he was experiencing the symptoms of trauma similar to when his father beat him (Ex. 26, ¶ 62), and petitioner's "typical" response to aggression was to be passive (Ex. 26, ¶ 83), and he was primed to "go limp" (Ex. 26, ¶ 153). But Dr. Foster also said, "Occasionally though, [petitioner] would respond with an automatic fight response." (Resp. Ex. S[5] at p. 128.) He also found petitioner's behavior

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5. Resp. Ex. S is the deposition of Dr. Foster that was admitted as cross-examination at the reference hearing on petitioner's prior petition. (See *In re*

"varies substantially in different situations." (Ex. 26, ¶ 40.) Dr. Foster had additional evidence petitioner had "stabbed" an inmate in San Quentin who had raped him. (Resp. Ex. S at p. 27.) Dr. Foster also acknowledged petitioner had "episodes of aggressive outbursts" in his history. (Ex. 26, ¶ 124.) And Dr. Foster acknowledged petitioners account of the murder was significantly different from the testimony presented at trial. (Resp. Ex. S at p. 134.) He also acknowledged he could not know what happened without corroboration. (Resp. Ex. S at p. 135.) In sum, Dr. Foster's testimony was too vague and indefinite to provide any benefit to petitioner. It would have corroborated the evidence showing petitioner committed the shooting as much it would have undermined that evidence.

Similarly, Dr. Foster's proposed testimony as to petitioner's drug use would not have benefited petitioner. Dr. Foster relied entirely on petitioner's own report of drug use at the time of the offense, even though he acknowledged petitioner's prior unreliability in this area. (Ex. 26, ¶ 50; Resp. Ex. S at pp. 20, 121-122.) Dr. Foster did not speak with Cummings, Robin Gay, or Pamela regarding petitioner's drug use at the time of the offenses and the declarations from these individuals did not address petitioner's alleged drug use. (Resp. Ex. S at pp. 123-124.) Petitioner's report he had used heroin was contradicted by his own deposition testimony. (Resp. Ex. S at pp. 122-123.) Dr. Foster was not clear about what drugs petitioner had used immediately prior to the crime. (Resp. Ex. S at pp. 124-126.) And Dr. Foster clearly recalled petitioner had not used any drugs on the day of the murder. (Resp. Ex. S at p. 126.) In sum, this proposed testimony would also have been equivocal and indefinite. Because petitioner cannot show prejudice from failing to call Dr. Foster, his claim fails.

Fifth, petitioner contends his counsel erred in failing to retain an expert to examine his clothing and Cummings's clothing for gunshot residue (GSR).

Gay, *supra*, 19 Cal.4th at p. 802 [referencing the deposition of Dr. Foster].)

(Petn. 95-97.) However, petitioner's allegation that his clothing was available is entirely speculative. He states that Eula Heights informed the police that his shirt was left in her driveway. (Petn. 96, citing Ex. 47.) First, the exhibit petitioner cites to refers to a police interview of Eula Heights, but nowhere in the report does it state that petitioner's shirt was in her driveway. (Ex. 47.) In any event, the report is from October 1984, some 16 months after the murder; presumably the shirt was no longer there 16 months after the murder and even if it was, a finding of GSR was very unlikely even though petitioner was a shooter. As for the testing of Cummings's clothing, even if such testing showed the presence of GSR, it would not have undermined the prosecution theory that Cummings fired the first shot and then passed the gun to petitioner who shot Officer Verna five more times.

Sixth, petitioner claims trial counsel erred in failing to call an expert to counter the coroner's testimony. He relies on the testimony of Dr. William Sherry and Dr. Martin Fackler from petitioner's penalty retrial, and the declaration of Kenneth Solomon. (Petn. 97-103.) Although petitioner explains that Dr. Sherry and Dr. Martin would have contradicted Dr. Cogan's findings with regard to the path of one of the bullets (Petn. 98, 100), he makes no allegation as to why this contrary finding is helpful to his case. As for Solomon, as noted above (Argument I, B, *ante*), Dr. Solomon's opinion is based on an assumption that there was no pause between the first and second shots, an assumption that a jury might easily reject. Petitioner fails to plead a prima facie case.

Seventh, petitioner claims his counsel failed to present evidence effectively challenging the evidence presented at trial by the testimony of Robert Thompson, Gail Beasley, Shannon Roberts, and Marsha Holt. (Petn. 103-114.) But petitioner fails to account for counsel's extensive cross-examination of three of these witnesses. (RT 7641-7653, 7663-7691, 7697-

7699, 7737-7741 [Thompson]; RT 7793-7819 [Roberts]; RT 7552-7574, 7588-7589 [Holt].) This cross-examination elicited much of the impeaching evidence that petitioner now claims should have been presented. For instance, Thompson admitted not identifying petitioner at the lineup or the grand jury proceedings and admitted he described someone who did not match petitioner as the shooter. Roberts admitted he did not identify petitioner in the live lineup, the preliminary hearing, or the grand jury proceedings. Holt admitted she had not identified petitioner on the form given to her at the lineup and admitted she had previously testified she did not see the shooter. Given the impeachment evidence elicited by trial counsel, there is no reasonable probability petitioner would have benefitted from the additional evidence now proposed by petitioner. As for Beasley, cross-examination showing that Beasley gave different estimates as to the number of shots she saw, and showing that her memory faded with the passage of time, would have had limited significance. Because there is no reasonable probability appellant would have received a better result if petitioner's trial counsel had cross-examined differently, his claim fails.

Eighth, petitioner claims his counsel erred in failing to challenge tainted eyewitness identifications. (Petn. 114-119.) Petitioner claims the prosecution used impermissibly suggestive identification procedures by allowing witnesses to talk to each other prior to viewing the lineup and by forcing petitioner to stand in the lineup with a scab on his face that resulted from injuries received shortly after his arrest. But petitioner notes no witness identified him at the lineup. (Petn. 116.) Since no one identified petitioner, he cannot have been prejudiced from any suggestive procedures. In fact, Marsha Holt and Gail Beasley were unable to identify petitioner *because* he had a scab and the shooter did not have one. (RT 7568, 8362, 8368.) Their ability to identify petitioner from photographs of him without his injuries shows that their identification was from their independent recollection at the crime scene, not

that it was based on the allegedly suggestive lineup where they were *unable* to identify petitioner. And Shequita Chamberlain never identified petitioner, even at trial. (RT 7512-7526.) Petitioner's allegation that Robert Thompson only identified petitioner as a result of coaching by the police (Petn. 117) is vague and speculative. As for petitioner's claim that his counsel should have suppressed the in-court identification by Shannon Roberts, which was made as a result of pretrial coaching by police, there is no allegation as to how counsel could have discovered this alleged misconduct prior to Roberts's testimony. Indeed, given Roberts's testimony at trial, that he had not spoken with officers prior to his testimony that day, there is no way counsel could have discovered any alleged misconduct. (RT 7796-7805.) Petitioner's claim fails.

Ninth, petitioner claims his counsel failed to make better arguments in his closing argument. (Petn. 119-125.) A counsel's decision on how to give closing argument is reviewed under a very deferential standard. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 634-635 [closing argument lacking in length, clarity, and eloquence was not ineffective]; *People v. Hendricks* (1987) 43 Cal.3d 584, 592-594 [counsel who presented no opening statement, presented no evidence, and presented no closing argument was not ineffective]; *People v. Diggs* (1986) 177 Cal.App.3d 958, 970 [closing argument may be waived in appropriate cases as a matter of tactics].) Here, petitioner's trial counsel emphasized the prosecution's burden to show guilt beyond a reasonable doubt (RT 10919-10922, 10987-10990), and reviewed the alleged discrepancies and weaknesses of the prosecution witnesses (RT 10923-10967). Given the deference given to counsel over closing argument, petitioner has failed to plead sufficient grounds for relief on the basis that counsel's performance was deficient or that petitioner was prejudiced.

Tenth, petitioner claims his counsel failed to object to discovery violations. (Petn. 125-127.) Petitioner asserts there were numerous

undocumented meetings with witnesses (Petn. 126), but his claim is purely speculative; there is nothing to show that any meetings with witnesses were not documented in police reports or disclosed to defense counsel in some other form, or that if such meetings occurred, discoverable evidence was obtained. Petitioner alleges his counsel was never given criminal history records from Marsha Holt and Gail Beasley, but he does not allege that Beasley and Holt had criminal histories, what their history was, or that such documents would have led to the discovery of any admissible evidence. This claim fails.

Eleventh and finally, petitioner claims his counsel failed to object to the presentation of perjured testimony by Shannon Roberts that he had identified petitioner's photograph as that of the shooter at an earlier pretrial hearing. (Petn. 127-129, citing RT 7783.) "[T]he [United States Supreme] Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (*United States v. Agurs* (1976) 427 U.S. 97, 103 [96 S.Ct. 2392, 49 L.Ed. 342]; *Giglio v. United States* (1972) 405 U.S. 150, 153 [92 S.Ct. 763, 31 L.Ed.2d 104]; *Napue v. Illinois* (1959) 360 U.S. 264, 269, 271 [79 S.Ct. 1173, 3 L.Ed.2d 1217].) After identifying petitioner in court as the shooter (RT 7782-7783), Roberts testified that he had previously testified that the man in picture number 9 (petitioner) was the shooter (RT 7783). But later testimony clarified that Roberts had not identified petitioner in the live lineup, the preliminary hearing, or the grand jury proceedings. (RT 7795-7802.) Given that Roberts clarified he had not previously identified petitioner, there is no reasonable likelihood that any false testimony could have affected the judgment. Petitioner's allegation that the prosecutor falsely argued that other identifications were reliable fails. (Petn. 128.) Since the prosecutor "'has the right to fully state his views as to what the evidence shows and to urge whatever

conclusions he deems proper . . ." (*People v. Thomas* (1992) 2 Cal.4th 489, 526), any motion for a mistrial would have failed. As with all of petitioner's claims of ineffective assistance of counsel, petitioner fails to plead a prima facie case. Therefore, petitioner's claim fails.

Claim 4

In claim 4, petitioner claims the prosecution violated petitioner's constitutional rights by committing egregious acts of misconduct. (Petn. 130-137.) Again, petitioner fails to plead a prima facie case.

First, petitioner claims the prosecution used impermissibly suggestive identification procedures in the live lineup by forcing petitioner to stand in the lineup with a scab on his face that resulted from injuries received shortly after his arrest. But petitioner notes no witness identified him at the lineup. (Petn. 131.) Since no one identified petitioner, he cannot have been prejudiced from any suggestive procedures. In fact, Marsha Holt and Gail Beasley were unable to identify petitioner *because* he had a scab and the shooter did not have one. (RT 7568, 8362, 8368.)

Second, petitioner complains that the police conducted several interviews with witnesses "for the purpose and with the effect of causing the witnesses to make suggestive, false and unreliable identifications of petitioner as a suspect. [Citations.]" (Petn. 131-132.) In support, petitioner cites a portion of the trial where Marsha Holt testified that she identified petitioner as the shooter. (Petn. 132, citing RT 7550.) Petitioner's assertion is too vague: he does not allege what the police did during interviews to lead witnesses. Although he has declarations by witnesses, he does not cite any portion where they mention police coercion or any other misconduct that might have affected their testimony. Indeed, petitioner does not even identify which witnesses were coerced.

Third, petitioner claims the prosecution knowingly presented false evidence by allowing Shannon Roberts to testify that he had identified petitioner's photograph as that of the shooter at an earlier pretrial hearing. (Petn. 132-133, citing RT 7783.) After identifying petitioner in court as the shooter (RT 7782-7783), Roberts testified that he had previously testified that the man in picture number 9 (petitioner) was the shooter (RT 7783). But later testimony clarified that Roberts had not identified petitioner in the live lineup, the preliminary hearing, or the grand jury proceedings. (RT 7795-7802.) As noted above, "the [United States Supreme] Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (*United States v. Agurs*, *supra*, 427 U.S. at p. 103; *Giglio v. United States*, *supra*, 405 U.S. at p. 153; *Napue v. Illinois*, *supra*, 360 U.S. at pp. 269, 271.) Given that Roberts clarified he had not previously identified petitioner, there is no reasonable likelihood that any false testimony could have affected the judgment since the jury was left with an accurate, correct account of regarding his identification evidence. Petitioner's claim fails.

Fourth, petitioner claims the prosecution knowingly presented false evidence by allowing Pamela to testify in a way that attempted to make her husband, Cummings, appear to be innocent. (Petn. 133-134.) Petitioner relies on a letter from the prosecutor to the court in charge of sentencing Pamela (Ex. 22); in this letter, the prosecutor details several instances where, in the prosecutor's opinion, Pamela lied at trial. Where false testimony has been knowingly presented, the prosecutor has a duty to correct the testimony. (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717.) Here, the prosecutor's letter also details how the prosecutor impeached Pamela with her prior statements to correct her testimony: Pamela testified she could not see position

of officer (RT 9811-9812) but the prosecutor got Pamela to admit she had changed her testimony (RT 9813-9814); Pamela testified she did not know who fired the first shot (RT 8162-8163, 8228), but the prosecutor played a tape of her prior statement that she thought Cummings had fired the first shot (RT 8671, 8979; I Supp. CT 591, 594); Pamela testified that petitioner reenacted the murder and then Cummings copied him (RT 8184-8185), but the prosecutor impeached Pamela with her prior testimony that Cummings had been the first to reenact the murder (RT 8785-8786); and Pamela said she did not remember hearing Cummings say that he would shoot an officer who tried to arrest him (RT 8762), but the prosecutor played a tape of her prior statement where she inferred Cummings had made such statements (RT 8979; I Supp. CT 592). (Ex. 22 [citing contradictory portions of transcript].) Thus, the prosecutor corrected any false testimony and no error occurred. Alternatively, given that Pamela's contradictory statements were elicited before the jury, there is no reasonable likelihood that any false testimony could have affected the judgment.

Fifth, petitioner claims the state "engaged in discovery violations." (Petn. 135-137.) Petitioner fails to cite any documents in existence that were not disclosed. He does not include any declaration from trial counsel identifying any materials that were not disclosed. Petitioner asserts there were numerous undocumented meetings with witnesses (Petn. 136), but his claim is purely speculative; there is nothing to show that any meetings with witnesses were not documented in police reports or disclosed to defense counsel in some other form. There are no facts pleaded to indicate that even if such meetings occurred, that such meetings led to the discoverable evidence that was withheld. Petitioner generally avers that the prosecution failed to preserve physical evidence, but he only identifies one item, the clothing he wore at the time of the offense. (Petn. 137.) Of course, there is no evidence the police ever obtained possession of the clothing petitioner wore when he shot Officer Verna, or that

such evidence had an apparent exculpatory value, or that there was "bad faith" on the part of the police in failing to preserve the evidence. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [109 S.Ct. 333, 102 L.Ed. 2d 281]; *California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 81 L.Ed.2d 413].) Thus, petitioner's assertion is purely speculative. As with all of his allegations of prosecution misconduct, petitioner fails to plead a prima facie case.

Claim 5

In claim 5, petitioner claims unconstitutional juror misconduct occurred during trial. (Petn. 137-139.) Petitioner alleges: discussion of the case prior the commencement of deliberations; the presence of alternate jurors, who had not been substituted for regular jurors, during deliberations; deliberate inattention and absence during several stages of the proceedings; and disregard of the law and instructions. (Petn. 138.)

Specifically, petitioner alleges that juror Maxfield was sleeping during the trial. (Petn. 138-139.) In support, he cites declarations by one juror and two alternates that suggest Juror Maxfield slept during trial. (Ex. 77, ¶ 4 [juror Maxfield "kept falling asleep all during the trial"]; Ex. 78, ¶ 5 [alternate juror was aware of older male juror "sleeping"]; Ex. 84 ¶ 4 [juror Maxfield "was often asleep during the entire trial"].) However, petitioner fails to explain how a sleeping juror escaped the notice of the two defendants, their three attorneys, the prosecutor, and the judge. Indeed, the prosecutor noticed a prospective juror sleeping during the voir dire and raised it with the trial judge. (RT 5714-5716.) Petitioner also attaches no declaration from juror Maxfield, nor does he explain the failure to obtain one. Petitioner fails to plead a prima facie case. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1349 [stating court's reluctance

to overturn verdict "in the absence of convincing proof that the jurors were actually asleep during *material* portions of the trial" (italics added)].)

Petitioner also claims misconduct for deciding guilt prior the commencement of deliberations. He relies on juror Cochetti's declaration, which states that after viewing a demonstration he and some other jurors "made up our minds that [petitioner] was guilty, because we could really picture the shooting." (Ex. 77, ¶ 5.) He also states:

> Despite the belief some of the other jurors and I had going into the deliberations that [petitioner] was guilty, and we did not feel the need to go over all the evidence, some of the older jurors insisted each count be discussed and evidence considered. I just sat back and let them go through the motions.

(Ex. 77, ¶ 7.)

Again, petitioner fails to plead a prima facie case. Generally, jurors commit misconduct if they express or form an opinion on guilt prior to deliberations. (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) However, where "misconduct is ""of such a trifling nature that it could not in the nature of things have been prejudicial to the moving party and where it appears that the fairness of the trial has been in no way affected by such impropriety, the verdict will not be disturbed."" [Citation.]" (*People v. Stewart* (2004) 33 Cal.4th 425, 510.) And under Evidence Code section 1150, jurors' statements as to their mental processes in arriving at a verdict may not be used to challenge a verdict. (*In re Stankewitz* (1985) 40 Cal.3d 391, 397-398.)

Here, Cochetti's assertion that he "made up his mind" that petitioner was guilty is vague. Cochetti does not state that he refused to listen to further evidence or had come to a fixed opinion on guilt. Nor does Cochetti ever assert that he shared or expressed his opinion of guilt. Rather his assertion may be understood as a statement that he was heavily persuaded as to petitioner's guilt

at that moment in the trial. Nothing is improper about being heavily persuaded by strong evidence. Moreover, there was nothing improper about starting deliberations with an opinion about the defendant's guilt. Again, Cochetti does not state he refused to engage in deliberations or refused to let others review the evidence. Taking a passive role in deliberations, based on an opinion that a review is unnecessary based on the strength of the evidence, is not improper. Thus, petitioner's claim fails.

Petitioner also claims misconduct for discussing the evidence prior the commencement of deliberations. In his declaration, juror Cochetti states

> [T]here were breaks before and during the trial when we were in the jury room and we had time to discuss testimony that I had missed or was not sure about. We were all able to go over things with each other and discuss each other's viewpoints on what we had heard that day or the day before.

(Ex. 77, ¶ 3.) A declaration from alternate juror Comerford states:

> As jurors and alternates, we spent a lot of time waiting in the deliberation room talking, working on crossword puzzles, and reading. Some people kept to themselves, but several of us discussed the case among ourselves, including going over what the witnesses had said, and exchanging views concerning the guilt of the defendants.

(Ex. 78, ¶ 5.)

Petitioner's vague evidence again fails to state a prima facie case. Jurors commit misconduct if they discuss the case prior to deliberations (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118), but the misconduct must be more than "trifling" (*People v. Stewart*, *supra*, 33 Cal.4th at p. 510). Here, petitioner's documentary evidence merely states that vague discussions about the evidence occurred. The declarations do not state what was said or how often the

discussions occurred. They do not state specific names of which jurors were involved in such discussions. Petitioner's claim fails.

Finally, petitioner contends juror Cochetti knowingly violated his oath by talking to his parents who influenced juror Cochetti's decision on guilt. (Petn. 139.) In his declaration, juror Cochetti states:

> My parents raised me as a Baptist, and they brought me up to believe in the death penalty. Although, technically, we were not supposed to do this, I spoke with them about the case during the trial because I was young at the time and wanted their opinions and guidance. We discussed the fact that if someone is caught for shooting a police officer, they are more than likely guilty. One of the things my parents told me was that if I thought that [petitioner] was guilty of shooting an officer he should be convicted and there was no other option but to sentence him to death. Their advice was good and helped me to be comfortable with the decisions I had to make.

(Ex. 77, ¶ 2.)

Jurors commit misconduct if they discuss the case with others prior to deliberations. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 118.) Even where jurors commit misconduct by receiving information from extraneous sources, the verdict is only reversed where there is a "substantial likelihood of juror bias." (*In re Carpenter* (1995) 9 Cal.4th 634, 653.)

Here, petitioner fails to allege a substantial likelihood of bias. While Cochetti's parents may have said things to Cochetti, he never said his verdict was attributable to anything other than the overwhelming evidence of guilt, especially since his parents' advice made him comfortable with the decisions he, not his parents, had to make. Part of the alleged parents' statement was of course correct- a person who shoots a police officer should be convicted. In sum, the juror Cochetti's declaration is insufficient to make a prima facie case

of a "substantial likelihood of juror bias." (*In re Carpenter*, *supra*, 9 Cal.4th at p. 653.) Therefore, the claim should be rejected. (*People v. Danks* (2004) 32 Cal.4th 269, 304-311 [misconduct was harmless where two jurors spoke to their pastor during deliberations].)

Claims 6, 7, 8 and 9

In claims 6, 7, 8, and 9, petitioner raises claims that are similar to claims that were raised in his prior state habeas petition and were rejected because they have previously been raised and rejected on appeal. In each case however, petitioner has added new constitutional bases, but no new factual allegations, to his claim. However, petitioner provides no legal analysis or authority explaining why the addition of these legal bases should make any difference.

Therefore, to the extent these claims are the same ones raised on appeal, this Court should reject them as having been raised and rejected on appeal. (*In re Waltreus*, *supra*, 62 Cal.2d at p. 225.) Alternatively, if petitioner's alteration of his claims changes them from what was raised on appeal, then the claims should be rejected as claims that could have been but were not raised on appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Moreover, the claims should be denied on the merits for the same reasons as on appeal.

These claims are as follows:

- In claim 6, petitioner claims the trial court's eight-day adjournment prior to jury deliberations violated petitioner's right to due process. (Petn. 140-141.) In the prior state habeas petition, a substantially similar claim (1st Petn. 71-73, 192-95 [Claim 4]) was denied as having been raised and rejected on appeal, *In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4. On appeal, this Court found adjournment had been necessary to accommodate proceedings in Cummings's case and held there was

"neither error nor abuse of discretion." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1306; see Supp. AOB 14-15.)

• In claim 7, petitioner claims the presence of uniformed officers in court during trial denied petitioner his constitutional rights. (Petn. 141-143.) In the prior state habeas petition, a substantially similar claim (1st Petn. 73-75, 201-05 [Claim 6]), was denied as having been raised and rejected on appeal, *In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4. On appeal, the Court found that exclusion of the police officers were not necessary to petitioner's right to a fair trial and found no prejudice. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1298-1299.)

• In claim 8, petitioner claims the prosecutor's use of misleading physical simulations denied petitioner his constitutional rights. (Petn. 143-148.) In the prior state habeas petition, a substantially similar claim (1st Petn. 75-77, 195-200 [Claim 5]), was rejected as having been raised and rejected on appeal, *In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4. On appeal, the Court found petitioner had failed to object to the simulations, and found the simulations were more probative than prejudicial as to Cummings. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1291.)

• In claim 9, petitioner claims he was denied his right to a jury that represented a fair cross-section of the community. (Petn. 148-159.) In the prior state habeas petition, a substantially similar claim (1st Pet. 77-80, 205-24 [Claim 7]), was rejected as having been raised and rejected on appeal, *In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4. On appeal, the Court rejected petitioner's claim adopting the trial court's finding "that there was no 'systematic exclusion,' i.e., that the procedures employed

by the jury commissioner and the bases for excusing those group members whose excusal was the probable cause of the disparity were constitutionally permissible. [Citations.]" (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1279; see *id.* at pp. 1277-1279.)

Claims 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, and 25

In claims 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, and 25, petitioner raises claims that are similar to claims that were raised and rejected on appeal. In each case however, petitioner has added new constitutional bases for his claim. However, petitioner provides no legal analysis or authority explaining why the addition of these legal bases should make any difference. Nor has petitioner added any factual allegations.

Therefore, to the extent these claims are the same ones raised on appeal, this Court should reject them as having been raised and rejected on appeal. (*In re Waltreus*, *supra*, 62 Cal.2d at p. 225.) Alternatively, if petitioner's alteration of his claims changes them from what was raised on appeal, then the claims should be rejected as claims that could have been but were not raised on appeal. (*In re Dixon*, *supra*, 41 Cal.2d at p. 759.) Moreover, the claims should be denied on the merits for the same reasons as on appeal.

These claims are:

- In claim 10, petitioner claims the trial court erred in denying petitioner's motion for a change of venue. (Petn. 159-171; cf. AOB 37-52.) On appeal, this Court rejected petitioner's claim finding there was no prejudice because there was no reasonable likelihood petitioner could not obtain a fair trial at the time the motion was denied. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1275-1277.)

• In claim 11, petitioner claims the trial court erred in admitting petitioner's confession to the robberies. (Petn. at 171-194; cf. AOB 61-94.) The Court rejected the claim and found the statements were voluntary and not obtained in violation of petitioner's constitutional rights. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1317-1318.)[6/]

• In claim 12, petitioner claims he was denied his right to represent himself at trial. (Petn. 194-202; cf. AOB 95-110.) On appeal, the Court found the trial court did not abuse its discretion in denying petitioner's motion, which was not timely. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1318-1321.)

• In claim 13, petitioner claims the admission of the Cummings's guilty pleas and Robin Gay's convictions violated his constitutional rights. (Petn. 202-209; cf. (AOB 110-119.) On appeal, the Court found the introduction of the evidence erroneous (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1295, 1322), but it held "those errors did not affect the [petitioner] jury's consideration of the murder and special circumstances charges" because the "evidence of both guilt of the murder and the motive for it was overwhelming" (*id.* at p. 1324).

• In claim 14, petitioner claims the trial court erred in failing to sever the non-capital counts from the capital counts. (Petn. 209-233; cf. AOB 139-169.) On appeal, the Court found the trial court did not abuse its

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6. In addressing a related contention raised in petitioner's prior petition, the Court found petitioner's trial counsel was incompetent in inducing petitioner to confess to the robberies, but found no prejudice as to the guilt phase. (*In re Gay*, *supra*, 19 Cal.4th at pp. 781-782, 791-794.)

discretion in denying the motion to sever. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1283-1285.)

• In claim 15, petitioner claims the trial court erred in failing to sever his case from codefendant Cummings's case. (Petn. 233-270; cf. AOB 169-213.) On appeal, the Court held the trial court did not abuse its discretion in denying the motion to sever and in using dual juries. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1285-1288.)

• In claim 19, petitioner claims the trial court erred in admitting Robin Gay's conviction for accessory to murder. (Petn. 283-287; cf. AOB 229-234.) On appeal, the Court found the introduction of the evidence erroneous but harmless in light of the "overwhelming evidence." (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1295; see *id.* at p. 1324.)

• In claim 20, petitioner claims the trial court's procedure of allowing the jury to communicate in writing with counsel violated petitioner's constitutional rights. (Petn. 287-296; cf. AOB 234-247.) On appeal, the Court found the trial court was within its discretion in passing questions submitted by jurors to counsel. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1305-1306.)

• In claim 21, petitioner claims the failure to insure that all proceedings were on the record violated petitioner's constitutional rights. (Petn. 296-303; cf. AOB 247-260.) On appeal, the Court found the trial court erred but found petitioner failed to show prejudice. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1333, fn. 70.)

• In claim 22, petitioner claims the admission of Gail Beasley's preliminary hearing testimony violated his constitutional rights. (Petn. 303-317; cf. AOB 260-283.) On appeal, the Court found the record showed the prosecution had engaged in due diligence sufficient to warrant admission of Beasley's testimony. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1297-1298.)

• In claim 24, petitioner claims there was insufficient evidence to support the attempted robbery charge in count 7. (Petn. 344-349; cf. AOB 119-124.) Although the Court reversed count 7 on appeal for instructional error (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1315), the Court nevertheless found there was sufficient evidence to support the conviction in count 7 (*id.* at pp. 1322-1324).

• In claim 25, petitioner claims there was insufficient evidence and instructional error surrounding the special circumstance finding. (Petn. 349-355; cf. AOB 375-386.) On appeal, the Court found the instructions were proper and there was sufficient evidence to support the special circumstance finding. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1299-1301.)

Claims 16, 17 and 23

In claims 16, 17, and 23, petitioner raises claims of ineffective assistance of counsel that are similar to claims that were raised and rejected on appeal. In each case however, petitioner has added new constitutional bases, but no new factual allegations, to his claim. However, petitioner provides no legal analysis or authority explaining why the addition of these legal bases should make any

difference. In any event, these claims should be denied on the merits for the same reasons as on appeal as follows:

- In claim 16, petitioner claims his trial counsel rendered ineffective assistance of counsel by causing or permitting statements made by Cummings, testified to by deputy sheriffs, to be admitted at trial. (Petn. 270-275; AOB 213-21.) On appeal, the Court rejected the claim because the record did not disclose whether trial counsel had a tactical basis for his actions, and petitioner had failed to show prejudice. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1340-1341; see *id.* at p. 1288, fn. 27 [separately finding that admission of Cummings's statements was harmless under any standard].)

- In claim 17, petitioner claims trial counsel rendered ineffective assistance of counsel in failing to object to the prosecutor's closing argument on Deputy La Casella's testimony. (Petn. 275-280; cf. AOB 221-226.) On appeal, the Court rejected the claim because the record did not disclose whether trial counsel had a tactical basis for his actions, and petitioner had failed to show prejudice. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1340-1341; see *id.* at p. 1288, fn. 27 [noting the People had argued that petitioner's silence in the face of Cummings's statement, as related by Deputy La Casella, was an adoptive admission].)

- In claim 23, petitioner claims trial counsel rendered ineffective assistance of counsel by failing to object to evidence at trial. (Petn. 318-344; cf. AOB 283-318.) On appeal, the Court rejected the claim because the record did not disclose whether trial counsel had a tactical

basis for his actions, and petitioner had failed to show prejudice. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1340-1341.)

Claim 18

In claim 18, petitioner claims the trial court's failure to give CALJIC No. 2.71.5 on adoptive admissions violated his constitutional rights. (Petn. 280-282.) Petitioner raised a similar claim on appeal, claiming that CALJIC No. 2.71.5 should have been given if the petitioner's silence was an adoptive admission. (AOB 226-229.) On appeal, the Court noted the prosecutor had argued that petitioner's silence in the face of Cummings's statement, as related by Deputy La Casella, was an adoptive admission, but did not otherwise address the claim. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1288, fn. 27.) Because petitioner failed to request the instruction at trial, his claim should be rejected. (*People v. Carter*, *supra*, 30 Cal.4th at p. 1198 [CALJIC No. 2.71.5 must be requested by defendant]; see RT 10218-10228 [discussion of jury instructions].)

Claim 26

In claim 26, petitioner claims the cumulative effect of the errors denied petitioner his constitutional rights. (Petn. 356-357.) Petitioner made similar claims on appeal and in his first petition. (AOB 318-319; 1st Petn. 228-229.) The Court denied these claims on the merits. (*In re Gay*, *supra*, 19 Cal.4th at p. 779, fn. 4; *People v. Cummings*, *supra*, 4 Cal.4th at p. 1324.)

On appeal and in his prior petition, petitioner argued the cumulative error required reversal but he did not claim *any* federal constitutional rights were impacted, as he does now (Petn. 356). However, petitioner provides no legal analysis or authority explaining why the addition of these legal bases should make any difference. Viewing the claims cumulatively, petitioner's

claims still fail for lack of a prima facie case. (*People v. Osband* (1996) 13 Cal.4th 622, 702 [no cumulative prejudice]; accord, *People v. Cox* (1991) 53 Cal.3d 618, 663.) This claim should be rejected.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition be dismissed as untimely (*In re Robbins*, *supra*, 18 Cal.4th at pp. 780-781) and successive (*In re Clark*, *supra*, 5 Cal.4th at p. 767). Claims 4, 5, 6, 7, 8, 18, and 21 should be denied because they were not raised at the time of trial. (*In re Seaton*, *supra*, 34 Cal.4th at p. 200.) Claims 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 20, 21, 22, 24, and 25 should be rejected as having been raised and rejected on appeal (*In re Waltreus*, *supra*, 62 Cal.2d at p. 225), or alternatively, as claims that could have been but were not raised on appeal (*In re Dixon*, *supra*, 41 Cal.2d at p. 759). Finally, all of the claims should be rejected on the merits.

Dated: January 28, 2005.

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General

LANCE E. WINTERS
Supervising Deputy Attorney General
Attorneys for Respondent

LEW/adm
000022215LA2005FH0001

CERTIFICATE OF COMPLIANCE

I certify that the attached INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS Times New Roman font and contains 13,246 words.

Dated: January 28, 2005.

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California

LANCE E. WINTERS
Supervising Deputy Attorney General
Attorneys for Respondent

LEW/adm
000022215LA2005FH0001

DECLARATION OF SERVICE

Case Name: ***In re Kenneth Earl Gay*** **Case No.** ***: S093765***

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **January 28, 2005**, I placed two (2) copies of the attached

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Mr. Gary D. Sowards
Habeas Corpus Resource Center
50 Fremont Street, Suite Number 1800 Street
San Francisco, California 94105

In addition, I placed one (1) copy in this Office's internal mail collection system, to be mailed to California Appellate Project (CAP) in San Francisco, addressed as follows:

California Appellate Project
Attention: Michael Millman
101 Second Street, Suite 600
San Francisco, California 94105

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court; and that I also caused a copy to be delivered to the appropriate District Attorney.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on **January 28, 2005**, at Los Angeles, California.

ADRIENNE DANIELLE MAYR
Declarant

Signature

LEW/adm
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