IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **In re KENNETH EARL GAY,** On Habeas Corpus.

CAPITAL CASE

S130263

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

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to this Court's August 4, 2008 Order, Robert Ayers, Jr., Warden of California State Prison, San Quentin, makes this Return to the allegations contained in Claims Two and Three of Petition for Writ of Habeas Corpus.

Respondent alleges that petitioner is in the custody of the warden of, and is lawfully incarcerated in, San Quentin State Prison, in San Quentin, California, pursuant to a valid judgment and conviction in Los Angeles Superior Court Case No. A392702.

Respondent alleges that petitioner was not denied the right to effective assistance of counsel or conflict-free counsel during the guilt phase of the trial in Los Angeles Superior Court Case No. A392702, as alleged in Claims Two and Three of the Petition, and as specifically discussed below.

Claim Two

In Claim Two, petitioner claims his counsel's representation was unconstitutionally burdened by multiple conflicts. (Petn. 34-59.) Respondent

and admits, denies, and alleges as follows:[1/]

1. Respondent admits that "Trial counsel, Daye Shinn, knowingly used fraudulent means to secure his appointment as petitioner's attorney prior to the guilt phase of his capital trial." (Petn. 36, ¶ 5.a; accord, *In re Gay, supra,* 19 Cal.4th at p. 828.)

2. Respondent admits that "The fraudulent means included, but were not limited to, employing and exploiting the services of Marcus McBroom." (Petn. 37, ¶ 5.a.(1); see *In re Gay*, *supra*, 19 Cal.4th at pp. 794-795.)

3. Respondent admits that "Shinn and McBroom approached petitioner in the county jail following petitioner's arrest in this matter. At that time both Shinn and McBroom were actually aware that petitioner was represented by the Los Angeles County Public Defender. McBroom, an American of African descent who was dressed in clerical garb, represented to petitioner that he was an ordained minister. [Citation.]" (Petn. 37, ¶ 5.a.(1)(a); accord, *In re Gay*, *supra*, 19 Cal.4th at p. 794.) Respondent alleges that McBroom was actually an ordained minister. (*In re Gay*, *supra*, at p. 794.)

4. Respondent admits that "McBroom, in Shinn's presence and with his explicit approval, further falsely informed petitioner that McBroom represented a group of Black businessmen who wished to hire a private lawyer for petitioner. [Citation.]" (Petn. 37, ¶ 5.a.(1)(b); accord, *In re Gay*, *supra*, 19 Cal.4th at p. 794.)

5. Respondent admits that "Both McBroom and Shinn encouraged, cajoled and persuaded petitioner to agree that Shinn should be retained by the purported group of businessmen to represent him. [Citation.]" (Petn. 37, ¶ 5.a.(1)(c); accord, *In re Gay*, *supra*, 19 Cal.4th at p. 794.)

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1. Respondent does not address claims incorporated by reference (Petn. 35), except Claim Three, since there was no order to show cause issued as to the other claims. (See *In re Gallego* (1998) 18 Cal.4th 825, 837, fn. 12.)

6. Respondent denies that "Shinn's and McBroom's ruse regarding the non-existent group of businessmen was the modus operandi of an ongoing pattern, practice and scheme by which Shinn approached represented criminal defendants and fraudulently induced them to seek, request and otherwise effectuate the substitution of Shinn as their attorney of record. Other criminal defendants who were victimized by Shinn's similarly fraudulent behavior included, but were not limited to John Kim. [Citation.]" (Petn. 37, ¶ 5.a.(2).) Respondent admits that Shinn, acting without McBroom, used a similar ruse to represent John Kim (Exh. 82)[2/], but denies the rest of the allegation based on the following: (1) Shinn is not available for respondent to interview[3/]; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, name any "[o]ther criminal defendants," making an investigation of them impossible; (3) since petitioner's allegation lacks specificity in this regard, respondent believes there is a good faith basis to believe the facts are untrue, i.e., that Shinn's acts were part of an ongoing practice. (See *People v. Duvall* (1995) 9 Cal.4th 464, 485.)

7. Respondent admits that "The fraudulent means by which Shinn secured his appointment in petitioner's case also included, but were not limited to Shinn making or causing knowingly false and misleading representations to be made to the trial court. [Citation.]" (Petn. 38, ¶ 5.a.(3); see *In re Gay*, *supra*, 19 Cal.4th at p. 794.)

8. Except as noted, respondent admits that "After inducing petitioner to accept Shinn's legal representation, which ostensibly was being financed by a

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2. References to "Exh." refer to the exhibits accompanying the petition, and references to "Return Exh." refer to the exhibits attached to this return. The various pages of the exhibits are numbered consecutively in the lower right hand corner.

3. According to the California State Bar website (http://www.calbar.ca.gov), Daye Shinn is deceased.

group of businessmen, Shinn thereafter instructed, directed and coerced petitioner to misinform and mislead the trial court to believe that petitioner's parents had paid Shinn's retainer. Shinn, with the intent to defraud the court and thereby engineer an appointment as petitioner's attorney, was present when petitioner so misinformed the trial court; and Shinn did not correct the representations he knew to be false. [Citations.]" (Petn. 38, ¶ 5.a.(3)(a); see *In re Gay*, *supra*, 19 Cal.4th at p. 794.) Respondent denies that Petitioner was "coerced" and alleges that Petitioner "thought it was a good idea." (Return Exh. 1, p. 3.)

9. Except as noted, respondent admits that "Shinn thereafter instructed, directed and coerced petitioner to make misrepresentations to the trial court, which Shinn again knew to be false and misleading, to the effect that petitioner's parents were unable to continue paying for Shinn's services and to request the court to appoint Shinn to represent petitioner. Shinn additionally provided petitioner with a sample motion to proceed in propria persona, which included the false representation that petitioner was seeking to represent himself because he could not afford to pay Shinn's legal fees; and further instructed him to copy it verbatim in his own handwriting for submission to the court. [Citation.]" (Petn. 38, ¶ 5.a.(3)(b); see *In re Gay*, *supra*, 19 Cal.4th at p. 794.) Respondent denies that Petitioner was "coerced" and alleges that Petitioner "thought it was a good idea." (Return Exh. 1, p. 3.)

10. Respondent admits that "the trial court appointed Shinn to represent petitioner in his capital proceedings on the same date [July 18, 1984]. [Citation.] Shinn thereafter was the only attorney of record for petitioner throughout the trial of the guilt phase, first penalty trial and imposition of the judgment of death on September 20, 1985. [Citation.]" (Petn. 38-39, ¶ 5.a.(3)(c).) Respondent denies that the appointment was "[b]ased upon further misleading representations Shinn knew to be false, and presented to the

court on July 18, 1984 . . . ." (Petn. 38-39, ¶ 5.a.(3)(c).) Respondent alleges that Shinn did not make any "further" misrepresentations to the court on July 18, 1984, other than those admitted above. (1A RT 87A-93A.)[4/]

11. Respondent admits that "McBroom, Shinn and at least one other individual, Fred Weaver, M.D., were parties and princip[al]s in, and maintained, an illegal capping relationship, which created a conflict of interest between the financial interests of said individuals, by virtue of their involvement in the illegal arrangement, and the interests of petitioner to whom Shinn owed constitutional, professional and ethical duties to provide minimally adequate representation." (Petn. 39, ¶ 5.b; see *In re Gay*, *supra*, 19 Cal.4th at pp. 796-798.)

12. Except as noted, respondent admits that "Pursuant to the capping arrangement, Shinn retained Weaver in any cases in which McBroom had arranged for Shinn to be counsel. Further, pursuant to this pattern and practice, whenever McBroom introduced Shinn to a client, Shinn did not consider retaining experts other than Weaver. [Citation.]" (Petn. 39, ¶ 5.b.(1); see *In re Gay*, *supra*, 19 Cal.4th at pp. 796-798.) Respondent denies that Shinn had any "pattern and practice" that involved failing to consider experts of than Weaver, based on the following: (1) Shinn is not available for respondent to interview[5/]; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, specify any other cases where McBroom, Weaver, and Shinn had a capping arrangement; (3) since petitioner's allegation lacks specificity in this regard, respondent believes there is a good faith basis to believe the facts are untrue, i.e., that Shinn's acts were part of a practice and pattern. (See *People v. Duvall,*

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4. All references to "RT" "CT" and "Supp. CT" refer to the records on appeal in *People v. Kenneth Earl Gay*, California Supreme Court No. S004699.

5. According to the California State Bar website (http://www.calbar.ca.gov), Daye Shinn is deceased.

supra, 9 Cal.4th at p. 485.)

13. Respondent admits that "In accordance with their illegal pattern and practice, Shinn retained Weaver, a licensed psychiatrist who was admittedly in the 'waning' years of his forensic work and did not possess the additional 'training and experience in forensic psychiatry . . . now expected of experts in this field,' to assess petitioner. [Citation.]" (Petn. 39, ¶ 5.b.(2); see *In re Gay*, *supra*, 19 Cal.4th at pp. 796-797.)

14. Except as noted, respondent admits that "Weaver had no experience in death penalty cases, and Shinn did not hire him based on any perceived or demonstrated areas of expertise or competence. Shinn's and Weaver's pre-existing, mutually beneficial capping arrangement was the sole motivating factor for Shinn's action in retaining Weaver to whom Shinn funneled public monies in exchange for appearing to work on petitioner's case. [Citations.]" (Petn. 39-40, ¶ 5.b.(2)(a); see *In re Gay*, *supra*, 19 Cal.4th at pp. 796-797.) Respondent denies that Weaver only "appear[ed] to work on petitioner's case." Respondent alleges that Weaver reviewed police reports, test results, and some trial transcripts. (*In re Gay*, *supra*, 19 Cal.4th at p. 799.) Weaver went to jail and interviewed petitioner. (*Id.* at p. 797, fn. 13.) Weaver also testified at the penalty phase of petitioner's trial. (*Ibid.*; 99RT 11315-11334.)

15. Respondent admits that "Pursuant to and as a result of such motivating factor, Shinn agreed to retain and compensate Weaver despite and with the explicit understanding that Weaver was not willing to commit the time or to undertake the work necessary to perform an adequate assessment necessary to assist counsel in preparing a defense in a complicated case such as petitioner's. [Citation.]" (Petn. 40, ¶ 5.b.(2)(b); see *In re Gay*, *supra*, 19 Cal.4th at p. 796.)

16. Respondent admits that "Shinn unreasonably failed to arrange for Weaver to perform any assessment of petitioner in a minimally timely fashion.

Weaver was not even contacted until after the conclusion of the guilt phase at petitioner's capital trial. [Citation.]" (Petn. 40, ¶ 5.b.(2)(c); see *In re Gay*, *supra*, 19 Cal.4th at pp. 796-797.)

17. Respondent admits that "Shinn intentionally and unreasonably failed to undertake and/or instruct Weaver to undertake the minimally adequate investigation and preparation of mental state evidence that is expected of competent professionals in a capital case. [Citation.]" (Petn. 40, ¶ 5.b.(2)(d); see *In re Gay*, *supra*, 19 Cal.4th at pp. 796-798.)

18. Respondent admits that "Shinn affirmatively and unreasonably limited and restricted the scope of Weaver's professional services to seeing petitioner once or twice, performing a perfunctory assessment and reporting back to Shinn. [Citation.]" (Petn. 40, ¶ 5.b.(2)(e); see *In re Gay*, *supra*, 19 Cal.4th at pp. 797-798.)

19. Respondent admits that "Pursuant to the limitations imposed by Shinn, and under which Weaver knew he was operating, Weaver understood he was to render only pro forma services requiring he do no more than 'go through the motions,' rather than provide petitioner the benefit of his best clinical and forensic skills. [Citation.]" (Petn. 40-41, ¶ 5.b.(2)(f); see *In re Gay*, *supra*, 19 Cal.4th at pp. 796-797.)

20. Respondent admits that "Pursuant to such limitations and understanding of the scope of his services, Weaver regarded the minimal investigation of petitioner's drug use or interviews with his family members as an unnecessary 'frill.' [Citation.]" (Petn. 41, ¶ 5.b.(2)(g); see *In re Gay*, *supra*, 19 Cal.4th at p. 797.)

21. Respondent admits that "Weaver was not provided with nor did he otherwise request or obtain any school, medical, hospital, correctional, employment, military or juvenile records for Kenneth Gay or any of his family members . . . ." (Petn. 41, ¶ 5.b.(2)(h); see *In re Gay*, *supra*, 19 Cal.4th at p.

797.) Respondent denies that Weaver "had no adequate or reliable source of clinically significant data at the time of his meetings with petitioner. [Citation.]" (Petn. 41, ¶ 5.b.(2)(h).) Respondent alleges Weaver had test results from the "considerable testing" administered by McBroom, including, but not limited to, the Wechsler Adult Intelligence Scale (WAIS), the Bender Gestalt, the Rorschach, and the MMPI tests. (99RT 11317, 11324; *In re Gay*, S030514, Evidentiary Hearing ["EH"] 2RT 412; *In re Gay*, *supra*, 19 Cal.4th at p. 789, fn. 11.) Weaver also had a parole outpatient report, dated May 11, 1983. (*In re Gay*, *supra*, 19 Cal.4th at pp. 799-800 & fn. 11.)

22. Respondent admits that "Shinn was aware and expected that, pursuant to the illegal capping arrangement, hiring Weaver to perform a pro forma evaluation would result in McBroom also receiving a share of case-generated funds on the pretense of performing diagnostic testing of petitioner." (Petn. 41, ¶ 5.b.(3); see *In re Gay*, *supra*, 19 Cal.4th at p. 795.) Respondent denies that "Shinn knew or reasonably should have known that both McBroom and Weaver were not licensed, and were unqualified to administer any indicated testing including, but not limited to, neuropsychological testing; and that authorizing and permitting McBroom to perform such testing constituted an intentional failure to vindicate petitioner's constitutional right of access to the assistance of a competent mental health professional. [Citations.]" (Petn. 41, ¶ 5.b.(3).) Respondent alleges that Weaver was a licensed physician and was licensed to administer psychological/psychiatric tests. (*In re Gay*, *supra*, 19 Cal.4th at p. 789, fn. 11; see 99RT 11315-11316.) McBroom had previously been licensed, but let his license lapse. (EH 2RT 360-361.) At the time of the 1985 penalty phase in petitioner's case, McBroom was a trained psychologist and he was qualified to administer psychological/psychiatric tests. (EH 2RT 346, 371, 408.) At the time of the 1985 penalty phase in petitioner's case, McBroom was permitted to

administer psychological testing at the direction and under the supervision of Weaver, even though he was not licensed. (EH 2RT 358, 438.)

23. Respondent denies that "As a result of his lack of qualifications, McBroom failed to select and/or competently administer any appropriate clinical instruments, and failed to obtain any readily available, reliable, or useful data." (Petn. ¶ 41-42, ¶ 5.b.(3)(a).) Respondent alleges that Weaver had test results from the "considerable testing" administered by McBroom, including, but not limited to, the Wechsler Adult Intelligence Scale (WAIS), the Bender Gestalt, the Rorschach, and the MMPI tests. (99RT 11317, 11324; EH 2RT 412; *In re Gay*, *supra*, 19 Cal.4th at p. 789, fn. 11.) Weaver relied on the information from these tests in forming his conclusions that were presented at petitioner's 1985 penalty phase. (See 99RT 11315-11334.)

24. Respondent denies that "McBoom's failures included, but were not limited to, administering the Wechsler Intelligence Scale for Children (WISC), which is appropriate only for children, rather than administering the age-appropriate Wechsler Adult Intelligence Scale - Revised; and the Bender Gestalt test for organicity, which, is an insufficient measure of organic brain damage. [Citation.]" (Petn. 41, ¶ 5.b.(3)(b).) Respondent alleges that McBroom gave the Wechsler Adult Intelligence Scale (WAIS), not the Wechsler Intelligence Scale for Children (WISC), and that Weaver misspoke when he testified at the 1985 penalty trial that the "WISC" test had been given. (EH 2RT 374-375, 412; 99RT 11324.) McBroom properly administered the Bender-Gestalt Test to screen for organic brain damage. (99RT 11324; 3 Ziskin, Coping with Psychiatric and Psychological Testimony (5th Ed. 1995) p. 716 [noting survey published in 1989 finding Bender-Gestalt Test one of the top ten tests used by mental health facilities]; *id.* at p. 876 [noting many clinicians use Bender-Gestalt Test to assess for brain damage]; *id.* at p. 918 [noting common technique for screening for brain damage is to give Bender-

Gestalt test with IQ test]; see *id.* at p. 920 ["due to the variation in method of neuropsychological evaluation it is nearly impossible to provide a standard description."].) Respondent alleges that all of the allegations relating to Shinn's appointment with McBroom's assistance and the capping arrangement with Weaver and McBroom do not state a prima face case for relief from the guilt verdicts, as this Court has already determined. (See *In re Gay*, *supra*, 19 Cal.4th at p. 795 [noting Court had "conclud[ed] that the allegations of the petition failed to state a prima facie case with respect to the guilt phase . . . ."].)

25. Respondent admits that "Beginning shortly after Shinn fraudulently engineered his appointment as petitioner's attorney, and continuing throughout the capital proceedings against petitioner in the trial court, Shinn was aware that he was being investigated for the embezzlement of client funds by the office of the same district attorney who was his adversary in the prosecution of petitioner. [Citation.]" (Petn. 42, ¶ 5.c.) Respondent alleges that different deputies in the Los Angeles County District Attorney's Office were assigned to the two matters: the deputy district attorney handling the prosecution of Petitioner was John Watson, and the deputy district attorney handling the investigation of Daye Shinn was Albert McKenzie. (Exh. 34, pp. 1111-1124; 7CT 1801-1802; 8CT 2075.) In addition, Deputy Watson never spoke to McKenzie, or anyone else, about the fraud investigation involving Shinn, he had no knowledge of the investigation, and Shinn never asked him to intercede in the investigation on Shinn's behalf. (Return Exh. 7, ¶ 4.)

26. Except as noted, respondent admits that "In the early fall of 1983, Oscar Dane reported to Deputy Los Angeles County District Attorney Al MacKenzie that Shinn had embezzled the proceeds, in the amount of approximately $200,000, awarded to Dane in an eminent domain proceeding that resulted in the sale of Dane's Santa Monica home. [Citations.]" (Petn. 42, ¶ 5.c.(1).) Respondent denies that the meeting occurred in the "early fall of

1983," and alleges that the meeting occurred in November 1983. (Exh. 33, ¶ 83.)

27. Except as noted, respondent admits that "In response to Dane's allegations, Deputy District Attorney Albert MacKenzie commenced a criminal investigation, and assigned Los Angeles County Sheriff's Detective Charles Gibbons as the principle [*sic*] investigator. As part of the ensuing investigation, Detective Gibbons made repeated telephonic contacts with Shinn in an unsuccessful effort to obtain an explanation and documentation for the handling and disbursement of Dane's funds; and thereafter conducted several personal interviews with Shinn, either by himself or with the participation of Deputy District Attorney MacKenzie, during which the authorities pointedly questioned Shinn about the whereabouts and disposition of Dane's money. [Citations.]" (Petn. 42-43, ¶ 5.c.(2).) However, respondent denies that Gibbons made repeated personal telephonic contacts with Shinn; respondent alleges the contacts were with Shinn's office, not necessarily Shinn. (Exh. 34, p. 969.) Also, respondent denies that Gibbons had "several personal interviews" with Shinn; respondent alleges Gibbons interviewed Shinn twice: on March 1, 1984, for approximately 10 minutes, and on August 21, 1984, for about 10 minutes. (Exh. 34, pp. 969-970, 979-980.)

28. Respondent admits that "Throughout the course of said telephonic and personal contacts with the investigating authorities, Shinn attempted to maintain an appearance of being cooperative while evading questions, withholding information and reneging on promises to provide relevant records and documentation, all for the intent and with the effect of stalling the investigation. [Citation.]" (Petn. 43, ¶ 5.c.(3).)

29. Except as noted, respondent admits that "Shinn's embezzlement of Dane's funds was motivated by improper personal interests including, but not limited to, the need to cover up his fraudulent behavior toward other clients

including, but not limited, to his misappropriation of approximately $90,000 from Rebecca and Alexander Korchin." (Petn. 43, ¶ 5.c.(4).) However, respondent denies that Shinn's embezzlement was motivated by the need to conceal fraudulent behavior toward any "other clients" aside from the Korchins. This denial is based on the following: (1) Shinn is not available for respondent to interview; (2) neither petitioner's allegation nor the documents relied upon by petitioner name the "other clients," apart from the Korchins, making an investigation of them impossible; (3) since petitioner's allegation lacks specificity in this regard, respondent believes there is a good faith basis to believe the facts are untrue, i.e., that Shinn's embezzlement was motivated by the need to conceal fraudulent behavior toward any "other clients" aside from the Korchins. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.)

30. Respondent admits that "Shinn's intent and attempts to appear cooperative with the District Attorney's Office and other investigating agencies, while simultaneously misdirecting and frustrating the investigation, were motivated by his knowledge that a reasonably minimal investigation would lead to conclusive evidence of his pattern and practice of fraudulent, criminal behavior toward his clients, which exposed Shinn to liability for successful criminal prosecution, imprisonment and disbarment." (Petn. 43-44, ¶ 5.c.(5); see Exh. 80, p. 2088.) Respondent alleges that Shinn was never criminally prosecuted or imprisoned for any fraudulent or criminal behavior toward his clients. (See Exh. 34, pp. 1122-1123.)

31. Respondent admits that "In February 1981, Shinn attempted to tender a check in the amount of $172,729.68 to his client Oscar Dane. [Citations.]" (Petn. 44, ¶ 5.c.(5)(a).) Respondent alleges that Shinn attempted to tender the check "through the office of the Los Angeles County Treasurer." (Exh. 33, p. 538.)

32. Respondent admits that Dane refused to accept the check, but denies

that "Dane refused Shinn's tender of the check because it was an amount less than Dane had authorized Shinn to accept as a settlement on Dane's behalf for his property and losses that had been appraised at over $2,000,000, and for which he had instructed Shinn not to settle for less than $1,600,000." (Petn. 44, ¶ 5.c.(5)(b).) Respondent alleges that Dane refused the check because he wanted the money returned to a trust account with the county. (Exh. 33, pp. 552-553; Exh. 34, pp. 914-916.) Respondent admits that "Dane also demanded a detailed accounting from Shinn." (Petn. 44, ¶ 5.c.(5)(b).)

33. Respondent admits that "Shinn could not and did not provide an accounting, and instead pursued a course of conduct designed to and which in fact did continue to mishandle and misappropriate Dane's funds for Shinn's personal benefit, while concealing and obfuscating Shinn's course of unlawful conduct. [Citations.]" (Petn. 44, ¶ 5.c.(5)(c).)

34. Respondent admits that "On February 10, and March 14, 1983, Shinn used Dane's money to make successive, improper purchases of Certificates of Deposit (CDs). [Citation.]" (Petn. 44, ¶ 5.c.(5)(d).)

35. Respondent admits that "Shinn made successive improper and unlawful purchases of CD's on May 16, [1983], June 15, 1983 and July 15, 1983. [Citations.]" (Petn. 44, ¶ 5.c.(5)(e).)

36. Respondent admits that "On August 15, 1983, Shinn used the funds to purchase another CD in the amount of $139,536.95. The account was payable to the Daye Shinn Trust Account in contravention of Shinn's awareness that all monies used to fund the account properly belonged to Dane. [Citation.]" (Petn. 45, ¶ 5.c.(5)(f).)

37. Respondent admits that "On September 14, 1983, Shinn used the liquidated proceeds of the fund to purchase two separate CDs, again executing and converting the instruments as payable only to the Daye Shinn Trust Account, despite Shinn's knowledge that the funds were the exclusive property

of his client. [Citation.]" (Petn. 45, ¶ 5.c.(5)(g).)

38. Respondent admits that "As of said date, Shinn further had depleted the account of approximately $25,000, which he had disbursed in a manner, by means and for purposes that he would not describe or disclose. [Citation.]" (Petn. 45, ¶ 5.c.(5)(h).)

39. Respondent admits that "On October 14, 1983, Shinn purchased another CD in the amount of $141,872.25, payable to the Daye Shinn Trust Account, at which point he owed Dane approximately $166,401. [Citation.]" (Petn. 45, ¶ 5.c.(5)(i).)

40. Except as noted, respondent admits that "In late 1983 and early 1984, Shinn endeavored to convert all monies from the unlawful CD accounts to his personal use . . . ." (Petn. 45, ¶ 5.c.(6).) Respondent denies that Shinn endeavored to convert "all" the money to personal use, and alleges that Shinn endeavored to convert only *some* of the monies to personal use. (Exh. 33, pp. 547-549 [noting Danes eventually received and accepted check for $178,287.93, and amount misappropriated could not be determined].) Respondent denies that Shinn endeavored to "cover up his embezzlement by blaming others for the theft, and by destroying all relevant records and documentation of his unlawful financial transactions." (Petn. 45, ¶ 5.c.(6).) Respondent alleges that: Linda Jones stole a check, for $145,285.88, that had been made out to Shinn's trust account for his client Oscar Dane; she was convicted of theft of that check; she set fire to Shinn's office in an attempt to conceal or delay discovery of that theft; and the fire in Shinn's office damaged many of Shinn's files. (*People v. Linda Sue Jones*, California Court of Appeal No. B021650,[6] 1CT 13, 126; Exh. 33, p. 547; Exh. 34, pp. 1303, 1323, 1334-1335.)

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6. Further citations to the appellate record in *People v. Jones* will simply cite "*Jones*" and the relevant record, e.g., "*Jones* CT."

41. Except as noted, respondent admits that "On or about January 11, 1984, Shinn closed the last of the CD accounts, obtaining a check for over $145,000 payable to his account. [Citation.]" (Petn. 45, ¶ 5.c.(6)(a).) However, respondent alleges the check was payable to "Daye Shinn Trust Account-Attn. Oscar Dane." (Exh. 33, p. 547.)

42. Respondent denies that "On or about January 16, 1984, Shinn set fire to a portion of his office causing damage to, inter alia, a wall and a photocopying machine. [Citation.]" (Petn. 46, ¶ 5.c.(6)(b).) Respondent alleges that Shinn was gone during the fire, and he did not set the fire; Linda Jones set the fire. (*Jones* 11RT 1596; *Jones* 1CT 13, 126.)

43. Respondent denies that "Shinn thereafter falsely claimed that the check he obtained on January 11, 1984, had been issued for the benefit of his client, Oscar Dane; that it had been stolen from Shinn's office by Linda Jones, the wife of Shinn's law partner, Lewis Jones . . . ." (Petn. 46, ¶ 5.c.(6)(c).) Respondent alleges: the check had been obtained for Oscar Dane and was made payable to "Daye Shinn Trust Account-Attn. Oscar Dane" (Exh. 33, p. 547); Linda Sue Jones did steal the check, and she was convicted of theft of that check (*Jones* 1CT 13, 126; Exh. 33, p. 547); and Lewis Jones rented office space to Shinn and they were not partners (*Jones* 11RT 1594-1595; Exh. 34, p. 1310). Respondent admits that "Shinn thereafter falsely claimed . . . that the records showing his proper handling of Dane's funds had been destroyed inadvertently in the fire in his office. [citations.]" (Petn. 46, ¶ 5.c.(6)(c).)

44. Respondent denies that "Independent investigation by law enforcement personnel including, but not limited to, Detective Charles Gibbons and Hassan Attalla, Supervising Investigative Auditor for the Los Angeles County District Attorney's Office, determined that Shinn made knowingly false representations regarding the exculpatory contents of the records that were purportedly destroyed in the office fire." (Petn. 46, ¶ 5.c.(6)(d).) Respondent

alleges that the fire in Shinn's office damaged many of Shinn's files. (Exh. 34, pp. 1303, 1323, 1334-1335.) Shinn did not allege that the documents destroyed in his office fire were "exculpatory"; he claimed that his fee agreement with the Danes had been modified by an "oral agreement," not a written one. (Exh. 33, p. 550.) Respondent admits that "Shinn's misrepresentations included, but were not limited to, falsely describing the terms and conditions of the retainer agreement into which he had entered with Dane, and falsely claiming he had placed Dane's funds in a single account and maintained the principle [*sic*] and interest for Mr. Dane's benefit. [Citations.]" (Petn. 46, ¶ 5.c.(6)(d).) Respondent alleges that Shinn did not make these misrepresentations in connection with any statements about what the files destroyed in his office showed. (Exh. 33, pp. 549-550, 552.)

45. Respondent admits that "Gibbons's and Attalla's investigations revealed in fact that Shinn had shifted the monies through a labyrinth of accounts for no legitimate purpose, and no purpose other than to conceal his misappropriation of the funds, and that Shinn had consistently skimmed off the interest as it accrued in each account. [Citation.]" (Petn. 46, ¶ 5.c.(6)(e).)

46. Except as noted, respondent admits that "On or about March 1, 1984, Detective Gibbons met with Shinn to again question him regarding the whereabouts of Dane's money, and to secure Shinn's authorization to obtain Shinn's banking records in light of the purportedly accidental destruction of such records in Shinn's office fire. [Citation.]" (Petn. 47, ¶ 5.c.(7).) Respondent denies that Gibbons met with Shinn "again"; respondent alleges this is the first time Gibbons and Shinn met. (Exh. 34, pp. 969-970.)

47. Respondent admits that "During the above-described interview with Gibbons, Shinn verbally agreed to authorize the release of his banking records, but then claimed he needed several days to review the contents of a three-line release Gibbons asked him to sign to formalize his authorization for release of

the records. At no time thereafter did Shinn execute or return the release to Gibbons or any other law enforcement personnel. [Citations.]" (Petn. 47, ¶ 5.c.(8).)

48. Respondent admits that "Shinn thereafter continued to obstruct and delay the investigation by making further unfulfilled promises and false assurances that he would timely provide the District Attorney's Office with documentation of his proper handling of Dane's funds. Such promises and assurances were advanced by Shinn pursuant to his purpose and intent to appear cooperative with the District Attorney's investigation while simultaneously taking all steps available to him to frustrate the legitimate aims of said investigation. [Citation.]" (Petn. 47 ¶ 5.c.(9).)

49. Except as noted, respondent admits that "Following further unsuccessful attempts to obtain the requested and promised documentation and records from Shinn, and commencing in or about the summer of 1984, Detective Gibbons secured and served the first of several search warrants to obtain Shinn's banking records. The number and complexity of accounts and transactions Shinn utilized to misappropriate the funds of Oscar Dane and other clients reasonably led and required Detective Gibbons thereafter to obtain successive search warrants authorizing the seizure of Shinn's banking records, including but not limited to, warrants that were issued during petitioner's capital murder trial proceedings, through and including May 18, 1986. [Citations.]" (Petn. 47-48, ¶ 5.c.(10).) Respondent denies that the transactions Shinn used to misappropriate funds from "other clients," i.e., clients other than the Danes, was a basis for requesting any of the search warrants. (Exh. 80, ¶¶ 7-13.)

50. Respondent admits that "In the midst of petitioner's trial proceedings, Shinn responded to the intensifying investigation, and the intervention of the offices of Congressman Edward Roybal, by providing a purported accounting of the money he owed Dane and the interest that had

accrued. Shinn also tendered a check on behalf of Dane. Shinn's alleged accounting was false and misleading, and the proffered check was for less than the amount owed to Dane. [Citations.]" (Petn. 48, ¶ 5.c.(11).) Respondent alleges that the meeting took place on February 22, 1985, before the presentation of evidence in Petitioner's trial. (Exh. 33, p. 547.)

51. Respondent denies that "Beginning shortly after Shinn fraudulently engineered his appointment as petitioner's attorney, and contemporaneous with his knowledge that he was being investigated for misappropriation of client funds, Shinn also was aware that he was being investigated for murder and arson by the office of the same district attorney who was his adversary in the prosecution of petitioner." (Petn. 48, ¶ 5.d.) Respondent admits that Shinn thought the district attorney's office and sheriff may have been investigating him in connection with the murder of Mr. Jones. But respondent alleges that Shinn was gone during the fire, the fire was never investigated by arson investigators, and Shinn did not think he was a suspect in the arson. (*Jones* 11RT 1596; *Jones* 13RT 1909.) Also, Linda Jones was convicted of setting the fire and of the murder of Lewis Jones. (*Jones* 1CT 13, 126.) Respondent alleges that different deputies in the Los Angeles County District Attorney's Office were assigned to the two matters: the deputy district attorney handling the prosecution of petitioner was John Watson and the deputy district attorney handling the murder of Lewis Jones was Charles Girot. (7CT 1801-1802; 8CT 2075; *Jones* 1CT 39, 65.) In addition, Deputy Watson never spoke to Girot, or anyone else, about the *Jones* case, he had no knowledge of Shinn's involvement in the case, and Shinn never asked him to intercede in the investigation on Shinn's behalf. (Return Exh. 7, ¶ 4.)

52. Respondent denies that "Approximately three-and-a-half weeks after Shinn set fire to his office and claimed that a $145,000 check had been stolen from him by Linda Jones, the wife of Shinn's law partner, Lewis Jones, Mr.

Jones was shot to death." (Petn. 48, ¶ 5.d.(1).) Respondent alleges the following: The fire in Shinn's office occurred on approximately January 16, 1984; Lewis Jones was shot to death and died somewhere between midnight February 26, 1984, and 10 p.m. February 27, 1984. (*Jones* Opn. 7.) Lewis Jones rented office space to Shinn; they were not partners. (*Jones* 11RT 1594-1595; Exh. 34, p. 1310.) Linda Sue Jones stole the check, for $145,285.88, that had been made out to Shinn's trust account for his client Oscar Dane; she was convicted of theft of that check. (*Jones* 1CT 13, 126; Exh. 33, p. 547.)

53. As to the allegation that "Shinn reasonably believed he was a suspect in both the Jones murder case and the arson at his office" (Petn. 48, ¶ 5.d.(2)), respondent admits that Shinn thought the district attorney's office and sheriff may have been investigating him in connection with the murder of Mr. Jones. But respondent alleges that Shinn was gone during the fire, the fire was never investigated by arson investigators, and Shinn did not think he was a suspect in the arson. (*Jones* 11RT 1596; *Jones* 13RT 1909.) Also, Linda Jones was convicted of setting the fire and of the murder of Lewis Jones. (*Jones* 1CT 13, 126.)

54. Respondent denies that "Shinn was aware that he had possible, plausible motives for killing Lewis Jones including, but not limited to, eliminating witnesses to his theft and misappropriation of Dane's client funds, and/or concealing his culpability for such acts by falsely claiming Linda Jones had stolen the check with which he intended to reimburse Dane and then engineering Linda Jones's conviction for killing her husband." (Petn. 49, ¶ 5.d.(3).) Respondent alleges Shinn's misappropriation of Dane's funds occurred in a series of financial transactions that Lewis Jones had no knowledge of. (Exh. 33.) Also, Shinn did not "falsely" claim that Linda Jones had stolen the check for the Danes; rather, Linda Jones stole the check, for $145,285.88, that had been made out to Shinn's trust account for his client Oscar Dane; she

was convicted of theft of that check. (*Jones* 1CT 13, 126; Exh. 33, p. 547.) Finally, Shinn in no way engineered Linda Jones's conviction for murder; rather, Linda Jones's conviction was based, in part, on evidence that had nothing to do with Shinn, namely: her lies about the victim on the day of the murder; her concealment of a gun that was consistent with the murder weapon; her motive to kill based on a need to conceal her theft of client funds for money to pay gambling debts; and her false account of having been kidnapped. (*Jones* Opn. 3-8.)

55. Except as noted, respondent admits that "Within days of Mr. Jones's murder, Shinn arranged for Linda Jones, the decedent's wife, and her family, to meet with him for the ostensible purpose of advising Mrs. Jones regarding her potential exposure for prosecution in the matter of her husband's death. [Citations.]" (Petn. 49, ¶ 5.d.(3)(a).) Respondent denies that Shinn "arranged" the meeting and alleges that Linda Jones's brothers sought the advice of Shinn on the recommendation of William Ramey. Respondent denies that Shinn met with Linda Jones and alleges that Shinn met only with Richard and Robert Badger, and their stepfather Cliff Carter. Respondent denies that the purpose of the meeting was to advise Linda Jones as to her potential exposure for prosecution and alleges the purpose was to discuss possible representation of Linda Jones. (Exhs. 58, 59.)

56. Except as noted, respondent admits that "Shinn thereupon questioned Mrs. Jones and her family in his office for several hours regarding a wide range of issues including, but not limited to Mrs. Jones's behavior, the extent of her and her family members' knowledge of the case, as well as Mr. Jones's finances. [Citations.]" (Petn. 49, ¶ 5.d.(3)(b).) Respondent denies that Linda Jones was present during the meeting, and alleges that the questioning was limited to Linda Jones, her behavior, and what the people present at the meeting knew about the case. (Exhs. 58, 59.)

57. Respondent admits that "At the conclusion of the interviews, Shinn announced that he could not represent Mrs. Jones because he had a conflict of interest. [Citation.]" (Petn. 49, ¶ 5.d.(3)(c).)

58. Except as noted, respondent denies that "Thereafter, Shinn exploited the information he had obtained from Mrs. Jones and her family members as part of his plan that was intended to, and did in fact, assist the prosecuting authorities in shifting suspicion away from himself and onto Linda Jones, and testified as a prosecution witness at Jones's murder trial. Shinn's unethical and duplicitous conduct in this regard was motivated by his reasonable fear and concern of possible jeopardy to himself." (Petn. 49-50, ¶ 5.d.(3)(d).) Respondent admits that Shinn testified as a prosecution witness at the trial of Linda Sue Jones. However, respondent alleges Shinn's testimony was limited to the following: Shinn was an independent lawyer who rented office space from Mr. Jones; he received a check for $145,285.88, payable to "Daye Shinn, Trust Account, Account Oscar Dane"; he placed the check on top of his desk on or about January 17, 1984, and left the office; he returned to the office at 7:30 or 8 p.m.; a fire had occurred at his office and his files, papers, and desk had burned; Shinn believed the check had burned; the fire was concentrated near a copier machine in the office; and Shinn did not have any involvement with the subsequent endorsement and deposit of the check or the distribution of any funds related to that check. (*Jones* 11RT 1593-1606.) Thus, Shinn's testimony did not exploit or involve any information received from his interview with the family of Linda Jones; his testimony did not involve placing anyone under suspicion. Moreover, Shinn did not do anything to assist the prosecuting authorities and shift suspicion away from himself and onto Linda Jones. Also, Linda Jones was convicted of setting the fire and of the murder of Lewis Jones, and Shinn's testimony played an extremely minor role in supporting that conviction. (*Jones* 1CT 13, 126.)

59. Respondent denies that "As a further part of his plan and scheme to avoid any possible jeopardy in connection with his partner's murder, Shinn falsely and misleadingly maintained that he was not Lewis Jones's law partner and that he was merely Jones's tenant. [Citations.]" (Petn. 50, 5.d.(3)(e).) Respondent alleges that Shinn truthfully testified that Lewis Jones rented office space to him; they were not partners. (*Jones* 11RT 1594-1595; Exh. 34, p. 1310; Stip p. 2, ¶ 10.) Furthermore, Shinn had no "plan or scheme" to avoid any possible jeopardy in connection with the murder.

60. Respondent denies that "Shinn feared that the detective investigating his embezzlement of client funds was gathering evidence to show that Shinn was involved in Jones's murder as a way to take the money. Shinn sought to frustrate this aspect of the authorities' investigation by refusing to authorize Detective Gibbons to review records of Shinn's numerous bank accounts. [Citation.]" (Petn. 50, ¶ 5.d.(3)(f).) Respondent alleges the investigation of the two crimes were completely separate; Deputy Sheriff Charles Gibbons was assigned to investigate the embezzlement of the Danes; Sheriff's Lieutenant Jack Scully was assigned to investigate the murder of Lewis Jones. (Exh. 34, p. 966; *Jones* 2RT 223-224.) Shinn was aware that these investigations were separate. Therefore, Shinn's actions to conceal or prevent detection of his embezzlement were not motivated by a desire to hinder the investigation of the murder, since the two were unrelated.

61. Respondent denies that "Shinn was also reasonably aware that the police knew he had an obvious motive to commit the arson as part of his efforts to conceal his theft of client funds, including but not limited to those he embezzled from Oscar Dane; and that the suspicious nature of the fire would be evident upon investigation. [Citation.]" (Petn. 50, ¶ 5.d.(4).) Respondent alleges that Linda Jones set the fire to conceal her theft of the check, for $145,285.88, that had been made out to Shinn's trust account for his client

Oscar Dane. (*Jones* 1CT 13, 126; Exh. 33, p. 547.) At the time of the fire, Shinn thought the fire was started by a copier and that the fire resulted in the destruction of the check. (*Jones* 11RT 1596-1597; *Jones* 13RT 1896-1899, 1903.) The commanding fire officer on the scene determined the copier was the cause of the fire; Firefighter Michael Gregg did not see any cause for the fire aside from the copier; there was no obvious evidence of arson; and the fire was never investigated by arson investigators. (*Jones* 13RT 1891, 1897-1899, 1903, 1909.) Thus, Shinn did not know there was any "suspicious nature" to the fire, and he had no reason to believe that the police would have suspected him of setting the fire, which resulted, he believed, in the destruction of a check for a large sum of money.

62. Respondent admits that "Shinn falsely claimed that at the time the fire occurred, he was making a summary of the Dane funds; the necessary financial records were lying next to the copying machine where the fire apparently originated; and the records were destroyed in the fire. [Citation.]" (Petn. 50, ¶ 5.d.(4)(a).)

63. Respondent admits that "Shinn's false claims were intended to provide him with a pretext for claiming that all of his ledgers and other accounting documents related to the Dane matter had been destroyed inadvertently, thereby necessitating further delay in responding to official investigators' inquiries while he purportedly undertook to contact various banks to obtain account information. [Citation.]" (Petn. 51, ¶ 5.d.(4)(b).)

64. Respondent admits that "Expert analysis at the scene of the fire demonstrated that it was not accidentally caused by the copier, based on physical findings including, but not limited to, the fact that the side of the machine containing the electrical wiring was not burned, while the other side was. [Citations.]" (Petn. 51, ¶ 5.d.(4)(c).) Respondent alleges the commanding fire officer on the scene determined the copier was the cause of the fire;

Firefighter Michael Gregg did not see any cause for the fire aside from the copier; there was no obvious evidence of arson; and the fire was never investigated by arson investigators. (*Jones* 13RT 1891, 1897-1899, 1903, 1909.) Also, Linda Jones was convicted of setting the fire. (*Jones* 1CT 13, 126.)

65. Respondent denies that "In the face of official inquiry, Shinn was unable to maintain a consistent story regarding the date and circumstances of the fire, and he altered his purported memory of events about when the fire occurred. [Citation.]" (Petn. 51, 5.d.(4)(d).) Shinn repeatedly asserted that the fire in his office occurred on approximately February 16, 1984. (Exh. 34, pp. 596, 644, 725, 1018, 1068.) Respondent alleges that Shinn misspoke when he said the date of the fire was February 6, 1984. (See Exh. 34, p. 726.) Shinn consistently testified that he left his office on the day of the fire and returned to the office at 7:30 or 8 p.m. after the fire had occurred. (*Jones* 11RT 1596.)

66. Respondent denies that "Throughout the time Shinn purported to act as petitioner's counsel, Shinn's representation was burdened by the conflicting demands of other State Bar disciplinary matters and/or lawsuits by former clients . . . ." (Petn. 51, ¶ 5.e.) Respondent admits that "State Bar disciplinary matters and/or lawsuits by former clients" were occurring during Shinn's representation of petitioner solely as admitted elsewhere in this Return. Respondent denies that Shinn's representation was "burdened" as a result of these "other matters." Respondent alleges Shinn's representation of petitioner was unaffected by these other matters because these "other matters" were spread out over a number of years, and Shinn's involvement in, and attention to, these other matters appears to have been extremely limited during the period he represented petitioner. (See Exh. 35, p. 1583 [Notice to Show Cause issued in Korchin matter on July 12, 1985, after the jury reached a death verdict in petitioner's case on July 3, 1985]; 9CT 2512; Exh. 34, p. 583 [state bar hearing

on Dane matter commencing on March 12, 1990, long after verdicts and sentencing in petitioner's case].) Respondent also denies that "the factual bases of [the other cases] all evidenced Shinn's lack of technical competence as an attorney as well as his inability to understand and/or his unwillingness to adhere to the most fundamental responsibilities of an attorney as embodied in the provisions of the Business and Professions Code and the Rules of Professional Conduct. [Citations.]" (Petn. 51, ¶ 5.e.) Respondent alleges that any failures in competence or failures to adhere to professional responsibilities in these specific other matters were insufficient to generally establish a "lack of technical competence as an attorney as well as [an] inability to understand and/or [an] unwillingness to adhere to the most fundamental responsibilities of an attorney as embodied in the provisions of the Business and Professions Code and the Rules of Professional Conduct. [Citations.]" Respondent makes this denial based on the following: (1) Shinn is not available for respondent to interview; and (2) respondent believes there is a good faith basis to believe the acts or omissions in a few isolated cases occurring over several years are insufficient to demonstrate a general lack of competence. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.)

67. Except as noted, respondent admits that "In April 1982, Shinn was notified that the State Bar had begun an investigation of his misappropriation of an award for more than $90,000 that Shinn had received on behalf of Rebecca and Alexander Korchin. [Citation.]" (Petn. 52, ¶ 5.e.(1).) Respondent denies that Shinn was notified of an "investigation," or that it was alleged he had misappropriated "more than $90,000." Respondent alleges that Shinn received a letter from the state bar, dated April 19, 1982, notifying Shinn that the Korchins had filed a complaint against him. (Exh. 35, p. 1593.) The letter said that Mr. Korchin alleged he had given Shinn approximately $90,000, only approximately $70,000 had been returned, and that Shinn had charged him

approximately $20,000 in fees without an accounting. (Exh. 35, p. 1593.) The letter asked Shinn for a response. (Exh. 35, p. 1593.) Shinn sent a letter response on April 30, 1982. (Exh. 35, p. 1595.) All of these events occurred prior to the June 2, 1983 murder of Police Officer Paul Verna.

68. Respondent admits that "In October 1982, Stanley Steinberg and Alfreda Leighton sued Shinn for malpractice. That suit remained ongoing through September 1987, covering the entire period of Shinn's purported representation of petitioner. [Citation.]" (Petn. 52, ¶ 5.e.(2).) Respondent alleges the case was dismissed for lack of prosecution. (Exh. 68, p. 2001.)

69. Respondent admits that "On July 26, 1983, the Korchins filed a lawsuit against Shinn for mishandling their client funds. [Citation.]" (Petn. 52, ¶ 5.e.(3).)

70. Respondent admits that "In September of 1983, shortly after the conclusion[] of petitioner's preliminary hearing, a State Bar preliminary hearing was held regarding the Korchin's complaint against Shinn. Based upon the evidence presented at such hearing, probable cause was found to issue formal charges against Shinn. [Citation.]" (Petn. 52, ¶ 5.e.(4).)

71. Respondent admits that "During the time the foregoing matters were all pending, John Kim also filed a lawsuit against Mr. Shinn for legal malpractice. [Citation.]" (Petn. ¶ 5.e.(5).) Respondent alleges that the lawsuit was filed by Kim, in pro per, while incarcerated in state prison. (Exh. 67, p. 1994.)

72. Respondent denies that "As alleged above, Kim was another victim of Shinn's fraudulent capping scheme." (Petn. 52, ¶ 5.e.(5)(a).) Respondent alleges that Shinn did not utilize the services or aid of McBroom or Weaver at any time during his meetings or representation of John Kim. (Exhs. 67, 82.)

73. Except as noted, respondent admits that "In a 1982 criminal matter, Shinn contacted Kim, who already was represented by counsel, falsely

represented himself as a 'criminal trial specialist,' and assured Kim that he had a good defense. Shinn did not then, or at any other time, possess any Bar certification. [Citation.]" (Petn. 52, ¶ 5.e.(5)(b).) Respondent denies that Shinn, by representing himself as a "criminal trial specialist," rather than a *certified* criminal law specialist, was making a false statement. Respondent alleges that Shinn's experience was mainly in criminal law. (Exh. 34, p. 1165.)

74. Except as noted, respondent admits that "Consistent with the modus operandi of his ongoing fraudulent scheme, Shinn induced Kim to discharge his counsel of record, Edward Printemps, by falsely representing to Kim that Shinn had been retained by a group of Korean businessmen to undertake Kim's representation. [Citation.]" (Petn. 53, ¶ 5.e.(5)(c).) Respondent admits that "Shinn induced Kim to discharge his counsel of record, Edward Printemps . . . ." Respondent denies that Shinn's actions were part of a "modus operandi of [an] ongoing fraudulent scheme" based on the following: (1) Shinn is not available for respondent to interview; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, specify any incidents where Shinn used a ruse to obtain employment, apart from petitioner's case and the Kim case, making an investigation of them impossible; (3) the two incidents that occurred in petitioner's case and the Kim case are insufficient to establish a "modus operandi of [an] ongoing fraudulent scheme"; and (4) since petitioner's allegation lacks specificity in this regard (failing to allege any other cases besides Kim and petitioner's), respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.)

75. Except as noted, respondent admits that "Kim's subsequent discovery of Shinn's fraudulent behavior exacerbated his already impaired mental state and provoked him to discharge Shinn and proceed to represent himself, after which he was convicted and sentenced to prison. [Citation.]" (Petn. 53, ¶ 5.e.(5)(d).) Respondent denies that Kim's mental state was

impaired; respondent alleges Kim was competent to stand trial and was able to draft a coherent complaint for malpractice on his own (see Exh. 67) and therefore there was no mental impairment that was "exacerbated" by Shinn's behavior.

76. Except as noted, respondent admits that "Shinn's unlawful and dishonest conduct in these and other cases demonstrated the accuracy of his reputation in the legal community as an unethical, unsavory blowhard who would promise his clients anything just to make a dollar, and for not understanding the rudimentary elements of the law. [Citation.]" (Petn. 53, ¶ 5.e.(6).) Respondent denies that there were "other cases" that demonstrated Shinn's reputation based on the following: (1) Shinn is not available for respondent to interview; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, specify any of the "other cases," making an investigation of them impossible; and (3) since petitioner's allegation lacks specificity in this regard, respondent believes there is a good faith basis to believe there were no other cases. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.)

77. Respondent denies that "Throughout the events described in the foregoing factual allegations, and continuing through Shinn's eventual disbarment, Shinn compounded his criminal, dishonest and unethical acts of moral turpitude by continuing to pursue a pattern and practice of bad faith, dishonesty and concealment marked by conduct including, but not limited to a lack of candor and cooperation to the victims of his criminality; repeatedly providing inconsistent and contradictory versions of events; and committing repeated acts of perjury, all with the primary purpose of concealing his unlawful misconduct and avoiding criminal prosecution and professional disciplinary sanctions. [Citation.]" (Petn. 53, ¶ 5.f.) Respondent admits that Shinn showed "lack of candor and cooperation to" the Danes, that he "repeatedly provid[ed]

inconsistent and contradictory versions of events" regarding his dealings with the Danes, and that Shinn's testimony at the 1990 hearing on the Dane matter was found to be not credible. (Exh. 34, pp. 575-576, 580.) However, respondent denies the rest of the allegation based on the following: (1) Shinn is not available for respondent to interview; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, support his assertions except as to the Dane matter, making an investigation of them impossible; and (3) since petitioner's allegation lacks specificity in this regard, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.)

78. Except as noted, respondent denies that "Shinn was reasonably and actually aware that he was acting unethically, unprofessionally and contrary to petitioner's interests throughout the periods of the foregoing described events and intentionally, willfully and dishonestly failed to apprise petitioner, independent counsel or the trial court of the conflicting personal, financial, legal and ethical burdens that prejudicially compromised his purported representation of petitioner. [Citation.]" (Petn. 54, ¶ 5.g.) Respondent admits that Shinn did not "apprise petitioner, independent counsel or the trial court" of the Dane matter, the Korchin matter, or the capping scheme involving McBroom and Weaver, and that Shinn "was reasonably and actually aware that he was acting unethically, unprofessionally and contrary to petitioner's interests" by being involved in the capping scheme involving McBroom and Weaver. But respondent denies the rest of the allegation based on the following: (1) Shinn is not available for respondent to interview; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, specify any of the unethical or unprofessional acts or any ways in which Shinn's representation was compromised, making an investigation of them impossible; (3) any acts or omissions caused by any conflicts were not prejudicial in light of the strong

evidence showing Petitioner's guilt (*People v. Cummings* (1993) 4 Cal.4th 1233, 1257-1267); and (4) since petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall, supra*, 9 Cal.4th at p. 485.)

79. Respondent denies that "At all times relevant to the foregoing events, the District Attorney's office and all law enforcement agencies involved in the investigation of petitioner's and Shinn's cases deliberately, intentionally, negligently, unlawfully and prejudicially failed to inform petitioner or the trial court of the disabling conflicts of interest that burdened Shinn's purported representation of petitioner." (Petn. 54, ¶ 5.h.) Respondent alleges that the Deputy District Attorney John Watson, who prosecuted petitioner, had no knowledge as to any facts that constituted a conflict of interest. (Return Exh. 7, ¶ 5.) Additionally, the District Attorney's Office and law enforcement had no obligation to inform either petitioner or the court regarding any of the facts Petitioner alleges constitute a conflict of interest. (See Rules Prof. Conduct, rule 2-100 [generally prohibiting attorneys from talking directly to represented party]; cf. Bus. & Prof. Code, § 6068, subd. (o) [requiring attorneys to *self*-report misconduct, but imposing no obligation to report other attorneys' misconduct].) Respondent also alleges Shinn's representation of petitioner at the guilt phase of trial was unaffected by the alleged conflicts of interest because the conflicts were spread out over a number of years, and Shinn's involvement in, and attention to, these alleged conflicts appears to have been extremely limited during the period he represented petitioner. (See Exh. 35, p. 1583 [Notice to Show Cause issued in Korchin matter on July 12, 1985, after the jury reached a death verdict in petitioner's case on July 3, 1985]; 9CT 2512; Exh. 34, p. 583 [state bar hearing on Dane matter commencing on March 12, 1990, long after verdicts and sentencing in petitioner's case]; *Jones* 1CT 39, 129, 157 [Jones murder occurred on Feb. 27, 1984; Jones was arrested on Mar.

2, 1984; jury selected in Jones case on Jan. 22, 1986; verdict in Jones case on Mar. 13, 1986].)

80. Respondent denies that "As a result of the individual and multiple instances of Shinn's active representation of conflicting interests and/or the burden of his competing, distracting and otherwise disabling and compromising personal financial, ethical and/or legal problems, Shinn abandoned and denied petitioner any assistance of counsel at each and every critical stage of the proceedings; failed at all times, from petitioner's arraignment to the commencement of trial, to undertake the steps necessary to the adequate preparation of a defense including, but not limited to failing to consult with petitioner, conduct a thorough investigation and meaningfully prepare a defense; entirely failed to subject the prosecution's case at trial to any meaningful adversarial testing; and adversely and/or prejudicially affected the adequacy of all aspects of his purported representation of petitioner. [Citation.]" (Petn. 54, ¶ 5.i.) Respondent denies the allegation based on the following: (1) Shinn is not available for respondent to interview; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, specify any of the unethical or unprofessional acts or any ways in which Shinn's representation was compromised, making an investigation of them impossible; (3) any acts or omissions caused by any conflicts were not prejudicial in light of the strong evidence showing Petitioner's guilt (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1257-1267); (4) Shinn did present a defense at the guilt and penalty phases such that there was no breakdown of the adversarial process (see *In re Gay*, *supra*, 19 Cal.4th at p. 826 ["This is not a case in which there was a total breakdown of the adversarial process at the penalty phase in which prejudice may be presumed."]; *id.* at pp. 781, 795 [rejecting claims of ineffective assistance and conflict of interest affecting guilt phase]; and (5) since petitioner's allegation lacks specificity, respondent believes there is a

good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485; see *id.* at p. 474 [conclusory or speculative allegations are insufficient].) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (Petn. 55-59.)

81. Except as noted, respondent admits that "Approximately three weeks after being interviewed by Detective Gibbons in the intensifying criminal embezzlement investigation that eventually led to Shinn's disbarment, Shinn sought to and did curry favor with the prosecution by inducing petitioner to confess falsely to several robbery charges. [Citation.]" (Petn. 55, ¶ 5.i.(1)(a).) Respondent denies that "Shinn sought to and did curry favor with the prosecution." Respondent alleges that different deputies in the office were assigned to the two matters: the deputy district attorney handling the prosecution of Petitioner was John Watson, and the deputy district attorney handling the investigation of Daye Shinn was Albert McKenzie. (Exh. 34, pp. 1111-1124; 7CT 1801-1802; 8CT 2075.) In addition, Deputy Watson never spoke to McKenzie, or anyone else, about the fraud investigation involving Shinn, he had no knowledge of the investigation, and Shinn never told him about, or asked him to intercede in, the investigation on Shinn's behalf. (Return Exh. 7, ¶ 4.) Respondent also denies the allegation based on the following: (1) Shinn is not available for respondent to interview; (2) neither petitioner's allegation, nor the documents relied upon by petitioner, offer any evidence that Shinn was seeking to, or did, curry favor with the prosecution; and (3) in absence of such a factual showing, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.) Respondent also denies that petitioner confessed "falsely" to the robberies. Respondent alleges that petitioner in fact committed: the April 25,

1983 robbery at Kenn Cleaners (Retrial[7] 15RT 1441-1460, 1466-1499; Retrial 18RT 1907-1912, Retrial 21RT 2451-2456); the May 2, 1983 robbery at Valley Plaza Vacuum Cleaner (97RT 11258-11274); the May 6, 1983 robbery at Salads Plus (59RT 6349-6354; 60RT 6491-6501); the May 13, 1983 robbery of Richard Hallberg (Retrial 15RT 1399-1431; Retrial 21RT 2457-2462); the May 20, 1983 robbery at Designer Florists (Retrial 16RT 1502-1527, 1540-1552; Retrial 21RT 2462-2470); the May 20, 1983 robbery at Artistic Bath (Retrial 16RT 1570-1597, 1603-1616; Retrial 20RT 2363-2365; Retrial 21RT 2471-2477); and the May 29, 1983 robbery at Pizza Man (60RT 6449-6453). (See 58RT 6255, 6261-6262; 60RT 6517-6518; Peo. Exh. 1.)

82. Respondent denies that "Shinn intentionally misled petitioner to believe that the defense had reached an express understanding with the prosecution that in return for Mr. Gay's confession to the robbery charges, and his testimony against his co-defendant on the capital murder charge, the prosecution would dismiss the murder charge against petitioner. [Citation.]" (Petn. 55, ¶ 5.i.(1)(a)(i).) Respondent alleges Shinn's understanding of the agreement was limited to the following: if the prosecution did not give petitioner a polygraph examination or use him as a witness for the prosecution, petitioner's statement could not be used against him. (58RT 6274-6276.) Shinn informed petitioner of this understanding. (*In re Gay*, *supra*, 19 Cal.4th at p. 791; 58RT 6266.) However, there was no such agreement. (*Id.* at pp. 791-792.) Shinn was hoping to negotiate a plea bargain with the prosecution. (Return Exh. 2, p. 5.)

83. Except as noted, respondent admits that "Shinn further intentionally misled petitioner to believe that if the prosecution did not consummate the

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7. Respondent will refer to records from the appeal of petitioner penalty retrial in *People v. Kenneth Earl Gay*, California Supreme Court No. S093765, with the designation "Retrial."

agreement, any statements made by petitioner admitting participation in the robberies could not be used at trial. [Citations.]" (Petn. 55, ¶ 5.i.(1)(a)(ii).) Respondent denies that Shinn "intentionally misled petitioner" on the consequences of not reaching an agreement. Respondent alleges that "Shinn, from past experiences with the District Attorney's Office . . . believed that he had this understanding [with the prosecution] and so advised Petitioner." (*In re Gay*, *supra*, 19 Cal.4th at p. 792.)

84. Respondent denies that "Shinn further falsely and misleadingly induced petitioner to submit to coaching by Shinn to learn the facts of the alleged robberies, and to agree to give a false, but incriminating account of petitioner's purported involvement in the crimes to the district attorney." (Petn. 55, ¶ 5.i.(1)(a)(iii).) Respondent alleges that Shinn advised petitioner to tell the truth about the robberies. (Return Exh. 3, p. 7.)

85. Except as noted, respondent denies that "As a result of Shinn's false, misleading, overbearing and coercive statements and behavior, petitioner gave a false, inaccurate and unreliable confession of his purported involvement in the robberies, which the prosecution intended to, and did in fact, introduce against him at his capital trial. [Citation.]" (Petn. 55, ¶ 5.i.(1)(a)(iv).) Respondent admits that "petitioner gave a . . . confession of his . . . involvement in the robberies, which the prosecution intended to, and did in fact, introduce against him at his capital trial. [Citation.]" (Petn. 55, ¶ 5.i.(1)(a)(iv).) But respondent denies that Shinn's statements and behavior were "overbearing and coercive" based on the following: (1) Shinn is not available for respondent to interview; petitioner never mentioned any coercion by Shinn when testifying about the matter (58RT 6262-6269); (2) Shinn advised petitioner to tell the truth about the robberies (Return Exh. 3, p. 7); (3) neither petitioner's allegation, nor the documents relied upon by petitioner, offer any evidence that Shinn was "overbearing and coercive"; and (4) respondent therefore believes there is a

good faith basis to believe the facts are untrue. (See *People v. Duvall, supra*, 9 Cal.4th at p. 485.) Respondent alleges that petitioner freely and voluntarily spoke to the prosecution because he had "nothing to hide." (58RT 6264-6265.) Respondent also denies that petitioner's confession was "false, inaccurate and unreliable," except to the extent that petitioner denied participation in any robberies and in the murder. Respondent alleges that petitioner in fact truthfully admitted that he committed: the April 25, 1983 robbery at Kenn Cleaners (Retrial 15RT 1441-1460, 1466-1499; Retrial 18RT 1907-1912; Retrial 21RT 2451-2456); the May 2, 1983 robbery at Valley Plaza Vacuum Cleaner (97RT 11258-11274); the May 6, 1983 robbery at Salads Plus (59RT 6349-6354; 60RT 6491-6501); the May 13, 1983 robbery of Richard Hallberg (Retrial 15RT 1399-1431; Retrial 21RT 2457-2462); the May 20, 1983 robbery at Artistic Bath (Retrial 16RT 1570-1597, 1603-1616; Retrial 20RT 2363-2365; Retrial 21RT 2471-2477); and the May 29, 1983 robbery at Pizza Man (RT 6449-6453). (See 58RT 6255, 6261-6262; 60RT 6517-6518; Peo. Exh. 1.) Also, petitioner did shoot and kill Officer Verna. (1Supp. CT 198-200, 205-208, 215-218, 222-223; 2Supp. CT 522-530, 534; 2CT 324-329, 335, 519-524, 540; 3CT 667-671, 711-717, 720, 725-726; 68RT 7527-7529, 7592-7597, 7604; 69RT 7781-7785, 7789; 73RT 8164-8170; Retrial 17RT 1796-1798; Retrial 18RT 1823, 1928-1938, 1952, 1957; Retrial 19RT 2030-2037, 2056-2057; Retrial 21RT 2500-2503, 2523-2524.)

86. Respondent denies that "But for Shinn's statements, actions and behavior in manufacturing petitioner's false confession, the prosecution would not have been able to prove petitioner's guilt for the robberies." (Petn. 56, ¶ 5.i.(1)(a)(v).) Respondent alleges that independent evidence strongly showed petitioner's guilt of: the April 25, 1983 robbery at Kenn Cleaners (Retrial 15RT 1441-1460, 1466-1499; Retrial 18RT 1907-1912; Retrial 21RT 2451-2456); the May 6, 1983 robbery at Salads Plus (59RT 6349-6354; 60RT 6491-6501);

the May 13, 1983 robbery of Richard Hallberg (Retrial 15RT 1399-1431; Retrial 21RT 2457-2462); the May 20, 1983 robbery at Designer Florists (Retrial 16RT 1502-1527, 1540-1552; Retrial 21RT 2462-2470); the May 20, 1983 robbery at Artistic Bath (Retrial 16RT 1570-1597, 1603-1616; Retrial 20RT 2363-2365; Retrial 21RT 2471-2477); and the May 29, 1983 robbery at Pizza Man (60RT 6449-6453).

87. Respondent denies that "By so doing, Shinn acted as a second prosecutor by creating evidence that led to petitioner's conviction of robberies for which the State otherwise would not have been able to convict him . . . ." (Petn. 56, ¶ 5.i.(1)(a)(vi).) Respondent alleges that the State would still have been able to convict petitioner of several of the robberies based on other evidence that strongly showed petitioner's guilt of: the April 25, 1983 robbery at Kenn Cleaners (Retrial 15RT 1441-1460, 1466-1499; Retrial 18RT 1907-1912; Retrial 21RT 2451-2456); the May 6, 1983 robbery at Salads Plus (59RT 6349-6354; 60RT 6491-6501); the May 13, 1983 robbery of Richard Hallberg (Retrial 15RT 1399-1431; Retrial 21RT 2457-2462); the May 20, 1983 robbery at Designer Florists (Retrial 16RT 1502-1527, 1540-1552; Retrial 21RT 2462-2470); the May 20, 1983 robbery at Artistic Bath (Retrial 16RT 1570-1597, 1603-1616; Retrial 20RT 2363-2365; Retrial 21RT 2471-2477); and the May 29, 1983 robbery at Pizza Man (60RT 6449-6453). Respondent admits that Shinn's actions "permitted the prosecution to prejudicially portray petitioner as an *admitted* serial robber who killed a police officer to avoid arrest and prosecution for the robberies. [Citation.]" (Petn. 56, ¶ 5.i.(1)(a)(vi), italics added.) Respondent alleges that the independent evidence would have nonetheless "permitted the prosecution to prejudicially portray petitioner as a[] . . . serial robber who killed a police officer to avoid arrest and prosecution for the robberies."

88. Except as noted, respondent admits that "Petitioner's alleged guilt

of the robberies was the centerpiece of the prosecution's theory of motive for petitioner committing the charged capital murder. [Citation.]" (Petn. 56, 5.i.(1)(a)(vii).) Respondent denies the robberies were the "centerpiece" of the prosecution's theory of motive. Respondent alleges that the prosecutor argued several motives equally, specifically: petitioner was in fear of being apprehended for the robberies (95RT 10878, 10885); petitioner was in fear of being apprehended for being in a stolen car, with a separately stolen license plate (95RT 10874, 10881, 10886); and petitioner was in fear of being apprehended in possession of a firearm, in violation of his parole (95RT 10881, 10885-10886).

89. Respondent denies that "For the direct purpose of representing and protecting interests conflicting with those of petitioner including, but not limited to, currying favor with the prosecutor's office that was investigating Shinn for murder, arson and embezzlement, maximizing the monetary gains realized by the princip[al]s of the capping relationship and accumulating funds with which to satisfy the claims of defrauded clients, Shinn neither conducted, nor authorized, supervised or effectively utilized the results of any guilt phase investigation; and took affirmative steps to introduce and permit the introduction of evidence prejudicial to petitioner." (Petn. 56, ¶ 5.i.(1)(b).) Respondent denies the allegation based on the following: (1) Shinn is not available for respondent to interview; (2) petitioner does not allege any specify any acts or omissions to support his assertions; (3) any acts or omissions by Shinn were not prejudicial in light of the strong evidence showing Petitioner's guilt (*People v. Cummings, supra,* 4 Cal.4th at pp. 1257-1267); and (4) respondent therefore believes there is a good faith basis to believe the allegations are untrue. (See *People v. Duvall, supra*, 9 Cal.4th at p. 485; see *id.* at p. 474 [conclusory or speculative allegations are insufficient].) Respondent acknowledges that this allegation appears to be an introduction to the more

specific allegations that follow. (Petn. 56-59.)

90. Except as noted, respondent denies that "Shinn did not retain, consult or present the testimony of any expert criminalists, forensic pathologists, mental health professional or other experts whose professional expertise and services were reasonably necessary to conduct an independent, reliable and informed review, examination and testing of all physical evidence and testimony, and test and refute the prosecution's guilt phase theory including, but not limited to, the 'pass the gun' scenario necessary to implicate petitioner." (Petn. 56, ¶ 5.i.(1)(b)(i).) To the extent this allegation could be construed as applying to the penalty phase or penalty phase evidence, respondent alleges that Shinn did consult experts for presenting testimony. (99RT 11315-11326; *In re Gay*, *supra*, 19 Cal.4th at pp. 808-809.) Respondent denies the allegation based on the following: (1) Shinn is not available for respondent to interview; (2) petitioner fails to identify specific experts and what they would have concluded; (3) any acts or omissions by Shinn were not prejudicial in light of the strong evidence showing Petitioner's guilt (*People v. Cummings* (1993) 4 Cal.4th 1233, 1257-1267); and (4) since petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485; see *id.* at p. 474 [conclusory or speculative allegations are insufficient].) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (Petn. Claim Three.)

91. Respondent denies that "Shinn wholly failed to undertake any independent investigation of guilt phase witnesses including, but not limited to failing to interview, cause to be interviewed or evaluate the credibility and/or strategic significance of any actual or potential percipient witnesses." (Petn. 57, ¶ 5.i.(1)(b)(ii).) Pursuant to a trial court order, Doug Payne, a private investigator and former Los Angeles Police Officer, was appointed to act as an

investigator for petitioner to aid in the investigation for the defense. (6CT 1524-1526, 1655-1657; 7CT 1823-1826, 1892-1894, 1957-1958.) Payne conducted an investigation of and interviewed actual and potential witnesses. (6CT 1541-1546, 1672-1675; 7CT 1816-1819, 1846-1849, 1973-1975; 9CT 2385-2388; Exh. 9, pp. 78, 84.)

92. Except as noted, respondent denies that "Shinn presented a pro forma defense to the capital murder charge by recalling and examining three marginal prosecution witnesses: Rosa Martin and Rose Perez, both of whom saw petitioner at the scene of the shooting, but did not see him firing a gun [citation]; and Pamela Cummings, the co-defendant's wife, who reiterated her false, misleading and self-serving claim that after the first shot was fired she saw petitioner slide across the front seat of the car, exit the vehicle and shoot the decedent. [Citation.]" (Petn. 57, 5.i.(1)(b)(iii).) Respondent admits that "Shinn presented . . . defense to the capital murder charge [in part] by recalling and examining three . . . prosecution witnesses: Rosa Martin and Rose Perez, both of whom saw petitioner at the scene of the shooting, but did not see him firing a gun [citation]; and Pamela Cummings, the co-defendant's wife, who reiterated her . . . [testimony] that after the first shot was fired she saw petitioner slide across the front seat of the car, exit the vehicle and shoot the decedent. [Citation.]" (Petn. 57, 5.i.(1)(b)(iii).) Respondent denies that the defense was "pro forma." Respondent alleges that Shinn's defense to the murder was adequate, and included, in addition to the above, testimony from Detective Jack Holder (86RT 9817-9826) and defense investigator Douglas Payne (86RT 9827-9829), and cross-examination of the prosecution witnesses (66RT 7294-7298 [Dwayne Norton]; 67RT 7428-7434 [Oscar Martin]; 67RT 7497-7498 [Rosa Martin]; 68RT 7511-7512 [Linda Smith]; 68RT 7525-7526 [Shequita Chamberlain]; 68RT 7552-7574, 7588-7589 [Marsha Holt]; 68RT 7641-7653; 69RT 7663-7691, 7697-7699, 7737-7741 [Robert Thompson]; 69RT 7771-

7772, 7774-7775 [Eric Lindquist]; 69RT 7793-7819 [Shannon Roberts]; 70RT 7852-7870, 7874-7875 [Rose Perez]; 71RT 8029-8034 [Joseph Cogan]; 73RT 8221-8232; 77RT 8684-8732, 8734-8740; 78RT 8849-8862, 8980-8991 [Pamela Cummings]; 74RT 8323-8337, 8358-8364 [Gail Beasley]; 74RT 8409-8412 [John Totorici]; 74RT 8420-8426, 8429-8434 [Henry Cadena]; 76RT 8602-8605 [Marvin Engquist]; 76RT 8633 [David La Casella]; 78RT 8893-8895 [Deborah Cantu]; 78RT 8903 [George Herrera]; 78RT 8941 [Jack Holder]; 79RT 8962-8965 [Paul Smith]; and Raynard's witnesses (81RT 9230-9242 [Paul Hermann]; 81RT 9315-9325; 82RT 9408-9409 [Vincent Guinn]; 83RT 9496-9499, 9503-9505 [Richard Raffel]; 83RT 9514-9525, 9528-9529 [Neil Joebchen]; 839531-9535 [Jack Wegner]; 83RT 9542-9543, 9545 [William Blumenthal]; 84RT 9581-9583 [Salvador Piscopo]; 84RT 9608-9610 [Benson Lee]; 85RT 9667-9670 [Neil Collins]) as well as the cross-examination of rebuttal and surrebuttal witnesses (87RT 9855-9856 [Vincent Guinnn]; 89RT 10172-10173 [Robert Paniagua]). Respondent denies that Pamela's testimony was "false, misleading, and self-serving." Respondent alleges that Pamela truthfully testified that petitioner got out of the car and shot Officer Verna. (See Retrial 36RT 4902 [trial court commenting that Pamela Cummings was "breathtakingly credible"]; 69RT 7777-7785 [Shannon Roberts]; 68RT 7526-7530 [Marsha Holt]; 68RT 7590-7605 [Robert Thompson]; Retrial 19RT 2050-2057 [Gail Beasley]; Retrial 18RT 1944-1949, 1956-1957 [Marsha Holt]; Retrial 18RT 1823, 1827, 1874 [Robert Thompson].)

93. Respondent denies that "Shinn made no effort to interview or present the readily available, reliable, credible and persuasive testimony of witnesses who affirmatively exculpated petitioner including, but not limited to Ejinio Rodriguez, Martina Jimenez and Irma Esparza, all of whom would have truthfully testified that co-defendant Cummings was the only shooter.

[Citations.]" (Petn. 57, ¶ 5.i.(1)(b)(iv).) Respondent alleges that Shinn directed his investigator, Douglas Payne, to conduct field interviews but Payne was unable to reach the above named witnesses. (See ¶¶ 102, 108, *post*; Exh. 9, pp. 78, 84.) Respondent alleges that numerous witnesses truthfully and credibly testified that petitioner shot Officer Verna. (1Supp. CT 198-200, 205-208, 215-218, 222-223; 2Supp. CT 522-530, 534; 2CT 324-329, 335, 519-524, 540; 3CT 667-671, 711-717, 720, 725-726; 68RT 7527-7529, 7592-7597, 7604; 69RT 7781-7785, 7789; 73RT 8164-8170; Retrial 17RT 1796-1798; Retrial 18RT 1823, 1928-1938, 1952, 1957; Retrial 19RT 2030-2037, 2056-2057; Retrial 21RT 2500-2503, 2523-2524.)

94. Except as noted, respondent admits that "Shinn made no effort to interview or present the readily available, reliable, credible and persuasive testimony of witnesses who affirmatively exculpated petitioner, and inculpated co-defendant Cummings based on Cummings's custodial admissions that he was the sole shooter who killed the decedent. Said witnesses, who included both inmates and law enforcement officers, included but were not limited to Jack John Flores, James Edward Jennings, Michael David Gaxiola and William McGinnis, all of whom would and could have testified truthfully that Cummings made admissions and/or confessions to being the sole shooter who killed the decedent. [Citations.]" (Petn. 57, ¶ 5.i.(1)(b)(v).) Respondent denies that Raynard's custodial statements to Gaxiola exculpated petitioner and denies that Gaxiola could have testified to Raynard stating that he was the "sole shooter." (Exh. 14.) Respondent denies that Flores, Jennings, Gaxiola, and any other witnesses aside from McGinnis were "readily available, reliable, credible and [could give] persuasive testimony [that] affirmatively exculpated petitioner, and inculpated co-defendant Cummings . . . ." (See ¶¶ 152-171, *post.*)

95. Except as noted, respondent admits that "Following the trial court's dismissal of the count charging petitioner with the robbery of Christopher

Poehlmann, who specifically did not recognize petitioner as one of the perpetrators [citation], Shinn prejudicially called Poehlmann to testify that he did recognize co-defendant Cummings as a perpetrator; and then called Pamela Cummings who identified petitioner as another participant in the Poehlmann robbery. [Citations.]" (Petn. 58, ¶ 5.i.(1)(b)(vi).) Respondent denies that such actions were done "prejudicially." Respondent also alleges that Shinn called Poehlmann to impeach Pamela's identification of petitioner as robbing Poehlmann. (See 85RT 9704-9706.) Shinn also called Pamela to testify that Raynard had used a gun to commit a separate robbery of a person leaving a bank (like the robbery of Poehlmann) without petitioner and with Billy Sims; she also testified that Sims and Raynard had committed a second robbery outside Pamela's presence. (85RT 9708-9729.) Shinn elicited testimony from Pamela that she had identified petitioner as being involved in the Poehlmann robbery to suggest that Pamela was lying since Poehlmann did not identify petitioner. (See 85RT 9729 ["You said Mr. Gay was there, when he wasn't there?"].) Shinn also called Sims to confirm that Sims had committed two separate robberies with Raynard, one involving a person leaving a bank (like Poehlmann), wherein Raynard used a gun. (86RT 9759-9772.) The robbery of the man leaving the bank took place in the Lakeview Terrace area, the same area where the murder of Officer Verna occurred. (85RT 9720; 86RT 9766.) During the robbery, Pamela drove the 1979 stolen Cutlass that she also drove during the murder. (85RT 9710; 86RT 9763.) Shinn used this evidence to argue that Pamela was lying when she testified that when she and Raynard committed robberies, petitioner was always there. (95RT 10977-10979.)

96. Except as noted, respondent admits that "Shinn elicited prejudicial testimony from prosecution investigator Officer Holder that there had been no agreement or tacit understanding that petitioner's confession to the robbery charges made during plea negotiations would not be used against him; and

Holder's opinion that petitioner had been truthful in confessing to the robberies, but had lied about denying his commission of the murder of the decedent. (58RT 6254-56.)" (Petn. 58, ¶ 5.i.(1)(b)(vii); see 85RT 9735-9741, 9743-9747.) Respondent denies that Shinn's actions were "prejudicial." Respondent alleges that Shinn argued in closing that the prosecution had been "underhanded" and that petitioner's confession was unreliable because the prosecution team stopped the interview prior to allowing petitioner to take a polygraph test. (95RT 10986.) Respondent alleges there was no prejudice to petitioner as to the robbery charges because all the robbery convictions were eventually reversed as a result of instructional error. (*People v. Cummings*, *supra*, 4 Cal.4th at p. 1315.) Respondent alleges that the evidence independent of Holder's testimony allowed the prosecution to portray petitioner as a serial robber who killed Officer Verna to avoid arrest and prosecution for the robberies.

97. Respondent denies that "Shinn unreasonably failed to join in co-defendant Cummings's meritorious motion to preclude the prosecution from using a[] photographic re-enactment of the alleged events to illustrate the State's theory for the jury that two assailants, Cummings and petitioner, shot the decedent." (Petn. 59, ¶ 5.i.(1)(b)(viii).) Shinn could not have "join[ed]" in Cummings's motion to exclude the slide show since the motion was made after the slides had already been presented in opening statement to petitioner's jury. (Compare 58RT 6286-6292 with 63RT 6833-6885.) Also, the use of the slides was not any more prejudicial than the prosecutor's opening statement, which reviewed the evidence showing what was depicted in the slides. (58RT 6287-6292.) Respondent denies that "Because of Shinn's otherwise [i]nexplicable failure to advocate against the prosecutor's office with whom he was attempting to curry favor, the prejudicial re-enactment was used only in front of petitioner's jury. [Citations.]" (Petn. 59, ¶ 5.i.(1)(b)(viii).) Respondent alleges that the

failure to object was not "prejudicial" since the prosecutor was properly allowed to make an opening statement that covered what had been depicted in the slides. (58RT 6287-6292.) Respondent denies that Shinn was "attempting to curry favor" with the prosecutor's office based on the following: (1) Shinn is not available for respondent to interview; (2) petitioner's allegation does not specify any acts or omissions to support the currying of favor; and (3) since petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.)

98. Respondent denies that "The foregoing results, impacts, effects and influences of Shinn's failure to provide any or conflict-free representation were prejudicial under any and all standards governing the complete denial of counsel at critical stages of the proceedings, a total breakdown of the adversarial system, the active representation of conflicting interests and the denial of the effective assistance of counsel." (Petn. 59, ¶ 5.i.(2).) Respondent alleges there was no breakdown of the adversarial process, and that any acts or omissions caused by any conflicts were not prejudicial in light of the strong evidence showing Petitioner's guilt. (*People v. Cummings*, *supra*, 4 Cal.4th at pp. 1257-1267.)

Claim Three

In its Order requiring a Return to the Petition, the Court asked for a return on Claim Three "on the ground of trial counsel's failure to adequately investigate and present evidence at the guilt phase tending to show that petitioner *did not participate* in the murder of Officer Verna . . . ." (Italics added.) Thus, to the extent petitioner has alleged his counsel failed to adequately investigate and present evidence that would have diminished his culpability for participating in the murder, respondent does not address these

allegations. (See Petn. 84, ¶ 1.e, through Petn. 86, ¶ 1.f.(8) [e.g., Petn. 86, ¶ 1.f.(7) counsel failed to investigate and present mental health evidence showing that petitioner would have submitted to the commands of Raynard and which would have created a doubt that petitioner "harbored any requisite *mens rea* at the time of the shooting"]; Petn. 87, ¶ 1.g. through Petn. 95, ¶ 1.g.(9) [e.g., Petn. 90, ¶¶ 1.g.(8), 1.g.(8)(a), counsel failed to investigate and present mental health evidence that petitioner was not a "willing" participant, petitioner was "vulnerable to manipulation," and Petn. 94, ¶ 1.g.(8)(m) "would submit, without consciously choosing, to the commands of [Raynard]"]; Petn. 119, ¶ 6 through Petn. 125 ¶ 6.c. [petitioner's counsel failed to *argue* the evidence showing petitioner's innocence]; Petn. 125, ¶ 7 through Petn. 127, ¶ 7.b. [petitioner's counsel failed to litigate "state's misconduct"]; Petn. 127, ¶ 8 through Petn. 129, ¶ 8.c. [petitioner's counsel failed to request a mistrial for knowing presentation of perjured evidence and false argument]; Petn. 129, ¶ 9.c. [petitioner's counsel failed to seek remedies for discovery violations and knowing use of false testimony].) To the extent respondent has misconstrued the court's order or failed to address any allegations of Claim Three that need to be addressed, respondent respectfully requests the opportunity to file a supplemental return. As to the portion of Claim Three alleging that counsel failed to adequately investigate and present evidence at the guilt phase tending to show that petitioner did not participate in the murder of Officer Verna (Petn. 59-84, 95-119, 129-130), respondent admits, denies, and alleges as follows:

99. Respondent denies that "Trial counsel unreasonably and prejudicially failed to investigate and present evidence of petitioner's innocence." (Petn. 60, ¶ 1.) Because respondent is unable to interview trial counsel and because petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an

introduction to the more specific allegations that follow. (See Petn. 60-84.)

100. Respondent denies that "Shinn unreasonably failed to undertake minimally adequate investigation of readily available, materially exculpatory information including, but not limited to, avenues of investigation that were or reasonably should have been, evident to any minimally qualified attorney who was familiar with the contents of the police reports counsel received in discovery, as well information provided by petitioner who alerted Mr. Shinn to numerous important witnesses." (Petn. 60, ¶ 1.a.) Since petitioner's allegation lacks specificity as to acts or omissions, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (See Petn. 60-72.)

101. Respondent denies that "Counsel's deficiencies in this regard included, but were not limited to, the failure to interview numerous witnesses whose names and locations were disclosed in police reports and whose testimony would have exculpated petitioner. The testimony of such witnesses demonstrated that there was only one shooter, a person who did not match petitioner's description, and would have prevented the state from carrying its burden of proof." (Petn. 60-61, ¶ 1.b.) Because respondent is unable to interview trial counsel, and because petitioner's allegation lacks specificity as to the names of witnesses or what they would have said, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (See Petn. 61-68.)

102. Respondent admits that Shinn did not interview Ejinio Rodriguez. (See Petn. 60-61, ¶ 1.b, 61, ¶ 1.b.(1).) Respondent alleges that Douglas Payne, petitioner's investigator, conducted field interviews to attempt to discover

potential witnesses. (Exh. 9, pp. 78, 84.) His notes reflect that he went to the house at 12097 Hoyt Street, where Ejinio Rodriguez lived. He spoke to someone at the house and asked them if anyone had seen the shooting. No one told him that Ejinio Rodriguez lived at the house or that he had seen the shooting. (Return Exh. 6, p. 30.)

103. Respondent denies that "Ejinio Rodriguez would have testified truthfully that the 'shooter was a black man who had dark skin,' and this did not match petitioner's description. Mr. Rodriguez would have further testified that the other man, who was in the car had much lighter skin[,] 'was not the shooter.' [Citation.]" (Petn. 61, ¶ 1.b.(1).) Respondent alleges that his declaration, dated February 26, 2003 (Exh. 24), is not reliable in light of an earlier interview, on May 6, 1999, wherein Mr. Rodriguez reported: he saw Officer Verna lying on the ground and the car next to him drove up the street; he only saw two Black men in the car, both sitting in the front seat; he only heard one shot; he saw several expended shells lying around; the entire incident was "not clear" to him. (Return Exh. 18, p. 138.) In light of the contradiction between Mr. Rodriguez's earlier statement and his later declaration, Mr. Rodriguez's recollection of the shooting is unreliable. In addition, his recollection of the shooting is contradicted in part by the uncontested evidence that Pamela Cummings was in the car, and that the shooting was committed with a revolver (66RT 7277; 67RT 7439-7441, 7457; 69RT 7680; 78RT 8824, 8887), which would not have left shell casings on the ground.

104. Respondent denies that "Mr. Rodriguez would have testified that the 'man with the much lighter skin then jumped out of the car and picked up a gun that belonged to the police officer. This was not the man who actually shot the police officer.' [Citation.]" (Petn. 61, ¶ 1.b.(1)(a).) Based on the above (¶ 103, *ante*), respondent alleges that Mr. Rodriguez's account of the shooting is unreliable and not credible.

105. Respondent admits that "Minimal investigation would have revealed that Mr. Rodriguez was playing with his friends Shannon and Walter Roberts on the day of the shooting . . . ." (Petn. 61, ¶ 1.b.(1)(b).) Respondent denies that "like Shannon and Walter, Mr. Rodriguez saw the shooting. [Citation.]" (Petn. 61, ¶ 1.b.(1)(b).) Based on the above (¶ 103, *ante*), respondent alleges that Mr. Rodriguez's declaration regarding the shooting is unreliable and not credible and that he did not see the shooting, as reflected in his earlier interview.

106. Except as noted, respondent admits that "This fact, as well as Mr. Rodriguez's name and approximate address appear in both Shannon Roberts's and Walter Roberts's police reports, and in Shannon Roberts's grand jury and preliminary hearing testimony. [Citations.]" (Petn. 61-62, ¶ 1.b.(1)(c).) Respondent denies that the referenced documents referred to Mr. Rodriguez's first name and alleges that the documents referred to him as "Choppy" or "Choppy Rodriguez." (Exhs. 44, 52, p. 1729; Exh. 53, p. 1750-1751.)

107. Respondent admits that "Shinn never interviewed Mr. Rodriguez," but denies that the lack of interview, "thus depriv[ed] petitioner of an important exculpatory witness." (Petn. 62, ¶ 1.b.(1)(d).) Based on the above (¶ 103, *ante*), respondent alleges that Mr. Rodriguez's account of the shooting is unreliable and not credible.

108. Respondent admits that Shinn did not personally interview Martina Jimenez. (See Petn. 60-61, ¶ 1.b, 62, ¶ 1.b.(2).)[8/] Respondent alleges that Douglas Payne, petitioner's investigator, conducted field interviews to attempt to discover potential witnesses. (Exh. 9, pp. 78, 84.) His notes reflect that, on January 14, 1985, he went to the house at 12133 Hoyt Street, where Ms. Jimenez

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8. "Martina Jimenez" was variously known as "Elizabeth Martina Jimenez" (Exh. 43, p. 1628), "Lisabeth Jimenez" (Exh. 43, pp. 1630-1635), and at the penalty retrial as Elizabeth Ruelas (Retrial 16 RT 1650, 1690).

lived (see Exh. 43, p. 1628). He spoke to someone at the house and they said they had not lived there at the time of the shooting. He was not given any information about where Ms. Jimenez had moved. (Return Exh. 6, pp. 28-29; see also Exh. 43, p. 1630 [interview of Ms. Jimenez conducted in February 1985 in Mexico].)

109. Respondent admits that "Martina Jimenez had spoken to the decedent moments before the shooting, watched him as he approached the suspect vehicle, saw the shooting, and informed the police during an interview that she saw a black man near where the victim fell to the ground. [Citation.]" (Petn. 62, ¶ 1.b.(2).)

110. Respondent denies that "Ms. Jimenez would have testified that the man she saw involved in the shooting was 'very dark complected,' thereby excluding petitioner as the perpetrator. [Citation.]" (Petn. 62, ¶ 1.b.(2)(a).) Respondent alleges that Ms. Jimenez did not see the face of the shooter, she was unable to identify either petitioner or Raynard in live lineups, and on June 6, 1983, she "couldn't remember what the people looked like when the policeman got shot." (Exh. 43, pp. 1628, 1632, 1633; Return Exh. 8.) Respondent alleges that Ms. Jimenez has given numerous inconsistent statements regarding the perpetrators of the shooting. Ms. Jimenez said that a Black man was driving the car (Exh. 43, p. 1630) and she saw no White female in the car or present at the scene (Return Exh. 9, p. 36), but the uncontested evidence established Pamela Cummings, a White female, was driving the car (68RT 7528, 7592; 73RT 8143). When interviewed in 1985, Ms. Jimenez said the Black male passenger got out of the car and shot the officer (Exh. 43, p. 1630), but when interviewed in 2000 said that the male Black sitting in the driver's seat shot the officer (Return Exh. 9, p. 35). Moreover, Ms. Jimenez's 2003 identification of Raynard as the shooter (Exh. 27) is unreliable given that she was unable to identify Raynard as the shooter in 1983 (Exh. 43, pp. 1632-1633). Based on the above,

respondent alleges that Ms. Jimenez's account of the shooting is unreliable and not credible.

111. Respondent denies that "Ms. Jimenez also would have testified truthfully that the dark skinned man 'shot numerous times consecutively without stopping. He did not hand the gun to the passenger at any point.' [Citation.]" (Petn. 62, ¶ 1.b.(2)(b).) Based on the above (¶ 110, *ante*), respondent alleges that Ms. Jimenez's account of the shooting is unreliable and not credible.

112. Respondent denies that "The available testimony regarding the rapidity with which the entire shooting took place, would have served to undermine the prosecution's theory that there was enough time between the first and second shots for Mr. Cummings to hand a just fired gun to petitioner." (Petn. 62, ¶ 1.b.(2)(c).) Based on the above (¶ 110, *ante*), respondent alleges that Ms. Jimenez's account of the shooting is unreliable and not credible.

113. Respondent denies that "If called as a witness, Ms. Jimenez would have conclusively excluded petitioner as having fired any of the shots during the offense. [Citation.]" (Petn. 62, ¶ 1.b.(2)(d).) Based on the above (¶ 110, *ante*), respondent alleges that Ms. Jimenez's account of the shooting is unreliable and not credible.

114. Respondent admits that Shinn did not personally interview Walter Roberts. (See Petn. 60-61, ¶ 1.b, 63, ¶ 1.b.(3).) Respondent alleges that Douglas Payne, petitioner's investigator, conducted field interviews to attempt to discover potential witnesses. (Exh. 9, pp. 78, 84.) His notes reflect that, on January 14, 1985, he went to the house at 12085 Hoyt Street, where Walter lived (see Exh. 44, p. 1637). He spoke to someone at the house who was not living there at the time of the shooting and provided no information about where Walter had moved. (Return Exh. 6, p. 26.)

115. Respondent denies that "Walter Roberts, the older brother of Shannon Roberts, saw 'the driver exit the car, stand up over the officer point a

small handgun [] and shoot two more rapid-fire shots at the officer.' [Citation.]" (Petn. 63, ¶ 1.b.(3).) Respondent alleges that Walter Roberts's account of the shooting is largely contradicted by uncontested facts and therefore lacks significant credibility. Walter told officers that a White female was inside the car during the shooting, and only got out after the shooting occurred and the driver returned to the car (Exh. 44, pp. 1637-1638), but the evidence established that Pamela was outside the car when the shooting occurred (67RT 7356; 69RT 7779; 73RT 8145; 74RT 8298-8302). Walter told officers that a fourth person, a man, was inside the car (Exh. 44, p. 1637), but the evidence established that only Pamela, Raynard, and petitioner were inside the car stopped by Officer Verna (68RT 7592; 73RT 8143). Walter also identified someone other than petitioner and Raynard in a live lineup as the shooter. (Exh. 44, p. 1640.) Based on these inconsistencies between Walter's statement and the uncontested evidence, respondent alleges that Walter's account of the crime is unreliable and not credible.

116. Respondent denies that "Mr. Roberts would have described the 'driver as a male Negro, black unknown 6-0/6-1, 175, 25/30 medium complexion, 3 - 4 inch Afro, clean shaven, thin, wearing a dark blue long sleeve shirt, blue Jean pants, dark shoes.' [Citation.]" (Petn. 63, ¶ 1.b.(3)(a).) Based on the above inconsistencies (¶ 115, *ante*), respondent alleges that Walter's account of the crime is unreliable and not credible.

117. Respondent denies that "The description excluded petitioner as being the shooter, and Mr. Roberts could have so testified." (Petn. 63, ¶ 1.b.(3)(b).) Respondent alleges that Walter's description of the shooting to police was most consistent with petitioner having committed the shooting because Walter said the shooter exited the car from the driver's side door, and the left back seat passenger, a "male, Negro," did not leave the car until after the shooting. (Exh. 44, p. 1636.) This would have corroborated the other evidence

establishing the petitioner was in the front passenger seat, exited the car from the driver's side door, and that Raynard was in the back seat and never left the car. (67RT RT 7416; 68RT 7592-7593; 69RT 7783; 73RT 8143, 8164.)

118. Respondent admits that Shinn did not personally interview Gustavo Gomez. (See Petn. 60-61, ¶ 1.b, 63, ¶ 1.b.(4).)

119. Respondent denies that "Gustavo Gomez would have provided testimony helpful to unraveling the state's pass-the-gun theory." (Petn. 63, ¶ 1.b.(4).) Respondent alleges that Gustavo Gomez did not witness the shooting, and was inside his home when his brother entered the home and his brother informed him of the shooting. Mr. Gomez went outside and saw Pamela. However, Mr. Gomez "did not get a good look at any of the males." Mr. Gomez was unable to identify either petitioner or Raynard in live lineups. (Return Exh. 10.)

120. Respondent admits that "Mr. Gomez could have testified that by the time he ran outside the shooting had ended; however, as he stood there, a car passed him and stopped in the middle of the street, about three houses away from his house. [Citation.]" (Petn. 63, ¶ 1.b.(4)(a).)

121. Respondent denies that "He watched as 'a tall African American man, with a gun, got out of the car and then back in again.' [Citation.]" (Petn. 63, ¶ 1.b.(4)(b).) Respondent alleges that Mr. Gomez gave inconsistent statements and therefore lacks significant credibility. At different times, Mr. Gomez said that the person who got out of the car was five feet seven inches tall, and five feet, eleven inches tall. He also reported a Black woman being in the car, in contradiction to all the other witnesses. (Return Exh. 10, p. 37.)

122. Respondent denies that "Mr. Gomez's testimony demonstrated that, contrary to the state's theory, petitioner's co-defendant was in possession of at least one gun. [Citation.]" (Petn. 63, ¶ 1.b.(4)(c).) Respondent alleges that, even if Mr. Gomez could testify that a Black man got out of the car with a gun,

it is just as consistent with petitioner being in possession of the gun as with Raynard being in possession of the gun. Moreover, Mr. Gomez lack significant credibility based on his inconsistent statements, his inability to identify either Raynard or petitioner, and his late arrival on the scene. (See ¶¶ 119, 121, *ante.*)

123. Respondent admits that Shinn did not personally interview Linda Lee Orlick. (See Petn. 60-61, ¶ 1.b, 63, ¶ 1.b.(5).)

124. Respondent admits that "Linda Lee Orlik was another witness whose identity and location were readily available from discovery materials. [Citation.]" (Petn. 63, ¶ 1.b.(5).)

125. Respondent denies that "Ms. Orlik could, and would have testified, that she heard 'three simultaneous shots, followed by two separate shots. All of the shots were fired rapidly in a short amount of time.' [Citation.]" (Petn. 64, ¶ 1.b.(5)(a).) Respondent alleges other evidence, Marsha Holt's testimony, showed that between the first and second shots fired, there was a gap of 30 seconds to two minutes. (68RT 7531, 7583; see 2CT 327, 339; Retrial 18RT 1936-1937, 1949.)

126. Respondent denies that "Such independent witness testimony would have further convinced the jurors that the shooting happened much too quickly for a gun to have been passed from one person in the back seat of a car to another person in the front seat." (Petn. 64, ¶ 1.b.(5)(b).) Respondent alleges Marsha Holt testified that, between the first and second shots fired, there was a gap of 30 seconds to two minutes. (68RT 7531, 7583; see 2CT 327, 339; Retrial 18RT 1936-1937, 1949.)

127. Respondent admits that "Petitioner's jury never received this . . . evidence" but denies that it was "crucial" or that it "independently undermined the state's pass-the-gun theory." (Petn. 64, ¶ 1.b.(5)(c).) Respondent alleges that Orlick's statement, that she heard "three simultaneous shots, followed by two separate shots," implies that a gap occurred, which

would have been consistent with the passing of the gun theory. Moreover, her characterization of the shots being fired in a "short amount of time" is insufficient to contradict the prosecution theory of the passing of the gun. (See Exh. 17, p. 175 [it would have taken petitioner seven seconds to exit the car after the firing of the first shot].)

128. Respondent admits that Shinn did not personally interview Mackey Como. (See Petn. 60-61, ¶ 1.b, 64, ¶ 1.b.(6).) Respondent alleges that Douglas Payne, petitioner's investigator, conducted field interviews to attempt to discover potential witnesses (Exh. 9, pp. 78, 84), and his notes reflect that, on January 14, 1985, he spoke to Mackey Como at her home. She said she did not see the shooting and was unable to offer any additional information that was useful to petitioner's defense. (Return Exh. 6, p. 25.)

129. Respondent denies that "Mackey Como would have provided circumstantial, highly probative, information that refuted the state's theory, that the darker skinned back seat passenger did not exit the car during the shooting, which would have served to undermine the theory that petitioner shot the victim." (Petn. 64, ¶ 1.b.(6).) Respondent alleges Ms. Como did not see the shooting or see anyone leaving the scene of the shooting. (Exh. 49.)

130. Respondent admits that "Ms. Como lived across the street from where the shooting occurred, and she was the mother of eyewitness Gail Beasley." (Petn. 64, ¶ 1.b.(6)(a).)

131. Respondent denies that "She would have provided important information regarding the extent of Raynard Cummings's involvement in the shooting." (Petn. 64, ¶ 1.b.(6)(b).) Respondent alleges Ms. Como did not see the shooting or see anyone leaving the scene of the shooting. (Exh. 49.)

132. Respondent admits that "After the shooting, petitioner's co-defendants, Raynard and Pamela Cummings, went to Mr. Cummings's mother's house. [Citations.]" (Petn. 64, ¶ 1.b.(6)(c).) Respondent denies that "After this

visit from her son, Mr. Cummings's mother, Mary Cummings, paid a visit to Mackey Como, whom she had not seen in a long time." (Petn. 64-65, ¶ 1.b.(6)(c).) Respondent alleges that Mary Cummings did not visit Mackey Como because, almost immediately after the shooting, the street was sealed off and people were not allowed in or out of the area. (68RT 7584.)

133. Respondent denies that "Mary Cummings's visit to Ms. Como was not a social one; instead, it lasted only about five minutes - long enough for Mary Cummings to gather information on whether Ms. Como saw the shooting. [Citation.]" (Petn. 65, ¶ 1.b.(6)(d).) Respondent alleges that Mary Cummings did not visit Mackey Como because, almost immediately after the shooting, the street was sealed off and people were not allowed in or out of the area. (68RT 7584.)

134. Respondent denies that "Ms. Como found Mary Cummings's visit unusual, especially given the events of the day." (Petn. 65, ¶ 1.b.(6)(e).) Respondent alleges that Mary Cummings did not visit Mackey Como because, almost immediately after the shooting, the street was sealed off and people were not allowed in or out of the area. (68RT 7584.) Respondent alleges that it was not unusual for Mary Cummings to come to her house at that time in the afternoon. (Retrial 24RT 3073; cf. Exh. 49.)

135. Respondent denies that "Introduction of this testimony would have permitted counsel to argue that if Mr. Cummings did not exit the car, he had no reason to be concerned whether anyone saw him, and thus, his mother would have no reason to question Ms. Como or other neighbors whether or not they saw the shooting." (Petn. 65, ¶ 1.b.(6)(f).) Respondent alleges that Mary Cummings did not visit Mackey Como because, almost immediately after the shooting, the street was sealed off and people were not allowed in or out of the area. (68RT 7584.) Also, Mary Cummings had a motive to question and intimidate witnesses that could identify Raynard as being present during the

shooting, even if those witnesses could not report or testify that Raynard had committed the shooting. (See e.g., Exh. 47 [Mary Cummings approached in threatening manner her sister, Eula Heights, who testified that Raynard, Pamela and petitioner came to house after shooting].) Moreover, Ms. Como would not have been allowed to testify to the contents of her alleged conversation with Mary Cummings because it was irrelevant, unduly prejudicial, and hearsay. (Evid. Code, §§ 210, 352, 1200; Retrial 24RT 3073-3074 [excluding testimony regarding contents of conversation with Mary Cummings as irrelevant and hearsay].)

136. Respondent denies that "No such argument was presented, and the jury was unable to come to a similar conclusion on its own because trial counsel unreasonably failed to present Ms. Como's testimony." (Petn. 65, ¶ 1.b.(6)(g).) Respondent alleges that counsel reasonably declined to call Ms. Como to testify because she could not have testified to the contents of her conversation with Mary Cummings and her remaining recollections of the day of the murder were unhelpful to petitioner. (See ¶¶ 131, 135, *ante*.)

137. Respondent admits that Shinn did not personally interview Mary Cummings. (See Petn. 60-61, ¶ 1.b, 65, ¶ 1.b.(7).) Respondent alleges that Ms. Cummings would not have cooperated with or provided assistance to anyone from Petitioner's defense team. (See Exh. 47 [Mary Cummings approached in threatening manner her sister, Eula Heights, who testified that Raynard, Pamela and petitioner came to house after shooting].)

138. Respondent denies that "Mary Cummings also immediately threatened her sister, Eula Heights, to falsely report her recollection of events in a manner designed to avoid incriminating Mr. Cummings as the shooter." (Petn. 65, ¶ 1.b.(7).) Respondent alleges that, after the grand jury proceedings, Ms. Cummings "approached her and told her, in a threatening manner that she ha[d] read the transcripts and [knew] what she ha[d] testified to." (Exh. 47.)

Respondent admits that "Ms. Heights admitted that because she feared her nephew, Raynard Cummings, and her sister, Mary Cummings, she lied under oath before the grand jury. [Citations.]" (Petn. 65, ¶ 1.b.(7).)

139. Respondent denies that "Said perjury included, but was not limited to, a description of Raynard Cummings and Pamela Cummings's activities immediately after the commission of the offense." (Petn. 66, ¶ 1.b.(7)(a).) Respondent alleges that Ms. Heights truthfully testified, consistent with her statement to police, that: Raynard and Petitioner came to her house; Pamela entered the house a little while later; Pamela had two bags of clothing; Raynard made a phone call but got no answer; petitioner made a phone call that he completed; Raynard asked Ms. Heights to take him and Pamela to a Motel 6 and she agreed; Raynard changed his mind and asked to go to his mother's house, and Ms. Heights took him there. (Compare Return Exh. 11 with 4Supp. CT 743-749.) Ms. Heights testified at the grand jury that Pamela had taken the bags of clothing with her (4Supp. CT 752), which she later admitted to police had been false (Exh. 47).

140. Respondent denies that "Mary Cummings's threats to Ms. Heights were part of an ongoing course of conduct designed to, and which did in fact, persuade and coerce percipient and other witnesses to change their reported recollection of events to conceal the fact that Raynard Cummings was the sole shooter and perpetrator of the murder." (Petn. 66, ¶ 1.b.(7)(b).) Respondent alleges that Ms. Cummings did not threaten Ms. Heights at all, and did not approach her in a threatening manner prior to Ms. Heights testifying. (Exh. 47.) Since petitioner's allegation as to the "ongoing course of conduct" and "other witnesses" lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.)

141. Respondent denies that "Said course of conduct included, but was

not limited to, reviewing the pretrial testimony of witnesses including, but not limited to, Ms. Heights, and making threats against them in a successful effort to prevent them from testifying wholly or truthfully." (Petn. 66, ¶ 1.b.(7)(c).) Respondent alleges that Ms. Heights never reported Ms. Cummings threatening her, only that Ms. Cummings "approached her . . . in a threatening manner." (Exh. 47.) Since petitioner's allegation as to the other "witnesses" lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.)

142. Respondent denies that "Investigation and presentation of said course of conduct and witness intimidation would have led to the presentation of further evidence persuading the jury to discredit the testimony of Gail Beasley and Marsha Holt." (Petn. 66, ¶ 1.b.(7)(d).) Since petitioner's allegation as to the "further evidence" lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.)

143. Except as noted, respondent admits that "Said evidence included, but was not limited to, the fact Marsha Holt knew Mr. Cummings since they were children, and Ms. Beasley's mother was a good friend of Mary Cummings. (Petn. 66, ¶ 1.b.(7)(e).) Respondent alleges that Mary Cummings was an "acquaintance" of Ms. Beasley's mother, Mackey Como, not a "good friend." (Retrial 24RT 3072.) Respondent denies that evidence of Ms. Holt's acquaintance with Raynard and Ms. Como's acquaintance with Ms. Cummings is evidence of a course of witness intimidation by Ms. Cummings. Respondent alleges that such acquaintances are equally consistent with lack of intimidation.

144. Respondent denies that "Ms. Holt and Ms. Beasley were, therefore, very familiar with Mr. Cummings and his notoriously vicious family. [Citations.]" (Petn. 66, ¶ 1.b.(7)(f).) Respondent alleges that the declarations cited do not support the assertion that the Cummings family was notoriously

vicious. (See Exhs. 47, 64, 65.) Respondent also alleges that Ms. Holt's acquaintance with Raynard is insufficient to support an inference that she was "very familiar" with Raynard's family. Respondent also alleges that Ms. Como's acquaintance with Mary Cummings is insufficient to support an inference that Ms. Como's daughter, Gail Beasely, was "very familiar" with Raynard's family.

145. Respondent admits that "Ms. Holt was the only close eyewitness to the shooting who failed to *ever* report seeing a third, or a dark skinned, man outside of the car." (Petn. 67, ¶ 1.b.(7)(g), italics added.) Respondent alleges that testimony from Pamela Cummings, Robert Thompson, Gail Beasley, and Marsha Holt, was admitted *at trial* that omitted any mention of seeing "a third, or a dark skinned, man outside of the car." (68RT 7527-7529, 7592-7597, 7604; 73RT 8164-8170; 74RT 8298-8304, 8310, 8322-8323, 8343-8344, 8348-8349.)

146. Respondent denies that "With such information, a jury could understand that Ms. Holt's failure to report seeing a third man outside of the car, and both Ms. Holt and Ms. Beasley's false reports that petitioner shot the victim, were purely a function of Mary Cummings's sudden intimidating visit to the crime scene." (Petn. 67, ¶ 1.b.(7)(h).) Respondent alleges that Mary Cummings did not visit crime scene immediately after the crime because the street was sealed off and people were not allowed in or out of the area. (68RT 7584.)

147. Respondent denies that Shinn did not interview Robin Gay. (See Petn. 60-61, ¶ 1.b, 67, ¶ 1.b.(8).) Respondent alleges that Shinn interviewed Robin Gay. (61RT 6717; 62RT 6726, 6766-6767; 74RT 8317; 76RT 8588, 8640-8641; 98RT 11306.) In addition, Shinn was in possession of Robin Gay's testimony at the grand jury proceedings. (See 3Supp. CT 704, 794, 829.)

148. Respondent denies that "Counsel unreasonably failed to call Robin Gay, who would have testified that, soon after the shooting, Pam Cummings told her that when the officer asked for ID 'Renard [sic] said yea I've got I.D, and

pulled out a gun and shot him in the neck and the officer spun around. Renard [sic] fired more shots. The officer went down and Renard [sic] got out of the car and shot him in the back.' [Citation.]" (Petn. 67, ¶ 1.b.(8).) Respondent alleges that Robin Gay would have refused to testify if called as a witness at the guilt phase of petitioner's trial, and she made her refusal known prior to being called as a witness. (75RT 8470-8471 [Robin Gay testifying, in hearing outside presence of jury, that she would refuse to answer any questions if called as a witness at the guilt phase of petitioner's trial]; see 62RT 6726; 74RT 8436-8437; 76RT 8588-8589.) Shinn, after consulting with petitioner and getting his agreement, reasonably decided not to try to call Robin Gay given her announced intention to refuse to testify. (76RT 8640-8641.)

149. Respondent denies that "Ms. Gay's testimony that Raynard bragged that he alone shot the victim and that petitioner expressly denied shooting the victim, would have served the dual purpose of presenting a witness who could affirmatively tell the jury that petitioner was innocent, and seriously impeach the testimony of Pam Cummings. [Citation.]" (Petn. 67, ¶ 1.b.(8)(a).) Respondent alleges that Robin Gay would have refused to answer any questions if called as a witness at the guilt phase of petitioner's trial. (75RT 8470-8471; see 62RT 6726; 74RT 8436-8437; 76RT 8588-8589.) Shinn, after consulting with petitioner and getting his agreement, reasonably decided not to try to call Robin Gay given her announced intention to refuse to testify. (76RT 8640-8641.)

150. Respondent admits that "Ms. Gay's testimony was not subject to impeachment with prior inconsistent statements regarding the person responsible for the shooting, as was Pamela Cummings's trial testimony." (Petn. 67, ¶ 1.b.(8)(b).) Respondent alleges Robin's testimony was subject to impeachment on other significant matters. (See, e.g., 3Supp. CT 820, 830-834 [Robin testifying at grand jury proceedings that she had no knowledge of any robbery at Artistic Bath]; Return Exh. 12, pp. 45-46 [Robin testified in her own trial she

had no knowledge petitioner was committing robberies]; cf. Return Exh. 13, pp. 92, 94 [Robin admitted "casing" Artistic Bath for petitioner and Raynard, and she learned that petitioner and Raynard were committing robberies a month before murder]; accord, Retrial 20RT 2363-2364.) Respondent also alleges that Robin Gay testfied at her own trial and denied participation in robberies of Artistic Bath and Christopher Poehlman, and denied assisting petitioner in his flight, but she was found guilty in a court trial of three counts of robbery and accessory to a felony for these acts. (Return Exh. 12.)

151. Except as noted, respondent admits that "Ms. Gay's testimony is highly consistent with eyewitness Robert Thompson's statement to the police and his grand jury testimony [citation]; Oscar Martin's statement to the police and his grand jury, preliminary hearing, and trial testimony [citation]; as well as Pam Cummings's statements to Debbie Warren; and Ms. Cummings's statement to her sister [citation], Debra Cantu immediately after the shooting, that the back seat passenger was the sole shooter. [Citation.]" (Petn. 67-68, ¶ 1.b.(8)(c).) Respondent denies the allegation if "Ms. Gay's testimony" refers to her prospective trial testimony, since she refused to testify at trial. (75RT 8470-8471; see 62RT 6726; 74RT 8436-8437; 76RT 8588-8589.) Respondent admits the allegation if "Ms. Gay's testimony" refers to her grand jury testimony. (See 3Supp. CT 704, 794, 829.) Respondent alleges that Robin Gay's grand jury testimony is *inconsistent* with: Gail Beasley's report to the police, her grand jury testimony, her preliminary hearing testimony, and her testimony at the penalty phase retrial (Exh. 12; 1Supp. CT 198-200, 205-208; 2CT 519-524, 540; Retrial 19RT 2030-2037, 2056-2057); Marsha Holt's report to the police, her grand jury testimony, her preliminary hearing testimony, her trial testimony, and her testimony at the penalty phase retrial (Exh. 42; 1Supp. CT 215-218, 222-223; 2CT 324-329, 335; 68RT 7527-7529; Retrial 18RT 1928-1938, 1952, 1957); Robert Thompson's preliminary hearing testimony, his trial testimony, and his

testimony at the penalty phase retrial (2CT 667-671; 68RT 7592-7597, 7604; Retrial 17RT 1796-1798; Retrial 18RT 1823); Pamela Cummings's trial testimony, and her testimony at the penalty phase retrial (73RT 8164-8170; Retrial 21RT 2500-2503, 2523-2524); and Shannon Roberts's report to the police, his grand jury testimony, his preliminary hearing testimony, and his trial testimony (Exh. 40; 1Supp. CT 522-530, 534; 2CT 711-717, 725-726; 69RT 7781-7785, 7789).

152. Respondent admits that "Counsel . . . failed to call any of the witnesses to co-defendant Raynard Cummings's confessions and admissions made soon after he was arrested." (Petn. 68, ¶ 1.b.(9).) Respondent denies that counsel's failure was "unreasonable." (Petn. 68, ¶ 1.b.(9).) Respondent alleges that counsel could tactically have chosen not to call the witnesses in light of other witnesses who did testify as to Raynard's confessions, namely: Gilbert Gutierrez (64RT 6950-6954, 6983-6984 [Raynard confessed firing all the shots, and petitioner said Raynard did all the shooting]); Alfredo Montes (64RT 7005-7008 [Raynard said, "I don't have nothing to lose. I killed a cop that had medals of valor."]); and Deputy Sheriff Michael McMullan (65RT 7148-7150 [Raynard said, "I am no ghost. The only ghost I know is Verna. I put six in him."and "He took six of mine."]).

153. Except as noted, respondent admits that "From July 1983 through the capital trial, Mr. Cummings admitted to several inmates at the Los Angeles County Jail that he alone was responsible for the murder of Officer Verna." (Petn. 68, ¶ 1.b.(9)(a).) Respondent denies that Raynard made such admissions to any inmates other than the ones for which petitioner has provided specific allegations, i.e., Gilbert Gutierrez, Michael Kanan, John Jack Flores, Michael David Gaxiola, and James Edward Jennings.

154. Respondent admits that "Reports of these confessions were provided to Shinn, who failed to interview or call any of the identified, readily

available witnesses to testify on petitioner's behalf." (Petn. 68, ¶ 1.b.(9)(b).) Respondent denies that "No tactical reason justified counsel's failing in this regard" (Petn. 68, ¶ 1.b.(9)(b)) based on the following: (1) Shinn is not available for respondent to interview; (2) the prosecutor did not call inmates David Elliott, John Jack Flores, Michael David Gaxiola, James Edward Jennings, or Norman Pernell, to testify; (3) the circumstances of the prosecutor's failure to call the inmate witnesses suggests tactical bases for Shinn's decision not to call them; and (4) therefore, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at p. 485.)

155. Respondent admits that Shinn did not interview or call at trial, David Elliot and Norman Pernell. (Petn. 68, ¶ 1.b.(9)(c)(i); see Petn. 68, ¶ 1.b.(9)(c).) Respondent denies that "David Elliot and Norman Pernell, whose names appeared on a list of exculpatory witnesses, and were both described as having heard Mr. Cummings confess to being the person solely responsible for the shooting of Officer Verna. [Citation.]" (Petn. 68, ¶ 1.b.(9)(c)(i).) Respondent admits that Elliott and Pernell appear on a list of witnesses "in custody at Los Angeles County Jail" that was provided to Shinn. (Exh. 61.) Respondent denies specifically that both witnesses are described as having Raynard confessing to being the sole shooter. Respondent alleges that the document describes Pernell as having reported that a "male Negro" known only as "Slim" confessed that he shot Officer Verna, but the document does not identify Raynard as "Slim" or as the person who talked to Pernell and does not describe the confessor as admitting being the *sole* shooter. (Exh. 61.) Respondent alleges the document also describes Elliott as having reported that Raynard admitting he shot Officer Verna, but the document does not describe Raynard as admitting being the *sole* shooter. (Exh. 61.) Therefore, Shinn was not required to interview or present the trial testimony of Elliott or Pernell, and the failure to do so was not prejudicial.

156. Respondent admits that Shinn did not interview or call at trial, Jack John Flores. (Petn. 69, ¶ 1.b.(9)(c)(ii); see Petn. 68, ¶ 1.b.(9)(c).) Respondent admits "Jack John Flores, to whom Raynard Cummings confessed that he alone shot Officer Verna, and described to Mr. Flores how he first shot the victim from inside the back seat of the car, then exited the back seat through the driver's door and continued shooting." (Petn. 69, ¶ 1.b.(9)(c)(ii).) Respondent alleges that Flores's character would have been impeached with the following facts: at the time Flores spoke to Raynard, Flores was in custody for a probation violation and a misdemeanor warrant from Orange County (103RT 11619); he had been convicted of grand theft in 1982 and placed on probation; he violated his probation for not reporting (103RT 11622-11623); in 1984, he was picked up for violating probation by committing a second degree burglary, a misdemeanor (103RT 11623-11624); at the time of trial, he was serving time for a burglary, for which he had been sentenced to a year in county jail (103RT 11625); his probation was terminated (103RT 11625-11626); at the time of trial he was also in custody for six armed robberies that were pending trial (103RT 11619-11620, 11624); he had also been arrested for three second degree burglaries and a couple grand theft autos in 1985 (103RT 11626); he also had grand theft auto cases pending in East Los Angeles and in Pasadena (103RT 11629, 11661); he had just "beat" a new burglary case (103RT 11629-11630); he had been to state prison for attempted robbery in 1979 (103RT 11626); he had another felony conviction prior to that for possession for sales of marijuana (103RT 11627); he had previously served 15 days for the petty theft in Alhambra (103RT 11629); he "beat" a burglary charge in Alhambra (103RT 11629); he had been kept in the high power part of county jail (near Raynard) because someone had hired him to commit murder, so he was being kept away from that person (103RT 11631); Flores had planned to take money from another inmate for killing two witnesses without actually doing it (103RT

11631-11636); Flores was a narcotics addict, starting his heroin addiction at age 25 (103RT 11637, 11646); and he had started committing crimes at age 25 and was 35 years old at the time of trial (103RT 11637-11638). Additionally, Flores would have testified that Raynard related the following to him: Officer Verna threatened to take Pamela to jail; Raynard asked petitioner what petitioner wanted to do and did he want to shoot Officer Verna; petitioner responded, "Yes, if it comes to it." (Return Exh. 19, p. 140.) Respondent alleges that such testimony would have shown that, even if petitioner was not the shooter, he was guilty as an aider and abettor of the murder–a theory that was not otherwise presented at trial. Therefore, Shinn had tactical reasons for not calling Flores, and the failure to do so was not prejudicial.

157. Respondent admits that Shinn did not interview or call at trial, Michael David Gaxiola. (Petn. 69, ¶ 1.b.(9)(c)(iii); Petn. 68, ¶ 1.b.(9)(c).) Except as noted, respondent admits that "Michael David Gaxiola, to whom Cummings made a detailed confession including, but not limited to, incriminating himself and exculpating petitioner:

> Cummings told me the officer then again pointed with his left hand at Cummings, who was in the rear driver's seat of the car, and asked him for identification. Cummings told me that all at once he yelled "I've got ID for you," or something to that effect, and fired his gun at the officer. Cummings said he shot the officer in the upper portion of his body, perhaps a couple of times . . . ."

(Petn. 69, ¶ 1.b.(9)(c)(iii).) Respondent denies that the above statement would have exculpated petitioner because it only shows that Raynard admitted to firing a shot or two from the back seat. Respondent denies that Raynard told Gaxiola that he (Raynard):

> then pushed the driver's seat forward, and exited the vehicle...Cummings now out of the car, continued shooting at the

officer, emptying his gun...Cummings made it clear that Ken Gay did not fire the gun and had nothing to do with the shooting at all. Cummings said that he alone was the trigger man. [Citation.]

(Petn. 69, ¶ 1.b.(9)(c)(iii).) Respondent alleges that when Gaxiola spoke to police officers about his conversation with Raynard, that he told officers only that Raynard "shot Officer Paul Verna in the upper part of Verna's body," and Raynard did not say he exited the car, and did not take sole responsibility and say that he alone shot Officer Verna. (Exh. 14.)

158. Respondent denies that "No tactical reason existed for trial counsel's failure to present this exculpatory testimony to petitioner's jury, or to follow up on the police report counsel was provided regarding this conversation between Mr. Gaxiola and Raynard Cummings that occurred on or around June 11, 1984. [Citation.]" (Petn. 69, ¶ 1.b.(9)(c)(iv).) Respondent alleges that Shinn did have a tactical reason for declining to call Gaxiola as a witness, namely that Gaxiola's statement did not exculpate petitioner, and Gaxiola would have been subjected to significant impeachment as a result of his lengthy criminal history.

159. Respondent admits that "Mr. Gaxiola would have been willing to present this . . . testimony to petitioner's jury. [Citation.]" (Petn. 70, ¶ 1.b.(9)(c)(v).) Respondent denies that Gaxiola's testimony would have been "highly exculpatory" or that "petitioner's jury was denied essential evidence that would have forced them to acquit petitioner of the murder charge." (Petn. 70, ¶ 1.b.(9)(c)(v).) Respondent alleges that Gaxiola's testimony would only have shown that Raynard fired the first shot or two, which was consistent with the prosecution theory at trial and was not exculpatory as to petitioner. (Exh. 14.)

160. Respondent admits that Shinn did not interview or call at trial, Alfred Montes. (Petn. 70, ¶ 1.b.(9)(c)(vi); see Petn. 68, ¶ 1.b.(9)(c).) Respondent denies that "Counsel unreasonably failed to investigate inmate

Alfred Montes's report that Cummings bragged about the fact '[he] killed a cop' who had been awarded a medal for valor. [Citation.]" (Petn. 70, ¶ 1.b.(9)(c)(vi).) Respondent alleges that the trial prosecutor informed Shinn about the substance of Montes's statement, and that he would be calling Montes as a witness; the prosecutor called Montes as a witness, and Montes testified at trial before Petitioner's jury that Raynard had said, "I don't have nothing to lose. I killed a cop that had medals of valor." (64RT 7008.) Therefore, Shinn's actions were reasonable, and any failure was not prejudicial.

161. Respondent admits that "Trial counsel's failure to investigate and research much of the above clearly exculpatory statements prevented him from pursuing Mr. Montes's vague response that Mr. Cummings had 'said a few things,' when asked by Cummings's counsel if his client had ever confessed to him. [Citation.]" (Petn. 70, ¶ 1.b.(9)(c)(vii).) However, respondent alleges there was no prejudice because there were no other "exculpatory" statements available from Montes. (Return Exh. 7, ¶ 8.)

162. Respondent admits that "Mr. Cummings's counsel did not follow-up to clarify Mr. Montes's answer . . ." and "Shinn therefore declined to cross-examine this witness . . . ." (Petn. 70, ¶ 1.b.(9)(c)(viii).) Respondent denies that "Shinn's unreasonable failure to investigate left him ignorant of Mr. Montes's much stronger potential testimony" or that "Shinn [failed] to elicit this exculpatory statement from him. [Citation.]" (Petn. 70, ¶ 1.b.(9)(c)(viii).) Respondent denies this allegation based on petitioner's failure to allege what "Mr. Montes's much stronger potential testimony" and "exculpatory statement" was. In any event, there were no other "exculpatory" statements available from Montes. (Return Exh. 7, ¶ 8.)

163. Respondent admits that Shinn did not interview or call at trial, James Edward Jennings. (Petn. 70, ¶ 1.b.(9)(c)(ix); see Petn. 68, ¶ 1.b.(9)(c).) Respondent admits that "James Edward Jennings would have testified, *inter*

alia, that Cummings 'stated that he had a .38 cal. revolver hidden between his legs, and when Verna asked him, Raynard, if he had I.D., Cummings stated, [']I've got I.D.,[*'*] pulled the gun from between his legs and shot Verna twice in the upper body, once in the neck or shoulder area, and once in the upper body area...Verna then spun around, at which time Cummings stated he shot Verna in the back.' [Citation.]"

164. Respondent denies that "Mr. Jennings also would have testified that Cummings continued to make confessions and incriminating statements during his capital murder trial, including, but not limited to, admitting that he was solely responsible for Officer Verna's death, and repeatedly admitting that petitioner was innocent of the crime; because he alone killed the victim. [Citation.]" (Petn. 71, ¶ 1.b.(9)(c)(x).) Although the police interview report of Mr. Jennings appears to show that Raynard took credit for shooting all of the bullets that struck Officer Verna, respondent denies this allegation because the report does not show that Jennings alleged repeated confessions or that Raynard repeatedly admitted that petitioner was innocent of the crime. (Exh. 5.)

165. Respondent admits that Shinn did not interview or call at trial, Gilbert Anthony Gutierrez. (Petn. 71, ¶ 1.b.(9)(c)(xi); see Petn. 68, ¶ 1.b.(9)(c).) Except as noted, respondent admits that "Gilbert Anthony Gutierrez, a witness called by the prosecution, testified, consistent with his police statement, that not only did petitioner deny shooting the victim, but also in a separate conversation, Mr. Cummings took full responsibility for murdering Officer Verna [citation]; and further testified that Cummings confessed to being the sole shooter to just about anyone who would listen [citation]." (Petn. 71, ¶ 1.b.(9)(c)(xi).) Respondent denies that Gutierrez testified that Raynard confessed to "being the sole shooter" to anyone who would listen. Respondent alleges that Gutierrez testified that Raynard was willing to tell anyone that he shot the officer, but he did not specify testify that Raynard was willing to tell anyone he was the *sole*

shooter. (64RT 6988-6989.)

166. Respondent denies that "A reasonably timely interview of Mr. Gutierrez, and investigation of his statement would have led any minimally competent attorney to further investigate, evaluate, and present the testimony of many other inmates who heard Mr. Cummings's confessions, and whose credible, consistent testimony would have given the jury a highly reasonable doubt that petitioner was guilty of shooting the victim." (Petn. 71, ¶ 1.b.(9)(c)(xii).) Respondent alleges that Shinn was aware of the possible testimony from David Elliott, John Jack Flores, Michael David Gaxiola, James Edward Jennings, and Norman Pernell from the police reports and summaries that had been provided to him. (Exhs. 5, 14, 61.) And no information contained in the statements of Gutierrez would have led petitioner's counsel to the discovery of other possible inmate witnesses. (See Exh. 63.) Also, given the strong evidence of Petitioner's guilt, the equivocal nature of some of their statements, and the significant impeachment these witnesses would have faced, in part because they were reporting jailhouse statements made by a fellow inmate, petitioner was not prejudiced by the failure to present any of these witnesses.

167. Respondent admits that Shinn did not interview or call at trial, Deputy William McGinnis. (Petn. 71-72, ¶ 1.b.(9)(c)(xiii); see Petn. 68, ¶ 1.b.(9)(c).) Respondent denies that counsel failed to interview or "investigate Raynard Cummings's confessions and admissions to Deputy William McGinnis, including, but not limited to, his statement: 'Ya well I put three in front of the motherfucker and he wouldn't have got two in the back if he hadn't been running – the punkass coward motherfucker.' [Citation.]" (Petn. 71-72, ¶ 1.b.(9)(c)(xiii).) Respondent alleges that Deputy William McGinnis testified as to the contents of Raynard's statements in court at a hearing outside the presence of the jury, so Shinn was fully aware of Deputy McGinnis's possible testimony

and therefore adequately "investigated." (65RT 7036-7044.) Respondent admits that Deputy McGinnis testified that Raynard 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 punkass motherfucker." (65RT 7041.)

168. Respondent admits that "The context and substance of Cummings's admissions made 'clear to [Deputy McGinnis] . . . that Cummings alone pulled the trigger and was the sole person responsible for killing Officer Verna." [Citation.]" (Petn. 72, ¶ 1.b.(9)(c)(xiv).)

169. Respondent denies that "Shinn's failure to conduct even a minimal investigation prevented the jury from hearing powerful, credible testimony regarding petitioner's innocence from a law enforcement officer." (Petn. 72, ¶ 1.b.(9)(c)(xv).) Respondent alleges that Deputy William McGinnis testified as to the contents of Raynard's statements in court at a hearing outside the presence of the jury, so Shinn was fully aware of Deputy McGinnis's possible testimony and therefore adequately "investigated." (65RT 7036-7044.) Respondent alleges that the jury heard other "testimony regarding petitioner's innocence from a law enforcement officer," as follows: On July 27, 1984, Deputy Sheriff Michael McMullan was in the hallway within a custody facility with Raynard when some inmates started chanting "dead man walking"; Raynard mentioned something about "You will die too," and said, "I am no ghost. The only ghost I know is Verna. I put six in him."; and Raynard also said, "He took six of mine," and told the deputies, "If I see you all on the streets I hope you are quicker than Verna." (65RT 7148-7150.)

170. Respondent admits that "Trial counsel was well aware that Cummings had confessed to shooting the victim – Shinn was in possession of a police report written by Deputy William McGinnis, and he was present when Deputy McGinnis gave testimony about Cummings's confession at a hearing pursuant to Evidence Code section 402. [Citations.]" (Petn. 72, ¶

1.b.(9)(c)(xvi).)

171. Except as noted, respondent admits that "The deputy's testimony also would have given even greater credibility to the inmate witnesses who did testify, and should have testified, to Cummings's confessions to them." (Petn. 72, ¶ 1.b.(9)(c)(xvii).) Respondent denies that other inmates "should have testified" for the reasons stated above. Respondent denies that "Petitioner was denied a strong defense as a result of Mr. Shinn's failure to interview, and call as a witness, Deputy McGinnis. . . . Shinn had no tactical reason for failing to present it." (Petn. 72, ¶ 1.b.(9)(c)(xvii).) Respondent believes there is a good faith basis to believe petitioner's allegation is untrue based on the following: (1) Shinn is not available for respondent to interview; (2) any acts or omissions by Shinn were not prejudicial in light of the strong evidence showing Petitioner's guilt (*People v. Cummings, supra,* 4 Cal.4th at pp. 1257-1267); and (3) the prosecuting attorney John Watson also did not call Deputy McGinnis to testify, suggesting some problem was present with presenting his testimony.

172. Respondent alleges that if Shinn had produced testimony from witnesses who testified to additional statements by Raynard taking credit for all of the shooting, then the prosecution would have introduced the following evidence to discredit Raynard's statements insofar as they involved taking credit for the entire shooting:

173. On approximately June 30, 1984, in county jail, Deputy A. Macias spoke with Raynard Cummings about what was happening with his murder case; during the conversation, Deputy Macias said, "So you're going to get off with shooting a man in the back"; Raynard said that Officer Verna was shot in the shoulder and "then we got out of the car, shot him again and again . . ."; Deputy Macias said "I bet Gaye [*sic*] shot him in the back"; and Raynard responded, "I wouldn't shoot anyone in the back. Gaye might, but I wouldn't say shit against him." (Return Exh. 4.)

174. On September 26, 1984, Deputy David La Casella and other deputies escorted petitioner and Raynard to holding cells; petitioner yelled to Raynard, "I'm not afraid to kill. One of their comrades are doing to die. It's going to happen in the courtroom or the elevator." (Return Exh. 5, p. 15.)

175. Respondent alleges that Raynard Cummings lied when he told other inmates and law enforcement officers that he got out of the car and fired the final shots into Police Officer Verna. (See *People v. Cummings, supra,* 4 Cal.4th at pp. 1257-1267 [reviewing evidence showing Petitioner's guilt].)

176. As specifically described in the following paragraphs (¶¶ 177-211, *post*), respondent denies that "Trial counsel unreasonably failed to interview impeachment witnesses who were readily available and who could have provided extensive impeachment evidence. Counsel's unreasonable failure to undertake even a minimal investigation, prejudicially prevented him from uncovering and presenting significant evidence that would have seriously undermined the credibility of the state's case against petitioner including, but not limited to, the following[.]" (Petn. 72, ¶ 1.c.)

177. Respondent admits that Shinn did not personally interview Robert or Cecilia Thompson. (See Petn. 72, ¶ 1.c.; 73, ¶ 1.c.(1).) Respondent alleges that Douglas Payne, petitioner's investigator, conducted field interviews to attempt to discover potential witnesses. (Exh. 9, pp. 78, 84.) His notes reflect that, on January 14, 1985, he spoke to Robert Thompson but Mr. Thompson refused to be interviewed. (Return Exh. 6, p. 24.)

178. Respondent denies that "Minimal investigation and interviews of Robert and Cecilia Thompson would have provided trial counsel with significant impeaching evidence based on the traumatic impact witnessing the shooting of Officer Verna had on Robert Thompson [citation], coupled with evidence of the extent to which Mr. Thompson's pre-existing psychological and emotional state affected his memory, ability to recall, and susceptibility to

suggestion. Said information and evidence that Mr. Thompson's mental state and emotional well-being were severely compromised before, and had further decompensated after the offense, included, but was not limited to, the following[.]" (Petn. 73, ¶ 1.c.(1).) Respondent alleges that being a witness to the murder of Mr. Thompson caused him personal problems. (Retrial 1779.) Witnessing petitioner's cold-blooded murder of Officer Verna was a shocking event. The jury was already aware that witnessing the murder had had an effect on Mr. Thompson's personal life. Mr. Thompson freely spoke and expressed his emotions while testifying. (68RT 7610-7611 [expressing anger at the publicity], 7611-7612 [stating he was very emotional at the grand jury proceedings because he had seen something he did not want to see], 7626-7627 [stating he re-experienced fear from shooting while going through re-enactment], 7647, 7653 [stating he did not want to be involved at lineup or grand jury proceedings]; 69RT 7683, 7689 [agreeing he was emotionally upset at the time of shooting, and that event was "traumatic"]; see 2Supp. CT 453 [Thompson crying during grand jury proceedings].) However, Mr. Thompson's personal problems did not affect his memory or his credibility. (107RT 11999 [trial court stating prosecution witnesses were "credible and believable"]; see Retrial 36RT 4902 [all of the witnesses who identified appellant as the shooter were "highly credible"].)

179. Respondent denies that "Mr. Thompson was a Vietnam veteran, and witnessing the shooting of a man in uniform caused him to experience sudden and unexpected flashbacks of the shooting and his war experiences. [Citation.]" (Petn. 73, ¶ 1.c.(1)(a).) Respondent makes this denial based on the following: (1) Mr. Thompson is not available to be interviewed (see Exh. 80, p. 2100 [Robert Thompson died]); (2) the allegation is made based on a report by Mr. Thompson's ex-wife who is very paranoid and divorced him because she wanted out of her relationship with Mr. Thompson (Retrial 17RT 1783); and (3)

Mr. Thompson never reported any of these experiences while testifying at the preliminary hearing, the grand jury proceedings, the original guilt phase trial, or the penalty retrial.

180. Respondent denies that "After witnessing the shooting, in an attempt to 'try and forget what he had seen," Mr. Thompson's alcohol consumption increased to the point where "all he wanted to do was drink beer all night and then sleep.' [Citation.]" (Petn. 73, ¶ 1.c.(1)(b).) Respondent makes this denial based on the following: (1) Mr. Thompson is not available to be interviewed; (2) the allegation is made based on a report by Mr. Thompson's ex-wife who is very paranoid and divorced him because she wanted out of her relationship with Mr. Thompson (Retrial 17RT 1783); and (3) Mr. Thompson never reported any of these experiences while testifying at the preliminary hearing, the grand jury proceedings, the original guilt phase trial, or the penalty retrial.

181. Respondent denies that "The psychiatric symptoms Mr. Thompson manifested after witnessing the shooting – hypervigiliance, agitation, jumpiness, increased alcohol and tobacco consumption, flash backs, sleep disturbance – made his later statements regarding the shooting highly unreliable." (Petn. 73, ¶ 1.c.(1)(c).) Respondent makes this denial based on the following: (1) Mr. Thompson is not available to be interviewed; (2) the allegation is made based on a report by Mr. Thompson's ex-wife who is very paranoid and divorced him because she wanted out of her relationship with Mr. Thompson (Retrial 17RT 1783); and (3) Mr. Thompson never reported any of these experience while testifying at the preliminary hearing, the grand jury proceedings, the original guilt phase trial, or the penalty retrial. Respondent alleges Mr. Thompson was "credible and believable." (107RT 11999 [trial court stating prosecution witnesses were "credible and believable"]; see Retrial 36RT 4902 [all of the witnesses who identified appellant as the shooter were "highly credible"].)

182. Respondent denies that "The police exploited Mr. Thompson's avoidant behaviors and other psychological symptoms he experienced from memories of the shooting by persuading him to adopt a different recollection of events that was less exculpatory of petitioner than Mr. Thompson's independent, uncontaminated recollection, and thereafter coached him for hours at a time to help him memorize his statement. [Citation.]" (Petn. 73-74, ¶ 1.c.(1)(d).) Respondent alleges that being questioned by officers on numerous occasions did not affect Mr. Thompson's memory (68RT 7625); also, Mr. Thompson was never coached or told what to say (69RT 7692-7693; see Return Exh. 7, ¶ 6).

183. Respondent denies that "Introduction of this material evidence would have led petitioner's jury to reject the reliability of Mr. Thompson's later manufactured 'memory' that he saw the light-skinned man rather than only the darker complexioned man shoot the victim." (Petn. 74, ¶ 1.c.(1)(e).) Respondent alleges this "evidence" did not exist and would have been inadmissible because it did not impeach Mr. Thompson and therefore was not relevant. Moreover, even if the above "evidence" had been admitted, it would not have significantly impeached Mr. Thompson's credibility in light of his numerous admissions of frustration, shock, and desire to avoid participation in the case. (68RT 7610-7612, 7626-7627, 7647, 7653, 69RT 7683, 7689.

184. Respondent admits that Shinn did not personally interview Gail Beasley. (See Petn. 72, ¶ 1.c.; Petn. 74, ¶ 1.c.(2).) Respondent alleges that Douglas Payne, petitioner's investigator, conducted field interviews to attempt to discover potential witnesses. (Exh. 9, pp. 78, 84.) His notes reflect that, on January 14, 1985, he went to the home of Gail Beasley, and left his card for her to call after finding she was not there, and she did not call him. (Return Exh. 6, p. 27.) In addition, Shinn was aware that Ms. Beasley avoided efforts to be located and contacted by the police. (70RT 7822-7832; 74RT 8258-8269.)

185. As described in the following paragraphs (¶¶ 186-189, *post*),

respondent denies that "Trial counsel's failure to interview known, testifying witnesses, prevented him from introducing readily available evidence to challenge the reliability of Gail Beasley's memory and overall credibility including, but not limited to, the following[.]" (Petn. 74, ¶ 1.c.(2).)

186. Respondent denies that "Ms. Beasley went into "shock" when she heard the gunfire . . . ." (Petn. 74, ¶ 1.c.(2)(a).) Respondent alleges she was "shocked" by witnessing petitioner's murder of Officer Verna. (Exh. 75, ¶ 3.) Respondent admits that she "observed events as if 'everything was happening in slow motion.' [Citation.]" (Petn. 74, ¶ 1.c.(2)(a).)

187. Respondent denies that "Her description of he[r] mental state at the time is consistent with a dissociated, unconscious state:

> By the time I went outside, *my mind had gone numb. I saw things, but did not really recognize them*; I knew I was supposed to be scared, but I was unable to feel anything. Even though it was still daylight outside, I remember the light being very dim... The night of the shooting I spoke to a number of police officers and gave them a statement. I told the police that my memory was still foggy from the shock of what I had witnessed, but they wanted me to tell them what I had seen, anyway. I was still very shaken up and *when I gave my statement, my memory was still blurry*. [Citation.]

(Petn. 74, ¶ 1.c.(2)(b).) Respondent alleges that Ms. Beasley was conscious and able to process the events of the murder based on her ability to report the crime and testify to her memory. (Exh. 12; 1Supp. CT 191-212; 2CT 515-591; Retrial 19RT 2023-2072, 2077-2113.)

188. Respondent denies that "Ms. Beasley's reported recollection of what she thought she saw was influenced by conversations with other eyewitnesses who informed her they all saw something different. [Citation.]" (Petn. 75, ¶ 1.c.(2)(c).) Respondent alleges that Ms. Beasley reported to police,

immediately after the crime and before having conversations with other witnesses attending the lineup, that the shooter was a Black man with light skin, six feet tall, 170 pounds, and a thin mustache, wearing blue jeans and a burgundy shirt; the other Black man was sitting in the back of the car. (Exh. 12.) Ms. Beasley testified consistently: at the grand jury proceedings that the shooter was a Black man with light skin, a thin mustache, wearing jeans and a red shirt; the other Black man was sitting in the back seat of the car (1Supp. CT 205-209); at the preliminary hearing that the shooter was a Black man with light skin, six feet tall, thin, and a mustache, wearing dark pants, and a red shirt; the other man was sitting in the back of the car (2CT 522-526, 530, 534-535); and at the penalty retrial that the shooter was a man with light skin, 170 pounds, and a thin mustache, wearing blue jeans or dark pants and a burgundy shirt; the other Black man was sitting in the back of the car (Retrial 19RT 2035-2037, 2062).

189. Respondent denies that "Trial counsel's failure to interview Ms. Beasley resulted in petitioner's jury relying on the testimony of a witness who has now admitted that she could not consistently remember a single version of events, even with the assistance of the police. [Citation.]" (Petn. 75, ¶ 1.c.(2)(d).) Respondent alleges that Ms. Beasley did consistently remember the events of the shooting and testified to them repeatedly. (Exh. 12; 1Supp. CT 191-212; 2CT 515-591; Retrial 19RT 2023-2072, 2077-2113.) Respondent alleges Ms. Beasley's testimony was "highly credible." (Retrial 36RT 4902 [all of the witnesses who identified appellant as the shooter were "highly credible"].)

190. Respondent admits that Shinn did not personally interview Shannon Roberts. (See Petn. 72, ¶ 1.c.; Petn. 75, ¶ 1.c.(3).) Respondent alleges that Douglas Payne, petitioner's investigator, conducted field interviews to attempt to discover potential witnesses. (Exh. 9, pp. 78, 84.) His notes reflect that, on January 14, 1985, he went to the residence of Shannon Roberts, 12085 Hoyt Street, but a different family lived at that address. (Exh. 40; Return Exh. 6, p.

26.)

191. As described in the following paragraphs (¶¶ 192-197, *post*), respondent denies that "Trial counsel failed to investigate and present numerous readily available bases for impeaching Shannon Roberts including, but not limited to, the facts that[.]" (Petn. 75, ¶ 1.c.(3).)

192. Respondent admits that "At the time of the shooting, he was eleven years old; cared for by a non-parent guardian; and, he simply wanted to 'please the police officers.' [Citations.]" (Petn. 75, ¶ 1.c.(3)(a).)

193. Respondent denies that "The police took full advantage of this young boy's willingness to please and 'coach[ed him] into making a statement.' [Citation.]" (Petn. 75, ¶ 1.c.(3)(b).) Respondent alleges that, on the day of the shooting, Shannon Roberts identified the shooter as the man in the front passenger seat who was "Mexican or Black/Caucasion" with a mustache and said that the rear seat passenger never left the car. (Exh. 40.) Respondent alleges that such a statement could not have been coached by the officer taking the statement who had little knowledge of the crime itself and had no reason to coax a statement that would implicate petitioner since petitioner was not even a suspect at that time. (See also Return Exh. 7, ¶ 6.)

194. Respondent denies that "The police intentionally made extraordinary efforts to make Mr. Roberts feel special for the purpose, and with the result of, inducing Mr. Roberts to give the statements and testimony the police fed him. [Citation.]" (Petn. 75, ¶ 1.c.(3)(c).) Respondent alleges that Mr. Roberts was not coached or induced to testify in any way prior to testifying at the grand jury since Mr. Roberts did not identify petitioner's photograph and instead testified consistently with his prior statement, that a "real light black" man who was the passenger was the shooter and that the rear passenger, a Black man, never got out of the car during the shooting. (2Supp. CT 522-530, 534; see Return Exh. 7, ¶ 6.) Respondent alleges that Mr. Roberts was not coached

or induced to testify in any way prior to testifying at the preliminary hearing since Mr. Roberts did not identify petitioner as the shooter and instead testified consistently with his prior statement, that a "White" man was the shooter, not the Black man who got out of the car after the shooting. (3CT 711-717, 720, 725-726, 734; see Return Exh. 7, ¶ 6.) Respondent alleges that Mr. Roberts's trial testimony was not the product of any coaching or inducement since he had never been coached or induced prior to making any of his earlier statements. (See Return Exh. 7, ¶ 6.) Respondent alleges that if the police treated Mr. Roberts special in any way it was simply to comfort Mr. Roberts, a young boy, who had witnessed petitioner's heinous murder of Officer Verna.

195. Respondent denies that "The police detectives told Mr. Roberts what they believed happened, and psychologically, emotionally, and otherwise rewarded Mr. Roberts's adoption of their version of events, despite it not being what Mr. Roberts recalled. Said rewards and inducements provided to Mr. Roberts in return for identifying petitioner as the shooter, even though he did not know who shot the victim included, but were not limited to, treating him to attendance at a Dodger's baseball game. [Citation.]" (Petn. 75-76, ¶ 1.c.(3)(d).) Respondent alleges that Mr. Roberts's statements and identification were true and not made in exchange for any inducement, for the reasons stated above. (¶ 194, *ante*.)

196. Respondent denies that "Investigation and introduction of such evidence would have led the jury to credit Douglas Payne's testimony that before trial, he saw the prosecutor and Mr. Roberts together, looking into a courtroom at petitioner [citation]; as well as Shinn's closing argument that Mr. Roberts's identification of petitioner as the shooter was coached by the state." (Petn. 76, ¶ 1.c.(3)(e).) Respondent alleges that such testimony would not have been introduced because it does not exist. (¶ 194, *ante*.) Mr. Payne testified that, prior to entering, Mr. Roberts looked into the courtroom in the direction of

counsel table where petitioner sat but not that he looked at petitioner. (86RT 9828-9829.) Further, when Mr. Roberts was sitting in the courtroom prior to testifying, Mr. Roberts looked at petitioner but also looked "all around the courtroom." (86RT 9829.) Respondent alleges Shinn was able to argue in closing that Shannon Roberts was unable to identify petitioner at the grand jury proceedings or the preliminary hearing and that his identification of petitioner at trial was the product of being in the courtroom with an officer when petitioner was present Raynard was not. (95RT 10965-10967.) In addition, no witnesses were ever coached or induced by the prosecutor or law enforcement. (See Return Exh. 7, ¶ 6.)

197. Respondent denies that "Timely interview of this important witness would have further led the jury to conclude that Mr. Roberts did not know who shot the victim, he just knew that if he said petitioner shot him that the police were nice to him. [Citation.]" (Petn. 76, ¶ 1.c.(3)(f).) Respondent alleges that an interview with Mr. Roberts would have revealed that his consistent and repeated description of the crime, without actual identification, clearly showed that petitioner, and not Raynard, was the shooter outside of the car. (Exh. 40; 2Supp. CT 522-530, 534; 3CT 711-717, 720, 725-726, 734.) Moreover, the failure to introduce the above alleged evidence was not prejudicial since (1) the circumstances of Mr. Roberts's identification of petitioner for the first time at trial was thoroughly explored at trial; and (2) Mr. Roberts's consistent and repeated description of the crime showed that petitioner was the shooter. Respondent alleges Mr. Roberts was "credible and believable." (107RT 11999 [trial court stating prosecution witnesses were "credible and believable"].)

198. Respondent alleges that, on April 1, 1985, Shinn completed a removal order to have Don Anderson brought to county jail from state prison on April 15, 1985. (7CT 1884-1885.) During the guilt phase, Mr. Payne received information about Don Anderson and interviewed him in jail on April 18, 1985.

(EH 797-807, 860; Return Exh. 6, pp. 20-23.) Accordingly, Anderson perjured himself when he testified he was never contacted by petitioner's investigator. (See Exh. 20, pp. 223-224.) Mr. Payne reported the substance of the interview to Shinn. (See Exh. 9, p. 84.) Shinn refrained from calling Don Anderson to testify because of Anderson's criminal history and Anderson's obvious bias as a friend of petitioner's. (EH 481, 536.) In 1973, Anderson was convicted of felony forcible rape and oral copulation. (Exh. 20, p. 233.) In 1976, Anderson was convicted of felony rape by threat and also of sodomy in a local detention facility. (Exh. 20, p. 233.) In 1981, he was convicted of robbery and grand theft from a person. (Exh. 20, pp. 233-234.) In 1983, Anderson was convicted of first degree burglary and rape in concert; he was in state prison for those offenses at the time of petitioner's trial in 1985. (Exh. 20, p. 203.) Anderson was also a friend of petitioner's. (Exh. 20, p. 232.)

199. As described in the following paragraphs (¶¶ 200-204, *post*), respondent denies that the "Timely interview of Don Anderson would have enabled minimally competent counsel to introduce evidence irreparably impeaching the credibility of Marsha Holt, one of the prosecution's key eyewitnesses including, but not limited to, the following evidence[.]" (Petn. 76, ¶ 1.c.(4).)

200. Respondent denies that "Ms. Holt did not see the shooting or any involvement by petitioner in the shooting." (Petn. 76, ¶ 1.c.(4)(a).) Respondent alleges that Ms. Holt saw petitioner shoot Officer Verna. (Exh. 42; 1Supp. CT 215-218, 222-223; 2CT 324-329, 335; 68RT 7527-7529; Retrial 18RT 1928-1938, 1952, 1957.)

201. Respondent denies that "Ms. Holt explicitly admitted that 'she didn't see who shot the police officer, she just heard gunshots' [citation]." (Petn. 76, ¶ 1.c.(4)(b).) Respondent alleges that Mr. Holt saw petitioner shoot Officer Verna. (Exh. 42; 1Supp. CT 215-218, 222-223; 2CT 324-329, 335; 68RT 7527-

7529; Retrial 18RT 1928-1938, 1952, 1957.)

202. Respondent denies that "Mr. Anderson was Ms. Holt's husband at the time and had been specifically identified by petitioner as someone trial counsel should interview and call as a witness. [Citation.]" (Petn. 77, ¶ 1.c.(4)(c), footnote omitted.) Respondent alleges that Mr. Anderson was Ms. Holt's husband after they got married in February 1984, after the murder in this case. Moreover, Anderson was identified by counsel as someone who should be interviewed, Anderson was interviewed, and Shinn reasonably elected not to call Anderson because of Anderson's criminal history and Anderson's obvious bias as a friend of petitioner's. (7CT 1884-1885; Return Exh. 6, pp. 20-23; EH 481, 536, 797-807, 860; Exh. 20, p. 232.)

203. Respondent admits that "Trial counsel neither called Mr. Anderson to testify nor even interviewed him. [Citation.]" (Petn. 77, ¶ 1.c.(4)(d).) Respondent alleges that investigator Payne interviewed Anderson and then reported the substance of the interview to Shinn. (EH 797-807, 860; Return Exh. 6, pp. 20-23.) Respondent denies that "Petitioner's jury, therefore, was left with the fatal misimpression that Ms. Holt actually witnessed petitioner shoot the victim." (Petn. 77, ¶ 1.c.(4)(d).) Respondent admits that the jury was left with impression that "Ms. Holt actually witnessed petitioner shoot the victim," but alleges this was accurate, not a misimpression. (Exh. 42; 1Supp. CT 215-218, 222-223; 2CT 324-329, 335; 68RT 7527-7529; Retrial 18RT 1928-1938, 1952, 1957.)

204. Respondent denies that "Trial counsel's inexcusable failure to interview Mr. Anderson and present evidence of Ms. Holt's uncontested false statements and perjured testimony implicating petitioner contributed greatly to petitioner's erroneous murder conviction." (Petn. 77, ¶ 1.c.(4)(e).) Respondent alleges that Shinn reasonably elected not to call Anderson to testify because of Anderson's criminal history and his obvious bias as a friend of petitioner's. (EH

481, 536; see Exh. 20, p. 232.) Moreover, the failure to present Anderson's proposed testimony was not prejudicial to petitioner in light of Anderson's criminal history and his obvious bias as a friend of petitioner's. (Exh. 20, pp. 203, 232-234.) Respondent alleges Ms. Holt was "credible and believable." (107RT 11999 [trial court stating prosecution witnesses were "credible and believable"]; see Retrial 36RT 4902 [all of the witnesses who identified appellant as the shooter were "highly credible"].)

205. Respondent admits that Shinn did not interview Richard Delouth. (See Petn. 72, ¶ 1.c.; Petn. 77, ¶ 1.c.(5).) Respondent alleges that Delouth was very good friends with petitioner and saw him almost every day for five to seven years beginning 1971 or 1972. (EH 231-232.) Delouth and petitioner engaged in substance abuse together, including smoking marijuana together and drinking alcohol. (EH 239.) They also committed theft and burglary together. (EH 235, 237-238, 255-256, 259.) At the time of petitioner's trial, Delouth was in custody for drug sales charges and sent to Wayside Honor Farm. (See EH 255.) Delouth sold crack cocaine and PCP in the early 1980's. (EH 248.) In 1989, Delouth was convicted of transportation or sales of a controlled substance and sent to state prison. (EH 260-261.)

206. As described in the following paragraphs (¶¶ 207-210, *post*), respondent denies that "Minimal investigation, including an interview of Richard Delouth, would have uncovered vital information that undermined the reliability and credibility of two of the state's key witnesses against petitioner including, but not limited to, the following[.]" (Petn. 77, ¶ 1.c.(5).)

207. Respondent denies that "Both Marsha Holt and Gail Beasley were very well-known in the neighborhood in which the shooting occurred as drug users and were especially well-known to the local drug dealers. [Citation.]" (Petn. 77, ¶ 1.c.(5)(a).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on, among other things, his longtime

friendship with petitioner and his criminal history. (EH 231-232, 248, 255, 260.) Additionally, Delouth was incarcerated at the time of the shooting and, according to Delouth, could not address the pattern of drug usage by Ms. Holt and Ms. Beasley at the time of the murder. (Return Exh. 14.)

208. Respondent admits that "At all times relevant, Richard Delouth was heavily involved in drug sales . . . ." (Petn. 77, ¶ 1.c.(5)(b).) Respondent denies that Delouth "was well-acquainted with the extensive drug habits of two of his most frequent customers, Marsha Holt and Gail Beasley. [Citations.]" (Petn. 77-78, ¶ 1.c.(5)(b).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on the above. (¶ 207, *ante*.)

209. Respondent denies that "Delouth would have credibly testified that, 'like clockwork, both Marsha and Gail would be constantly high beginning at the first of each month. Because both Marsha Holt and Gail Beasley had children, they received money from welfare around that time.' [Citations.]" (Petn. 78, ¶ 1.c.(5)(c).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on based on the above. (¶ 207, *ante*.)

210. Respondent denies that "This witness could have also completed the impeachment picture depicting Ms. Holt and Ms. Beasley as highly unreliable witnesses by connecting the last two damning dots: 'I know that both Gail and Marsha claimed to have seen an officer shot to death in the beginning of June 1983. Since they would have had their welfare checks by then, it would have been very unusual if both of them were not either high or coming off a high when the officer was shot.' [Citations]" (Petn. 78, ¶ 1.c.(5)(d).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on based on the above. (¶ 207, *ante*.) Also, Shinn would not have called Delouth as a witness based on Delouth's criminal history and his obvious bias as a friend of petitioner's. (EH 481, 536; see EH 231-232, 248, 255, 260.) Moreover, the failure to present Delouth's proposed testimony was

not prejudicial to petitioner in light of Delouth's criminal history, his incarceration at the time of the offense, and his obvious bias as a friend of petitioner's. (EH 231-232, 248, 255, 260; Return Exh. 14.)

211. Respondent denies that "Trial counsel's failures unconstitutionally and prejudicially prevented the jury from having access to testimony that completely discredited the reliability of the state's key witnesses. Shinn's failure to undertake even the minimal investigation discussed above - by simply following-up on witnesses identified in police reports and pretrial hearings - fell below the standard of care for a misdemeanor case. Such representation in a capital case violates the most basic tenets of constitutional law and legal ethics." (Petn. 78, ¶ 1.c.(6).) As described in the preceding paragraphs (¶¶ 176-210, *ante*), Shinn did not provide constitutionally inadequate assistance.

212. As described in the following paragraphs (¶¶ 213-235, *post*), respondent denies that "Trial counsel failed to consult with necessary experts in order to present a defense to the charged crimes by presenting readily available and credible evidence to explain 1) why petitioner could not have been the shooter, 2) why some eyewitnesses believed they saw him shoot the victim, and 3) why petitioner did not leave his co-defendant after the shooting. Reasonable and timely consultation with the appropriate experts would have enabled counsel to present evidence the jury would have found credible and worthy of belief in understanding why, despite contrary eyewitness testimony, it was virtually impossible for petitioner to have shot the victim; why the memories of the prosecution's key eyewitnesses were highly unreliable; and, how extreme psychological factors prevented petitioner from trying to escape from his murderous co-defendant including, but not limited to, the following[.]" (Petn. 78-79, ¶ 1.d.)

213. Respondent admits that "The confidence of a witness in the memory of an event is often unrelated to the accuracy of the memory

[citation] . . . ." (Petn. 79, ¶ 1.d.(1).) Respondent denies that "a variety of factors demonstrate the weaknesses in eyewitness testimony, in general and specifically, the reasons why the prosecution's key witnesses testimony was highly unreliable in petitioner's case." (Petn. 79, ¶ 1.d.(1).) This allegation appears to be an introduction to the more specific allegations that follow (see Petn. 79-80), which respondent addresses in detail below (¶¶ 214-219, *post*).

214. Except as noted, respondent admits that "Post-event information often interferes with and colors the memories of eyewitnesses. [Citations.] Thus, for example, media coverage of a crime can affect a witness's memory of an event." (Petn. 79, ¶ 1.d.(1)(a).) Respondent denies that post-event information "often" interferes with eyewitness memory. Respondent alleges that eyewitnesses are correct most of the time. (Return Exh. 15, p. 107.)

215. Except as noted, respondent admits that "The media coverage of the shooting and petitioner's trial was extensive. [Citations.] . . . In a June 8, 1983 news article about the shooting, a large photograph of petitioner – and only petitioner – is centered in the middle of the article; whereas, significantly smaller photos of each of his co-defendants are placed at the bottom of the article. [Citation.]" (Petn. 79-80, ¶ 1.d.(1)(a)(i).) Respondent denies that the photos of petitioner's codefendants are "significantly" smaller. Respondent alleges that the photograph of petitioner is approximately two by three inches, and the photographs of the codefendants are approximately one and a half by two inches. In addition, the article appears next to an unrelated article with a much bigger picture, approximately four by six inches. (Exh. 70.) Respondent denies that "In particular, petitioner's photograph received exceptional attention. . . . Such media coverage made petitioner's photograph much more memorable, and also served to suggest that he was the most culpable party." (Petn. 79-80, ¶ 1.d.(1)(a)(i).) Respondent alleges that a single news article featuring a slightly larger picture of petitioner than his codefendants does not

constitute "exceptional attention," nor did it make his photograph more memorable or suggest he was more culpable.

216. Respondent denies that "Several key prosecution witnesses frankly admitted that media coverage had affected their memory of the shooting." (Petn. 80, ¶ 1.d.(1)(a)(ii).) Respondent alleges that reports given by Marsha Holt, Gail Beasley, and Shannon Roberts to police immediately after the crime (Exhs. 12, 40, 42) and the description of the shooter that Robert Thompson gave to the sketch artist (2CT 693-697; 68RT 7639-7640; 3Supp. 2d CT 667 [Def. Exh. N, the sketch drawn at the instructions of Thompson]), which were all necessarily uninfluenced by any subsequent media coverage, were all consistent with, and showed the guilt of, petitioner. (See also ¶¶ 217-219, *post.*)

217. Respondent denies that "Robert Thompson admitted that his memory of the shooting had been corrupted by the extensive media coverage it received. [Citation.]" (Petn. 80, ¶ 1.d.(1)(a)(iii).) Respondent alleges that Robert Thompson said, at the grand jury proceedings, that the media had "destroyed" or "distorted" his mind (2Supp. CT 462; 69RT 7687), but he explained that he had meant to express frustration with the media who had falsely reported that no one in the neighborhood had tried to help Officer Verna or the investigation (Retrial 17RT 1781; Retrial 18RT 1825-1826).

218. Respondent denies that "Gail Beasley, also, acknowledged that the extensive media coverage affected her ability accurately to recall what she had witnessed. [Citation.]" (Petn. 80, ¶ 1.d.(1)(a)(iv).) Respondent alleges that Gail Beasley agreed, at the preliminary hearing, that the media coverage had helped her identify petitioner as a possible suspect, but in fact, she was not influenced by the media and instead hedged her testimony because she felt pressure from her community not to be a "snitch." (2CT 581-582; Retrial 19RT 2044-2045.)

219. Respondent denies that "Marsha Holt was also influenced by exposure to media coverage. [Citations.]" (Petn. 80, ¶ 1.d.(1)(a)(v).)

Respondent alleges that Ms. Holt said she heard petitioner's name on the TV news and saw his picture in the newspaper (2CT 452-455), but never testified her ability to identify petitioner was affected by those events. She instead testified that when she saw petitioner in the news, she recognized him from the lineup (2CT 455), where she had already identified petitioner (68RT 7548-7550).

220. Respondent denies that "Other post-event information or circumstances affected witness perception in this case including, but not limited to witness exposure to prejudicial post-event information that was intentionally and purposefully engineered by the state." (Petn. 80, ¶ 1.d.(2).) Respondent alleges that no one intentionally and purposefully engineered identifications by Shannon Roberts or Robert Thompson. (69RT 7796-7797, 7805.)

221. Respondent denies that "Shannon Roberts could not identify the shooter until prosecuting officials pointed out who they believed was the shooter, just prior to Roberts's testimony at trial. [Citation.]

> As far as I knew, by the time I testified at Mr. Gay's trial, I had not seen the shooter since the day of the crime. Before I entered the courtroom to testify at Mr. Gay's trial, the detectives asked me if I could see Mr. Gay in the courtroom. I could not identify him, so they had to point him out to me, and they told me that he was the shooter. Later, while I was testifying, I was asked if I could point out the man I had seen. I pointed to the man the officers had shown me before I entered the courtroom. If it had not been for the detectives, I would not have identified Kenneth Gay as the shooter, because I was not sure what the shooter looked like. [Citation.]

(Petn. 80-81, ¶ 1.d.(2)(i).) Respondent alleges that no one told Mr. Roberts that petitioner was in the courtroom prior to his testimony at trial. (69RT 7796-7797 ["Did someone tell you Mr. Gay is in the courtroom? No."].) Also, no one

showed Mr. Roberts any pictures immediately prior to testifying. (69RT 7805.) In addition, no witnesses were ever coached or induced by the prosecutor or law enforcement. (See Return Exh. 7, ¶ 6.)

222. Except as noted, respondent admits that "Robert Thompson offered several different versions of what he saw. He reported his original version, in which he identified Cummings as the sole shooter, to Detective Lindquist the night of the shooting and testified to the same version before the grand jury. His story changed several times, and became consistent with the prosecution's theory only after he 'walked through' the state's scenario with police officers. [Citations.]" (Petn. 81, ¶ 1.d.(2)(ii).) Respondent denies that Mr. Thompson's account of the crime changed "several" times. Respondent alleges that Mr. Thompson was initially confused because he saw a dark skinned arm belonging to a Black man shoot the officer from the back seat and then, after looking away and looking back, saw a petitioner, whom he described as a White man in the passenger seat, outside the car shooting the officer. (See 95RT 10888-10889 [prosecution closing argument].) This explains why, on the night of the crime, Mr. Thompson identified gave a sketch of the White passenger (petitioner) as the shooter but reported to another officer that the Black man in the back seat (Raynard) was the shooter. (Exh. 45; 2CT 693-697; 68RT 7639-7640; 3Supp. 2d CT 667 [Def. Exh. N, the sketch drawn at the instructions of Mr. Thompson].) He testified at the grand jury that a person who he thought was Black and thought was in the back seat, got out and shot the officer. (2Supp. CT 452, 456-457.) He then testified at the preliminary hearing that petitioner got out of the car and shot the officer. (2CT 667-671.) Mr. Thompson subsequently went through a walk through with Detective Holder at the scene, and Mr. Thompson remembered seeing a Black man's arm shooting from the back seat and then seeing petitioner, a light skinned man, get out of the car and shoot Officer Verna; he testified to this at trial. (68RT 7624-7627.)

223. Respondent admits that "Gail Beasley admitted that the eyewitnesses who assembled on Hoyt Street to wait for the police to take them to the line-up, on June 6, 1983, openly discussed their recollections of the event and who they believed shot the officer. [Citation.]" (Petn. 81, ¶ 1.d.(3).) Respondent denies that "Discussions among witnesses contaminated and altered the memory of those same witnesses. [Citation.]" (Petn. 81, ¶ 1.d.(3).) Respondent alleges that the reports given by Marsha Holt, Gail Beasley, and Shannon Roberts to police immediately after the crime (Exhs. 12, 40, 42) and the description of the shooter that Mr. Thompson gave to the sketch artist (2CT 693-697; 68RT 7639-7640; 3Supp. 2d CT 667 [Def. Exh. N, the sketch drawn at the instructions of Mr. Thompson]), which were all necessarily uninfluenced by any subsequent meeting on June 6, were all consistent with their trial testimony, and showed the guilt of petitioner.

224. Except as noted, respondent admits that "Eyewitnesses often unconsciously include someone they merely observed at the scene of the crime in their recollection of the actual commission of the crime. [Citation.]" (Petn. 81, ¶ 1.d.(4).) Respondent denies that this occurs "often," and alleges that the declaration upon which petitioner relies merely states that this "can" occur. (Exh. 7, p. 53.) Respondent alleges that eyewitnesses are correct most of the time. (Return Exh. 15, p. 107.)

225. Respondent denies that "Marsha Holt and Gail Beasley had an opportunity to see petitioner at the scene of the shooting, only after the shooting had ended and he was retrieving a gun from near the officer's body." (Petn. 81-82, ¶ 1.d.(4)(a).) Respondent alleges that Ms. Holt saw petitioner shoot Officer Verna. (Exh. 42; 1Supp. CT 215-218, 222-223; 2CT 324-329, 335; 68RT 7527-7529; Retrial 18RT 1928-1938, 1952, 1957.) Respondent alleges Ms. Beasley saw petitioner shoot Officer Verna. (Exh. 12; 1Supp. CT 198-200, 205-208; 2CT 519-524, 530, 540, 561, 565-566; Retrial 19RT 2030-2037, 2056-2057.)

226. Respondent denies that "Particularly in light of Ms. Beasley's description of the shooter as wearing the clothing worn by Cummings and putting aside their motive to lie out of fear of Mary Cummings, seeing petitioner with a gun in his hand, and near the body of the fallen officer, provides an innocent explanation why the witnesses may have thought they saw petitioner shoot the officer. [Citation.]" (Petn. 82, ¶ 1.d.(4)(b).) Respondent alleges Ms. Beasley saw petitioner shoot Officer Verna. (Exh. 12; 1Supp. CT 198-200, 205-208; 2CT 519-524, 530, 540, 561, 565-566; Retrial 19RT 2030-2037, 2056-2057.)

227. Except as noted, respondent admits that "Witnesses tend not to remember violent events as well as nonviolent events. 'Violence tends to produce an amnesic effect.' [Citation.] The killing of the police officer was unquestionably violent, but the jury was given no testimony that the event's very violence might have skewed the memories of those who witnessed it." (Petn. 82, ¶ 1.d.(5).) Respondent alleges that the "amnesic effect" means that "Witnesses tend not to remember violent events as well as nonviolent events." Respondent alleges that observing a person committing a violent act has less effect when the violent act is preceded by observing the person in a nonviolent context. (Return Exh. 15, pp. 108-110.) Gail Beasley, Marsha Holt, Shannon Roberts, and Robert Thompson all observed petitioner during the traffic stop before the shooting. (Exhs. 12, 40, 42, 45.)

228. Respondent denies that "Gail Beasley clearly experienced this 'amnesic effect.' Ms. Beasley recalls: 'The noise of the gun startled and surprised me. When I looked out the window and saw a man shooting at the officer, it felt like my mind and my body froze. I could not believe what I was seeing... The night of the shooting, I spoke to a number of police officers and gave them a statement. I told the police that my memory was still foggy from the shock of what I had witnessed, but they wanted me to tell them what I had

seen, anyway. I was still very shaken up, and when I gave them my statement, my memory was still blurry.' [Citation.]" (Petn. 82, ¶ 1.d.(5)(a).) Respondent alleges that Ms. Beasley accurately remembered seeing petitioner shoot Officer Verna. (Exh. 12; 1Supp. CT 198-200, 205-208; 2CT 519-524, 530, 540, 561, 565-566; Retrial 19RT 2030-2037, 2056-2057.)

229. Respondent denies that "Thereafter, under the coercive pressure of Mary Cummings, Ms. Beasley continually altered her purported recollections to falsely and unreliably implicate petitioner. [Citation.]" (Petn. 82, ¶ 1.d.(5)(b).) Respondent alleges that the document relied on by petitioner, a declaration by Raynard's aunt to the effect that Mary Cummings approached her in a threatening manner (Exh. 47, p. 1658), does not support an inference that Mary Cummings threatened Gail Beasley. In addition, respondent alleges that Mary Cummings did not visit Mackey Como (Gail Beasley's mother) almost immediately after the shooting because the street was sealed off and people were not allowed in or out of the area. (68RT 7584.)

230. Respondent admits that "Frequent drug use has a deleterious effect on the brain's ability to correctly code and recall information." (Petn. 83, ¶ 1.d.(6).) Respondent denies "That two of the prosecution's key witnesses were heavy, habitual drug users around the time of the shooting and would have been under the influence pursuant to their habit and custom at the time of the crime, casts grave doubt on the reliability of their testimony." (Petn. 83, ¶ 1.d.(6).) Respondent alleges that the source of this information, Richard Delouth (see Petn. 83, ¶ 1.d.(6)(a)), is not credible based on, among other things, his longtime friendship with petitioner and his criminal history. (EH 231-232, 248, 255, 260.) Additionally, Delouth was incarcerated at the time of the shooting and, according to Delouth, could not address the pattern of drug usage by Ms. Holt and Ms. Beasley at the time of the murder. (Return Exh. 14.)

231. Respondent denies that "Around the time of the crime, both Gail

Beasley and Marsha Holt were well known in their neighborhood for their drug use. [Citation.]" (Petn. 83, ¶ 1.d.(6)(a).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on the above. (¶ 230, *ante*.)

232. Respondent denies that "Richard Delouth was well familiar with 'Marsha's drug use because I was a drug dealer and sold drugs to her. We also did drugs together. I know she bought drugs from other people as well, because she often could be found hanging out around the Pierce Projects.... Marsha was living with my aunt when I went to jail on December 24, 1982. I sold drugs to Marsha Holt and smoked crack with her until the time I went to jail.' [Citation.]" (Petn. 83, ¶ 1.d.(6)(b).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on the above. (¶ 230, *ante*.)

233. Respondent denies that "Mr. Delouth also knew 'Gail Beasley since at least the mid 1970's. Like her friend Marsha Holt, Gail was a heavy drug user. Gail used PCP, crack, and sherm. As with Marsha, I sold drugs to Gail and sometimes got high with her. By the time I went to jail in December 1982, Gail had a reputation not only of being a crackhead, but a crackhead who was willing to have sex for drugs when she had no money. Gail's drug habit was so bad, she would bring her young daughter with her to buy crack.' [Citation.]" (Petn. 83, ¶ 1.d.(6)(c).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on the above. (¶ 230, *ante*.)

234. Respondent denies that "As one of their drug dealers, Mr. Delouth knew that '[l]ike clockwork, both Marsha and Gail would be constantly high beginning at the first of each month. Because both Marsha Holt and Gail Beasley had children, they received money from welfare around that time. I know that both Gail and Marsha claimed to have seen an officer shot to death in the beginning of June 1983. Since they would have had their welfare checks by then, it would have been very unusual if both of them were not either high

or coming off a high when the officer was shot.' [Citation.]" (Petn. 83-84, ¶ 1.d.(6)(d).) Respondent alleges that the source of this information, Richard Delouth, is not credible based on the above. (¶ 230, *ante.*)

235. Respondent denies that "Ms. Holt and Ms. Beasley were clearly extended and heavy drug users around the time of the shooting. Whether they were under the direct influence of drugs at the time they witnessed the shooting, is a factor that goes only to the degree of their impaired ability to recall events. Their heavy drug use, in combination with the other factors that affected the reliability of their ability to reliably encode and recall what they had seen, is sufficient evidence to seriously call into question the reliability of their memories." (Petn. 84, ¶ 1.d.(6)(e).) Respondent alleges that the source of this information, Richard Delouth (see Petn. 83-84), is not credible based on the above. (¶ 230, *ante.*)

236. Respondent denies that "Trial counsel unreasonably and prejudicially failed to consult or arrange for a competent criminalist to conduct gun shot residue (GSR) analysis on the clothing worn by petitioner and his co-defendant at the time of the offense." (Petn. 95, ¶ 2.) Respondent alleges that Petitioner abandoned his shirt in the driveway of Eula Heights's home, immediately after the shooting on June 2, 1983. (74RT 8381.) Shinn did not take over petitioner's case until approximately the middle of August 1983. (1CT 3-4.) The particles that are identified as gunshot residue "come flying out the front" barrel of a gun when the gun is discharged. (81RT 9291.) Even if the petitioner and Raynard's clothing could have been obtained at the time Shinn became involved in the case, there is no reasonable probability that any gunshot residue would have been detected on any of the clothing as a result of the direction the gunshot residue went, the passage of time, and the lack of any efforts to preserve the evidence. Moreover, the presence or absence of gunshot residue would not have established petitioner was innocent. (See 87RT 9860-

9861 [expert testifying that testing headrest on July 27, 1983, seven weeks after the murder, was not the best because disturbances to residue were possible]; Stone, *Scientific Evidence Symposium: Article: Capabilities of Modern Forensic Laboratories* (1984) 25 Wm. & Mary L. Rev. 659, 665 (hereafter "Stone") ["care taken in handling a garment affects whether gunshot residue will be available for examination"]; *id.* at p. 666 [even on a person's hands, which are often closer to a gun that a shooter's clothing, the absence of residue is not determinative of whether the person fired a firearm].)

237. Respondent denies that "After virtually each of the six shots [were] fired, the fired gun emitted a voluminous cloud of smoke, through which the shooter walked as he pursued the decedent. [Citations.]" (Petn. 95, ¶ 2.a.) Respondent alleges that Mr. Thompson testified he saw smoke from the gun, but there was never any testimony that the gun emitted a "voluminous cloud of smoke." (3CT 675; 69RT 7710.)

238. Respondent admits that "Minimally competent counsel would have been aware, or would have sought consultation with a criminalist familiar with firearms comparison and identification to become reasonably informed that discharge of a handgun results in the emission of GSR particles, including antimony and signature components of primer mixture, from the chamber and firing mechanism of the firearm." (Petn. 95, ¶ 2.b.) Respondent alleges that the testimony admitted at trial by Vincent Guinn and Richard Raffel adequately informed Shinn (and the jury) about the principles of gunshot residue. (81RT 9277-9342; 83RT 9478-9508.)

239. Respondent admits that "Counsel reasonably also should have known that detection and confirmation of the presence of unique GSR particles on clothing can be obtained by means of analysis with a scanning electron microscope (SEM)." (Petn. 95, ¶ 2.c.)

240. Respondent denies that "Counsel further reasonably should have

known that GSR particles are the size of a bacterium, and this microscopic size allows GSR particles to remain on clothing virtually indefinitely unless the clothing is laundered." (Petn. 95, ¶ 2.d.) Respondent alleges that gunshot residue that is deposited on a shooter's clothing (as opposed to a victim's) can be easily removed by a variety of means. (See Stone, *supra*, 25 Wm. & Mary L. Rev. at p. 665 ["care taken in handling a garment affects whether gunshot residue will be available for examination"]; 87RT 9860-9861 [expert testifying that residue that lands on surface, as opposed to being imbedded, such as car headrest, can be wiped off or blown off, and testing headrest on July 27, 1983, seven weeks after the murder, was not the best because disturbances to residue were possible], 83RT 9500-9501 [headrest was part vinyl and part cloth].)

241. Respondent denies that "The gun used by the shooter in petitioner's case contained the elements that are normally tested to determine the presence of GSR." (Petn. 96, ¶ 2.a.) Respondent alleges that the elements of gunshot residue are found in primer of bullets used in guns, rather than in guns themselves. The *ammunition* used by the shooter in petitioner's case no doubt contained the elements normally tested to determine the presence of gunshot residue. (81RT 9291-9294; 83RT 9484-9485.)

242. Respondent denies that "Deposits of GSR were detected in several areas in the car involved in the shooting. [Citation.]" (Petn. 96, ¶ 2.a.(1).) Respondent alleges that lead particles, which were consistent with but not conclusive of gunshot residue, were found in areas inside the car involved in the shooting. (83RT 9485-9487.)

243. Except as noted, respondent admits that "GSR deposits were also found on the decedent's jacket and shirt. [Citation.]" (Petn. 96, ¶ 2.a.(2).) Respondent denies that the gunshot residue was "also" found in addition to residue detected in the car because the samples found in the car were not conclusive of gunshot residue. (83RT 9485-9487.)

244. Respondent denies that "Shinn had, or should have had, available to him the clothing worn by petitioner and his co-defendant." (Petn. 96, ¶ 2.b.) Respondent alleges there is no evidence as to what happened to the clothes discarded by petitioner on the day of the shooting or the clothes worn by Raynard on the day of the shooting, and over two months passed before Shinn became petitioner's counsel of record. (1CT 3-4.) In addition, since petitioner's allegation lacks specificity or any documentary support, and because Shinn is unavailable to be interviewed, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.)

245. Respondent admits that "Witness Eula Heights informed the police that after petitioner, Raynard Cummings and Pamela Cummings arrived at her home following the commission of the offense on June 2, 1983 petitioner left his shirt on the driveway in front of her home. [Citation.]" (Petn. 96, ¶ 2.b.(1).)

246. Respondent denies that "The clothing worn by Raynard Cummings was collected by the police and entered as an exhibit at trial. [Citation.]" (Petn. 96, ¶ 2.b.(2).) Respondent alleges that the burgundy sweat pants worn by Raynard at the time of the shooting were identified and marked as an exhibit at trial; the pants were given to counsel by a bailiff, but it is unclear where the bailiff obtained them from. (73RT 8215-8217.)

247. Respondent denies that "Timely testing of the clothing worn by petitioner and Cummings at the time of the shooting, for GSR deposits, would have determined that petitioner's clothing contained virtually no residue, which proved petitioner could not have been the shooter; and, that Cummings's clothing contained an amount of gunshot residue that was highly consistent with his having fired six shots from the gun." (Petn. 96, ¶ 2.c.) Respondent alleges that timely testing may have shown that the clothing worn by petitioner had gunshot residue on it because he shot Officer Verna. (1Supp. CT 198-200, 205-

208, 215-218, 222-223; 2Supp. CT 522-530, 534; 2CT 324-329, 335, 519-524, 540; 3CT 667-671, 711-717, 720, 725-726; 68RT 7527-7529, 7592-7597, 7604; 69RT 7781-7785, 7789; 73RT 8164-8170; Retrial 17RT 1796-1798; Retrial 18RT 1823, 1928-1938, 1952, 1957; Retrial 19RT 2030-2037, 2056-2057; Retrial 21RT 2500-2503, 2523-2524.) Also, the lack of gunshot residue is consistent with guilt. (Stone, *supra*, 25 Wm. & Mary L. Rev. at p. 666 [even on a person's hands, which are often closer to a gun that a shooter's clothing, the absence of residue is not determinative of whether the person fired a firearm].)

248. Respondent denies that "The absence of gun shot residue on petitioner's clothes and the presence of gun shot residue on his co-defendant's clothing would have conclusively demonstrated to the jury that petitioner could not have been the shooter." (Petn. 96-97, ¶ 2.d.) Respondent alleges that finding gunshot residue on Raynard's clothing, and not finding any on petitioner's clothing, would have been equally consistent with the evidence that Raynard fired the first shot only from inside the car, and that the residue either did not fall on, or stay on, petitioner's clothing, when petitioner shot Officer Verna. Moreover, even if there was no gunshot residue on petitioner's clothing, it would not have "conclusively demonstrated" that petitioner was not the shooter. (Stone, *supra*, 25 Wm. & Mary L. Rev. at p. 666 [even on a person's hands, which are often closer to a gun that a shooter's clothing, the absence of residue is not determinative of whether the person fired a firearm].)

249. Respondent denies that "Shinn's failure to acquire readily available definitive evidence of petitioner's innocence was prejudicially deficient." (Petn. 97, ¶ 2.e.) Respondent alleges that evidence of gunshot residue on petitioner and Raynard's clothing was not "readily available" by the time Shinn assumed representation of petitioner, over two months after the shooting. Moreover, there is no reasonable probability petitioner would have received a better result with any such testing because the results of any such testing is entirely

speculative and the results of such testing is necessarily inconclusive.

250. Respondent denies that "Shinn's failure to employ scientific experts is inexcusable in light of the fact that such expert testimony would have exonerated petitioner. Expert analysis of the autopsy report would have revealed crucial inaccuracies. The jury should have heard, that once corrected, the autopsy report actually demonstrated that it was virtually physically impossible for petitioner to have committed the homicide. The jury should have learned that it was not possible for petitioner to exit the passenger side of the car and achieve a position of close proximity on the left side of the decedent in the time frame in which the shooting occurred. Such expert testimony was available; Shinn simply failed to consult with any guilt phase experts. Shinn's highly prejudicial failure allowed the jury to form the false impression that petitioner was guilty of capital murder." (Petn. 97, ¶ 2.f.) Since respondent is unable to interview Shinn and petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall, supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (See Petn. 97-103.)

251. Respondent denies that "Had trial counsel consulted a doctor or medical examiner with an expertise in gun shot wounds, such as, William Sherry, M.D., Senior Deputy Medical Examiner for the Country of Los Angeles, he would have been able to present scientific evidence that strongly pointed to petitioner's innocence." (Petn. 97, ¶ 2.f.(1).) Respondent alleges that Dr. Joseph Cogan, who performed the autopsy on Officer Verna, assigned a number to each of the wounds to supply some order to the descriptions; the numbers did not describe the order in which the wounds were inflicted. (70RT 7876-7879.) Dr. Cogan testified that Officer Verna suffered six gunshot wounds. (70RT 7878.) Number six entered over the right side of the neck and traveling

downward (70RT 7882); number five entered the left chest and went toward the back (70RT 7882); number four entered the left chest toward the back (70RT 7881); and numbers one, two, and three all entered the back (70RT 7880-7881). If the back seat passenger shot an officer leaning into the driver's side of the car, number six was the only possible gunshot wound that could have resulted. (70RT 8031.) All the remaining shots were fired from outside the car, and were consistent with petitioner shooting Officer Verna. Additional testimony about the path of number five would not have exculpated petitioner, nor is there any reasonable probability that it would have made any difference in the result.

252. Respondent denies that "Such an expert could have testified to the major error in Dr. Cogan's findings regarding the trajectory of bullet wound number 5." (Petn. 97, ¶ 2.f.(1)(a).) Respondent admits that an expert could have testified that, *in his opinion*, Dr. Cogan made an error in the findings regarding the trajectory of bullet wound number five. Respondent alleges no error occurred based on Dr. Joseph Cogan's personal observations during the autopsy, his personal experience, and the literature supporting his conclusions. (70RT 7876-7878; 87RT 9871-9876.) Moreover, testimony was presented at petitioner's trial, from pathologist Dr. Paul Herrmann, to the effect that, in his opinion, Dr. Cogan erred in his findings regarding the trajectory of number five. (80RT RT 9052-9053, 9083, 9086, 9096.)

253. Respondent denies that "Contrary to Dr. Cogan's findings, the bullet that made wound number 5 could not have changed direction simply by bouncing off of a rib. [Citation.]" (Petn. 98, ¶ 2.f.(1)(a)(i).) Respondent alleges that Dr. Cogan's finding, that a bullet can be deflected by bones, was supported by his experience and by his peers. (87RT 9871-9876.)

254. Respondent admits that "Dr. Cogan describes the bullet as traveling through the chest wall and cavity and hitting a rib near the back of the body, then bouncing forward and passing through major arteries and vessels, as well

as another bony structures before exiting . . ." (Petn. 98, ¶ 2.f.(1)(a)(ii).) Respondent also admits Dr. Sherry would have testified that those findings were "not what Dr. Sherry 'ha[s] seen in my thousands of gunshot wound autopsies. If there is a -- if there is a marked change in direction, the bullet travels only a very short distance in tissue afterwards, and that is what I object to is the fact that he had entry wound no. 5 passing almost all the way through the body, then changing direction by hitting on a rib, and then coming back all the way through the body again and exiting in the right chest area, or partial exit.' [Citation.]" (Petn. 98, ¶ 2.f.(1)(a)(ii).) Respondent alleges that Dr. Hermann testified at petitioner's trial that a bullet striking a bone will cause only minimal deflection, perhaps five degrees. (81RT 9185.) He also believed that Dr. Cogan confused the trajectories of numbers three, five, and six. (81RT 9203.) Dr. Hermann testified at trial that number five ended up in the right side near the jaw. (80RT 9103, 9130; cf. 70RT 7881 [Dr. Cogan testifying that number three ended in right side of the neck area].) In light of Dr. Hermann's testimony, there is no reasonable probability that petitioner would have received a better result if Dr. Sherry's testimony had also been admitted.

255. Respondent admits that "Dr. Sherry could have testified that the bullet entered on the left side of Officer Verna's body, but did not go through Officer Verna as Dr. Cogan had reported. '[U]pon closer examination you will see an eccentric or off-center abrasion or scrape on the left or lateral side of the wound and slightly upward, which would indicate the bullet was traveling from that direction; namely, it was going from left to right, and slightly downward as it was going into the body.' [Citation.]" (Petn. 98, ¶ 2.f.(1)(a)(iii).) Dr. Cogan testified at trial that the entry wound for number five was eccentric, meaning the bullet was not perpendicular to the skin at the time it entered. (71RT 7979; 72RT 8044.) Also, the bullet went from left to right, and upward. (71RT 7981.) Dr. Hermann agreed with Dr. Cogan's assessment of the angle of entry for

number five. (81RT 9265.) In light of Dr. Hermann's testimony, there is no reasonable probability that petitioner would have received a better result if Dr. Sherry's testimony had also been admitted.

256. Respondent admits that "An expert such as Dr. Sherry could have also testified that four of the six bullets struck Officer Verna as entry wounds in his back and that three of those four struck him from the left side of his body. [Citation.]" (Petn. 98, ¶ 2.f.(1)(b).) Respondent alleges that Dr. Cogan testified at trial to the same effect. Dr. Cogan testified that numbers one, two, and three all entered the back, with one and two entering on the left side and number three entering the right. (70RT 7880-7881.) Dr. Cogan testified that number four entered the "left chest toward the back" (70RT 7881), and Dr. Sherry agreed with Dr. Cogan's assessment (Retrial 25RT 3270-3271). Dr. Sherry would have also testified that the two bullets that did not enter the back, were numbers five and six, which entered the chest and neck, and Dr. Cogan testified to the same entries. (Retrial 25RT 3289-3290; 70RT 7881-7882, 7888-7889.) Therefore, the failure to present Dr. Sherry's testimony in this regard could not have been prejudicial to petitioner.

257. Respondent denies that "The complete invalidity of the 'pass-the-gun' theory could have been demonstrated to the jury through the testimony of a crime and accident reconstruction, human factors, and biomechanics expert, such as Dr. Kenneth Solomon. [Citation.] An expert, such as Dr. Solomon, could have testified that not only was the prosecution's theory not feasible, but that petitioner could not have physically performed the shooting as described by any of the witnesses, including Pamela Cummings, Gail Beasley, Marsha Holt, or Shannon Roberts." (Petn. 99, ¶ 2.f.(2).) Respondent alleges that Dr. Solomon's conclusion is premised in part on the assumption that the time between the first and second shots fired was 2.5 seconds, an opinion reached based on analyzing different witness statements. (Exh. 17, pp. 174, 180-182.)

Moreover, the jury, who unlike Dr. Solomon actually observed the witnesses, could have relied on the testimony that the gap between the first and second shots fired was 30 seconds to two minutes. (68RT 7531, 7583; see 2CT 327, 339; Retrial 18RT 1936-1937, 1949.) Assuming a gap of 30 seconds between the first and second shots, all of Dr. Solomon's other time estimates are equally consistent with petitioner having shot Officer Verna from outside the car. (See Exh. 17.) Because Dr. Solomon's conclusion is based on a flawed premise, there is no reasonable probability the jury would have reached a different result had his opinion been presented to the jury. Respondent also alleges that testimony like that proposed from a "biomechanics expert" was not available at the time of petitioner's trial.

258. Respondent denies that "An analysis of the scene, witness statements, the autopsy, crime scene photographs, and other relevant materials would have allowed such an expert to opine that a very conservative estimate of the time between the first and last shot is eight to ten seconds. [Citation.]" (Petn. 99, ¶ 2.f.(2)(a).) Respondent alleges that Dr. Solomon's conclusion is based on a flawed premise (the amount of time between the first and second shots), and therefore there is no reasonable probability the jury would have reached a different result had his conclusion been presented to the jury. (68RT 7531, 7583; 2CT 327, 339; Retrial 18RT 1936-1937, 1949.)

259. Respondent denies that "A human factors expert could have also testified that only the back seat passenger could have exited the vehicle in the short amount of time between the first shot and the second shot. [Citation.]" (Petn. 99, ¶ 2.f.(2)(b).) Respondent alleges that Dr. Solomon's conclusion is based on a flawed premise (the amount of time between the first and second shots), and therefore there is no reasonable probability the jury would have reached a different result had his conclusion been presented to the jury. (68RT 7531, 7583; 2CT 327, 339; Retrial 18RT 1936-1937, 1949.)

260. Respondent denies that "Such an expert could have informed the jury that taking into account all relevant materials, including testing data, the back seat passenger was the only individual who could have performed the shooting both inside and outside of the vehicle. [Citation.]" (Petn. 99, ¶ 2.f.(2)(c).) Respondent alleges that Dr. Solomon's conclusion is based on a flawed premise (the amount of time between the first and second shots), and therefore there is no reasonable probability the jury would have reached a different result had his conclusion been presented to the jury. (68RT 7531, 7583; 2CT 327, 339; Retrial 18RT 1936-1937, 1949.)

261. Respondent denies that "Minimally competent trial counsel would or should have known to consult a qualified expert, such as Martin Fackler, M.D., whose area of practice and expertise is in wound ballistics and the study of the effect of projectiles on the living body. Had trial counsel done so, he would have obtained readily available, credible expert evidence corroborating Dr. Sherry's findings, and demonstrating petitioner's innocence." (Petn. 99-100, ¶ 3.) Respondent alleges that Dr. Sherry's findings, which address the trajectory of gunshot wound number five, do nothing to demonstrate petitioner's innocence since there is nothing so unique about petitioner or Raynard as to make either solely incapable or capable of inflicting that gunshot wound. Similarly, Dr. Fackler's testimony regarding the sequence of the shots does nothing to demonstrate petitioner's innocence since there is nothing so unique about petitioner or Raynard as to make either physically incapable or capable of inflicting the wounds in the alleged sequence.

262. Respondent denies that "An expert such as Dr. Fackler would have confirmed Dr. Sherry's opinion that Dr. Cogan had made a critical error in describing the trajectory of bullet wound number five." (Petn. 100, ¶ 3.a.) Respondent admits that Dr. Fackler would have stated, "Dr. Sherry's analysis, which reconfigured bullet wound no. 5 'has the shot, instead of entering

basically predominantly as a front to back angle, of entering and being predominantly a left to right angle, and I agree with that.' [Citation.]" (Petn. 100, ¶ 3.a.) Respondent admits that an expert could have testified that, *in his opinion*, Dr. Cogan made an error in the findings regarding the trajectory of bullet wound number five. Respondent alleges no error occurred based on Dr. Joseph Cogan's personal observations during the autopsy, his personal experience, and the literature supporting his conclusions. (70RT 7876-7878; 87RT 9871-9876.) Moreover, testimony was presented at petitioner's trial, in the form of testimony from pathologist Dr. Paul Herrmann, to the effect that, in his opinion, Dr. Cogan erred in some of his findings regarding the trajectory of number five. (80RT 9052-9053, 9083, 9086, 9096.) Additionally, Dr. Cogan testified that number five went from left to right, consistent with Dr. Fackler's conclusion. (71RT 7981.)

263. Respondent agrees that "Bullet wound number five displayed an 'abraided' or 'shored exit,' which refers to an abrasion caused by a bullet unable to pierce the skin due to contact with a hard surface. [Citation.]" (Petn. 100, ¶ 3.a.(1).)

264. Respondent agrees that "The abraided exit from wound number five was located on the right side wall of the victim's chest." (Petn. 100, ¶ 3.a.(2).) Respondent denies that "Confirming Dr. Sherry's opinion and contradicting Dr. Cogan's opinion, the trajectory of the bullet that caused bullet wound number five was left to right, not front to back. [Citation.]" (Petn. 100, ¶ 3.a.(2).) Respondent alleges that Dr. Cogan testified that number five went from left to right. (71RT 7981.) Dr. Cogan also testified that the bullet went from front to back, was deflected by a rib in the back, and then returned to the right side of the chest. (70RT 7881-7882, 7889.)

265. Respondent denies that "An expert such as Dr. Fackler would have been able to demonstrate petitioner's inability to have exited the car quickly

enough to shoot the victim. The sequence of the bullet wounds demonstrated that petitioner could not have been the shooter. If petitioner had been the shooter, by the time he exited the car and fired the second shot, the decedent would have had ample time to draw his gun and return fire; however, that did not happen, as verified by the eyewitnesses, who were unanimous on this point." (Petn. 100, ¶ 3.b.) Dr. Fackler has not, could not, and would not be permitted to offer a speculative opinion on whether Officer Verna would have been able to draw his gun and return fire after the first shot or how long it would have taken him to do so. His testimony, which was offered at petitioner's penalty retrial, merely addressed his opinion on the sequence of the shots, which did nothing to demonstrate petitioner's innocence. (See Retrial 27RT 3542-3600.)

266. Respondent denies that "The decedent received the six gunshot wounds in the following order using of the numbers arbitrarily assigned during the autopsy: six, one or three, two, four, then finally five." (Petn. 101, ¶ 3.b.(1), footnote omitted.) Respondent alleges that petitioner's own expert, Dr. Fackler, testified that numbers one and three could have been inflicted after numbers two, four and five. (Retrial 27RT 3590-3591.)

267. Respondent agrees that "The easiest shot to sequence was the shot to the upper right neck, labeled as coroner's bullet wound number six. This was the first gunshot wound. [Citation.]" (Petn. 101, ¶ 3.b.(1)(a), footnote omitted.)

268. Except as noted, respondent admits that "Bullet wound number two was received after bullet wound number six. This bullet wound cut the spinal cord at the sixth thoracic vertebrae level. Once the spinal cord was cut, the body lost all muscle function below the site of the cut, and the legs were unable to hold the body. As a result, the victim's knees buckled and he would have fallen to his knees. [Citation.]" (Petn. 101, ¶ 3.b.(1)(c).) Respondent alleges that Officer Verna would only have fallen if he was standing at the time he was hit by number two. Respondent denies that number two "was the fourth gunshot

wound. [Citation.]" (Petn. 101, ¶ 3.b.(1)(c).) Respondent alleges that Dr. Fackler testified that numbers one and three could have been inflicted after numbers two, four and five. (Retrial 27RT 3590-3591.)

269. Except as noted, respondent admits that "Bullet wounds numbered four and five were received after bullet wound number two – after the decedent fell to his knees. Bullet wounds four and five had shored exits on the right side of the body and a left to right trajectory. [Citation.] The shored exits indicated that the decedent's right side was against a hard surface, the ground, when he received those wounds. The left to right trajectory of the wound indicated that the decedent's left side was exposed to the shooter." (Petn. 101, ¶ 3.b.(1)(c).) Respondent alleges nothing in the bullet wounds themselves demonstrates that Officer Verna fell to his knees. (See, e.g., Retrial 27RT 3553 [asking Dr. Fackler to assume that Officer Verna fell to his knees].)

270. Respondent denies that "Bullet wound number four preceded bullet wound number five. Bullet wound number two caused the decedent to fall to his knees. After he fell to his knees he rolled onto his right side, exposing his left back, the site of gunshot wound number four. This was the fifth gunshot wound." (Petn. 102, ¶ 3.b.(1)(c)(i).) Respondent alleges that bullet wound number five may have preceded number four since five entered the left chest and four entered the left chest near the back (70RT 7881-7882), which is consistent with Officer Verna lying on his right side and being shot as his chest came to lie on the ground. Respondent alleges nothing in wound number two demonstrates that Officer Verna fell to his knees. (See, e.g., Retrial 27RT 3553 [asking Dr. Fackler to assume that Officer Verna fell to his knees].) Wound number four entered the left chest toward the back, not the back itself. (70RT 7881.) Numbers one and three could have been suffered after numbers two, four and five. (Retrial 27RT 3590-3591.)

271. Except as noted, respondent admits that "Due to the location of

bullet wound number two, the severed spinal cord affected the decedent's legs, but not his arms. [Citation.] After receiving bullet wound number four, the victim pushed himself onto his back. As he did so, while his right side was still in contact with the ground, he received bullet wound number five. [Citation.] The victim after receiving the sixth and final gunshot wound, was now flat on his back, the way he was discovered by witnesses and medical personnel." (Petn. 102, ¶ 3.b.(1)(c)(ii).) Respondent alleges that bullet wound number five may have preceded number four since five entered the left chest and four entered the left chest near the back (70RT 7881-7882), which is consistent with Officer Verna lying on his right side and being shot as his chest came to lie on the ground. Also, numbers one and three could have been suffered after numbers two, four and five. (Retrial 27RT 3590-3591.)

272. Respondent admits that "*According to the gunshot residue analysis conducted by Dr. Vincent Guinn*, the distance between the victim and the gun was more than double for bullet wounds numbered one and three, than for bullet wounds numbered two, four, and five. [Citation.] The distance between the victim and the gun was approximately 2.13 feet and 2.44 feet for bullet wounds numbered one and three, respectively. [citation.] The distance between the victim and the gun for wounds numbered two, four, and five were all approximately one foot. [Citation.]" (Petn. 102, ¶ 3.b.(1)(d), italics added.) Respondent denies that "Bullet wounds one and three were received after bullet wound number six – (to the right neck area) and before bullet wounds numbered two, four, and five. . . . The victim was, therefore, moving away from the gun when he received bullet wounds numbered one and three. [Citation.] These were the second and third gunshot wounds." (Petn. 102, ¶ 3.b.(1)(d).) Respondent alleges that numbers one and three could have been suffered after numbers two, four and five. (Retrial 27RT 3590-3591.) Also, nothing about the distance between the victim and shooter proves any movement by the victim; at

most, the evidence shows that the shooter was further away from the victim during number one and three than for two, four, and five.

273. Respondent denies that "The sequence of the bullet wounds demonstrated that although wounded, the decedent had not been disabled by the first shot, or even the next two. At least one eyewitness reported that the decedent reached for his gun just before he fell to the ground – immediately before he had been shot for a third time and received bullet wound number two. [Citation.] That the decedent, a highly trained Los Angeles police officer, was unable to draw his weapon before he became incapacitated, illustrates the rapidity with which the first four gunshots were inflicted." (Petn. 103, ¶ 3.b.(2).) Respondent alleges that gunshot wound number six, the first wound inflicted upon Officer Verna, was a lethal wound. (71RT 8030.) There was testimony that Officer Verna drew his gun during the shooting. (68RT 7573.) But even if Officer Verna was unable to draw his weapon after being shot by surprise in the neck by a lethal gunshot wound, he may have been too severely injured to do so. The failure to draw the weapon, even if shown, does not demonstrate that the first four shots were fired rapidly and without pause.

274. Respondent admits that "Witnesses reported that the shooting took only seconds." (Petn. 103, ¶ 3.c.) Without conceding the accuracy of the opinion, respondent admits that "Dr. Kenneth Solomon, an expert in crime and accident reconstruction, human factors, and biomechanics, determined that a conservative estimate of the time between the first gunshot and the last was between eight to ten seconds [citation], and the maximum time between the first two shots was a mere two and a half seconds. [Citation.]" (Petn. 103, ¶ 3.c.) Respondent denies that "Testimony regarding the trajectory and sequencing of the bullets is especially significant when considered in conjunction with the evidence regarding the timing of the shooting and the proximity of the shooter. . . . Taken together, it is clear had Mr. Shinn presented such testimony,

any reasonable jury would have understood that it was nigh impossible for petitioner to have shot the victim." (Petn. 103, ¶ 3.c.) Respondent alleges that the proposed testimony about the trajectory and sequence of the gunshot wounds might have helped explain how the shooting occurred but would have done nothing to demonstrate that Raynard was guilty or that petitioner was innocent. Moreover, the proposed testimony from Dr. Solomon relies on the basic premise of a very short time between the first and second shots, which was contradicted by Marsha Holt's testimony that, between the first and second shots fired, there was a gap of 30 seconds to two minutes. (68RT 7531, 7583; see 2CT 327, 339; Retrial 18RT 1936-1937, 1949.) In light of the evidence contradicting Dr. Solomon's premise, there is no reasonable probability petitioner would have received a better result had the proposed expert testimony been presented.

275. Respondent denies that "Trial counsel failed to undertake even the most basic of trial preparation and to marshal and argue the available evidence to prove petitioner's innocence, including, but not limited to failure to use the material contained in the police reports and pre-trial transcripts to impeach prosecution witness[es], as a basis for moving to preclude any in-court identifications of petitioner, and to demonstrate how the evidence proffered by both the state and petitioner's co-defendant, actually established petitioner's innocence." (Petn. 103-104, ¶ 4.) Since petitioner's allegation lacks specificity, and Shinn is not available to be interviewed, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (See Petn. 104-114.)

276. As specifically described in the following paragraphs (¶¶ 277-322, *post*), respondent denies that "Trial counsel failed to impeach prosecution witnesses with their many prior inconsistent statements by pointing out key

factual discrepancies from statement to statement. Shinn failed to use readily available evidence to undermine the credibility of the state's most damaging witnesses -- Robert Thompson, Gail Beasley, Shannon Roberts, and Marsha Holt -- in a variety of ways that would have raised a reasonable doubt as to petitioner's guilt of the shooting including, but not limited to, the following[.]" (Petn. 104, ¶ 4.a.)

277. Respondent denies that "Robert Thompson's experienced on [*sic*] radical change in his 'memory' of the shooting over time, contrary to the prosecution's argument that Mr. Thompson['s] new memory was the obvious, direct result of Mr. Thompson looking at a photograph of the car while standing in the front yard where he witnessed the events. Mr. Thompson's new 'memory' was wholly manufactured and vulnerable to successful impeachment based on the witness's prior inconsistent statements. [Citation.]" (Petn. 104, ¶ 4.a.(1).) Respondent admits that Mr. Thompson's account of the crime varied over time and that his recollections changed over time. Respondent alleges that Mr. Thompson's account of the crime changed over time because various factors including: a desire to avoid having anything to do with the case because it was a traumatic event, the media unfairly portrayed the public's involvement in the case, and Mr. Thompson also felt somewhat responsible for the officer getting shot because he felt his hammering at the time of the murder might have distracted the officer in some way; and a walk through with Detective Holder at the scene wherein Mr. Thompson remembered certain facts. (3CT 707-709; 68RT 7624-7627, 7644, 7647, 7653; 69RT 7657-7658, 7664, 7666, 7668; Retrial 17RT 1781, 1789; 18RT 1825-1826, 1860-1863.)

278. Respondent denies that "Unlike a previously forgotten memory remembered, Mr. Thompson purportedly experienced a completely new and drastically different memory of the events[.]" (Petn. 104, ¶ 4.a.(1)(a).) Respondent alleges that Mr. Thompson was initially confused because he saw

a dark skinned arm belonging to a Black man shoot the officer from the back seat and then, after looking away and looking back, saw a petitioner, described as a White man in the passenger seat, outside the car shooting the officer. (See 95RT 10888-10889 [prosecution closing argument].) This explains why, on the night of the crime, Mr. Thompson identified gave a sketch of the White passenger (petitioner) as the shooter but reported to another officer that the Black man in the back seat (Raynard) was the shooter. (Exh. 45; 2CT 693-697; 68RT 7639-7640; 3Supp. 2d CT 667 [Def. Exh. N, the sketch drawn at the instructions of Thompson].) But after going through a walk through with Detective Holder at the scene, Mr. Thompson remembered seeing a Black man's arm shooting from the back seat and then seeing petitioner, a light skinned man, get out of the car and shoot Officer Verna. (68RT 7624-7627.) Respondent admits that "trial counsel failed to question Mr. Thompson as to *why* his testimony regarding the shooter changed so drastically from the grand jury to the preliminary hearing." (Petn. 104, ¶ 4.a.(1)(a), italics added.) Respondent alleges that Shinn did question Mr. Thompson about the changed in his testimony from his earlier grand jury testimony. (68RT 7641-7644, 7648-7652, 7666-7667, 7669-7670, 7688-7691.)

279. As specifically described in the following paragraphs (¶¶ 280-289, *post*), respondent denies that "Trial counsel's extensive failures in this area prevented the jury from hearing and considering any of several reasons to discount the prosecution's simplistic excusal of Mr. Thompson's conveniently changed memory including, but not limited to, the following[.]" (Petn. 104, ¶ 4.a.(1)(b).)

280. Respondent denies that "Mr. Thompson's initial recall of the events was amazingly lucid, detailed, and up to the preliminary hearing, consistent. Mr. Thompson's initial recall was so strong that he was able to give an incredibly detailed description and demonstration of the way in which the dark-

skinned shooter emerged from the back seat of the car to continue shooting the decedent. [Citation.]" (Petn. 105, ¶ 4.a.(1)(b)(i).) Respondent alleges that Mr. Thompson told Officer Eric Lindquist on the day of the shooting that: the rear passenger was a Black man with a medium to dark complexion; the front passenger was a White man with glasses and a mustache; and that the man in the rear seat driver's side of the car exited the car and shot Officer Verna. (Exh. 45; 7757-7760, 7765-7666, 7772.) Also, on the day of the shooting, Mr. Thompson told a sketch artist that the shooter was a White man with glasses and a mustache. (2CT 693-697; 68RT 7639-7640; 3Supp. 2d CT 667 [Def. Exh. N, the sketch drawn at the instructions of Mr. Thompson].) Respondent admits that, at the grand jury proceedings, Mr. Thompson gave a description of the way the shooter emerged from the car (see 2Supp. CT 456-457), but it was not "incredibly detailed" nor did it necessarily demonstrate that Mr. Thompson's recall was strong. Respondent alleges that, at the grand jury proceedings, Mr. Thompson was not sure if the shooter exited the rear seat of the car. (2Supp. CT 460 ["I'm assuming it was the person in the back seat"].)

281. Respondent denies that "The completely new version of events that subsequently evolved after repeated rehearsals with the police, fully supported the state's version of the shooting. Although Mr. Thompson's police statements and his pretrial testimony never indicated he ever told the police that he could not recall the events, nevertheless with the assistance of the police, Mr. Thompson suddenly 'remembered' the opposite of what he had first told the police and the grand jury." (Petn. 105, ¶ 4.a.(1)(b)(ii).) Respondent admits that Mr. Thompson's trial testimony "fully supported the state's version of the shooting." Mr. Thompson's testimony at trial was not "a completely new version of events": Mr. Thompson testified at the preliminary hearing and at trial that petitioner got out of the driver's side of the car and shot Officer Verna while standing outside the car (3CT 669-675; 68RT 7596-7595); Mr. Thompson

told Officer Lindquist and testified at the grand jury proceedings and at trial that he saw a Black man in the back seat holding the gun (Exh. 45; 2Supp. CT 452, 456-457; 68RT 7592-7595). Respondent alleges that Mr. Thompson's trial testimony was the product of his seeing the murder of Officer Verna occur, with his memory refreshed in part by the walk through with Detective Holder. (68RT 7624-7627.) Mr. Thompson began testifying in the trial on April 9, 1985 (7CT 1902), almost two years after the murder in this case. Detective Holder went over Mr. Thompson's account of the murder with Mr. Thompson to make sure he could remember what occurred prior to testifying; the practice of reviewing a witness's account prior to having a witness testify is common, especially when there is a large gap between the crime and trial. No one ever coached Mr. Thompson or told him what to say. (69RT 7692-7693; see Return Exh. 7, ¶ 6).

282. Respondent denies that "Trial counsel unreasonably failed to question Mr. Thompson on key elements of his vastly differing accounts of the shooting. If counsel had done so, the jury would have understood that, contrary to the prosecutor's assertion, Mr. Thompson's initial version of events was far more reliable and accurate than his subsequent versions that supported the state's theory of the crime." (Petn. 105, ¶ 4.a.(1)(b)(iii).) Respondent alleges that Shinn elicited through cross-examination of Mr. Thompson the following: Mr. Thompson went to the grand jury proceedings and preliminary hearing a short time after the offense (68RT 7641); his memory was better at the preliminary hearing (68RT 7642); he did not identify anyone at a lineup, a few days after the murder (68RT 7642); he took an oath to tell the truth at the grand jury proceedings (68RT 7642); at the grand jury proceedings he was asked to look at four photographs and see if he could identify anyone, but said he could not (68RT 7643); he lied about being unable to identify anyone (68RT 7644); he did not recognize petitioner at the lineup a few days after the murder (68RT 7646); at the grand jury proceedings, he said he had seen a gun and someone

coming out of the car (68RT 7648); at the grand jury proceedings he said his impression was the man with the gun was coming out of the back seat (68RT 7648-7649); at the grand jury proceedings he said his impression as to the man coming out of the car was that he was Black (68RT 7649); at the grand jury proceedings he said the man's complexion was "medium shade black" (68RT 7650-7651); petitioner was not "medium shade black" (68RT 7651); at that time, he said the passenger was White (68RT 7651); he never identified petitioner as coming out of car at the grand jury proceedings and he thought petitioner was Caucasian (68RT 7652); he gave a false answer when he said he could not identify anyone at the lineup (69RT 7666); he was not able to identify anyone at the grand jury proceedings (69RT 7667); he agreed that all the stories he told at the grand jury proceedings, at the preliminary hearing, and at trial were all different (69RT 7669-7670); the facts were much fresher in his mind at the grand jury proceedings, which was a month and a half after the crime (69RT 7688-7690); at the grand jury proceedings, he did not say anything about what the Caucasian person in the front seat did (69RT 7690-7691); he said the medium shade Black person was the one who got out of the car and shot the officer (69RT 7691); and he had previously testified at the preliminary hearing that he could not identify anyone in the lineup (69RT 7740-7741).

283. Respondent admits that "Mr. Thompson initially stated the back seat passenger, and only the back seat passenger, emerged from the car to shoot the decedent." (Petn. 105, ¶ 4.a.(1)(b)(iv); see 2Supp. CT 457.) Respondent also alleges that, on the day of the shooting, Mr. Thompson told a sketch artist that the shooter was a White man with glasses and a mustache. (2CT 693-697; 68RT 7639-7640; 3Supp. 2d CT 667 [Def. Exh. N, the sketch drawn at the instructions of Mr. Thompson].)

284. Except as noted and modified with brackets, respondent admits that "Mr. Thompson unequivocally described the shooter [in his initial report to the

police] and the clothing he was wearing: 'male Negro, black hair, finger wave (short) 6-2/3, 150, (thin build) 25/30 years. Baggy jeans (possible blue) with brown short sleeve shirt with other unknown colors. Medium to dark complexion.' [Citation.] Because he did not see the front seat passenger out of the car, Mr. Thompson explained he was unable to describe his clothing. [Citation.]" (Petn. 105-106, ¶ 4.a.(1)(b)(v).) Respondent denies that Mr. Thompson's report was "unequivocal" and denies that he was unable to describe the front passenger's clothing "[b]ecause he did not see the front seat passenger out of the car . . . ." Respondent makes this denial based on the following: (1) Mr. Thompson is not available to be interviewed (see Exh. 80, p. 2100 [Robert Thompson died]); (2) the report of Mr. Thompson's statement does not mention anything about Mr. Thompson's degree of certainty; and (3) Mr. Thompson did not give any statements as to why he was unable to describe the passenger's clothing in his initial report (Exh. 45).

285. Respondent denies that "Mr. Thompson did not see, and was unable to fully describe, the front passenger's face. Mr. Thompson could only give details of the front seat passenger's left profile, which Mr. Thompson would have seen since he saw petitioner sitting in the car. [Citation.]" (Petn. 106, ¶ 4.a.(1)(b)(vi).) Respondent alleges that Mr. Thompson did see the front passenger's face and noted the front passenger was a White man, wearing glasses, and had a thin mustache. (Exh. 45.)

286. Respondent denies that "Finally, trial counsel failed to reinforce that Mr. Thompson initially firmly believed that the shooter was a darker-skinned black man. During his interview with Officer Lindquist, Mr. Thompson emphasized that the person he saw stand over the victim shooting, was a black man. In his handwritten report, Officer Lindquist demonstrated Mr. Thompson's decisiveness by underlining 'def. a black man' under the description of the shooter standing over the victim shooting. [Citation.] Trial

counsel failed to convey this critical information to the jury through his questioning of Mr. Thompson or Officer Lindquist. Again, the jury was left with the erroneous impression that Mr. Thompson's initial identification of the darker skinned black man, as the sole shooter was weak and uncertain." (Petn. 106, ¶ 4.a.(1)(b)(vii).) Respondent makes this denial based on the following: (1) Mr. Thompson is not available to be interviewed (see Exh. 80, p. 2100); and (2) Mr. Thompson's degree of certainty in giving his initial statement to Officer Lindquist is not reflected in the report of Mr. Thompson's statement, his preliminary hearing testimony, Officer Lindquist's testimony, or in any other documents. Respondent denies that "def. a black man" was underlined by Officer Lindquist since his handwriting appears different from that of the note (Compare Exh. 45, p. 1644 with Exh. 45, pp. 1645-1466); moreover, respondent denies that the underlining reflected Mr. Thompson's decisiveness and alleges it only reflected the importance that the unknown writer put on that fact. Additionally, after the prosecution established that Officer Eric Lindquist interviewed Mr. Thompson the night of the murder (69RT 7742-7743), Shinn established through cross-examination that: Mr. Thompson never said the gun was passed to the passenger in the front seat (69RT 7771); he had said that the gun was in the hands of the person who exited the rear seat (69RT 7771); and he had said that the person who exited the rear seat continued to fire at Officer Verna (69RT 7772).

287. Except as noted, respondent admits that "When he was first interviewed, Mr. Thompson gave the police a detailed description of the way the shooter continued shooting as he exited the back seat of the car through the driver's door. 'Thompson says that susp was firing while he was exiting the vehicle. Also stated that susp had gun in his right hand and was forcing car door open with his left hand.' [Citation.]" (Petn. 106, ¶ 4.a.(1)(b)(viii).) Respondent denies that the description was "detailed," and alleges that the total description

is the sentence quoted by petitioner in this paragraph. (See Exh. 45.)

288. Respondent denies that "Thompson again gave this description of how the dark skinned back seat passenger exited the car during his testimony before the grand jury. Mr. Thompson's memory of the dark skinned man exiting the back seat of the car while shooting was so clear that he was able to demonstrate it for the grand jury." (Petn. 106-107, ¶ 4.a.(1)(b)(ix).) Respondent alleges that Mr. Thompson testified that his "impression" was that the shooter was a Black man and was in the back seat, but described the shooter as "three shades lighter" than himself, and said he was "assuming it was a person in the back seat." (2Supp. CT 457, 460.) Respondent also admits that the following colloquy occurred during the grand jury proceedings:

> (Mr. Berman) Q. And could you demonstrate the position of the hands for me now? Just do it.
>
> (Mr. Thompson) A. All right. From where I was -- if I was standing over there --. As if I was in the general area where you -- Okay, that's good.
>
> A. All right. I'm standing over there. What I see is this hand shooting, that's where I see the motorcycle, this hand is on something and one leg is out of the car.
>
> Q. All right. Now, I want you to just stop for a moment and let me say something, Mr. Thompson. May the record reflect that Mr. Thompson pivoted 90 degrees away from me so that I was getting his left profile, and then indicating as if he were the person with the gun in his right hand, Mr. Thompson himself turned around 180 degrees and aimed back around his left shoulder with his left hand out in front of him to his left, as though he were holding the door open. Is that right, Mr. Thompson?
>
> A. Yes. (2 Supp. CT 1003-04.)

(Petn. 107, ¶ 4.a.(1)(b)(ix); see 2Supp. CT 456-457.)

289. Respondent admits that "Trial counsel failed to question Mr. Thompson about his initial, consistent descriptions of how the dark skinned passenger emerged, shooting, from the back seat." (Petn. 107, ¶ 4.a.(1)(b)(x).) Respondent denies that "Instead, the jury was left with the erroneous impression that either Mr. Thompson failed to ever describe how the shooter exited the car or, worse, that his initial description was consistent with his preliminary hearing and trial testimony." (Petn. 107, ¶ 4.a.(1)(b)(x).) Respondent alleges that, through cross-examination by Shinn of Mr. Thompson and Officer Lindquist, the jury was adequately informed that Mr. Thompson had previously described the shooter as the darker skinned Black male passenger in the rear seat of the car. (68RT 7648-7652; 69RT 7669-7671, 7690-7691, 7771-7772.)

290. Respondent denies that "Trial counsel failed to impeach Mr. Thompson with these important prior inconsistent statements and argue, that as Mr. Thompson himself reluctantly testified, his memory was better at the time of the shooting. [Citation.] Had he done so, the jury would have better understood that Mr. Thompson's new 'memory' of the front seat passenger shooting the victim was highly unreliable and must be discounted." (Petn. 107-108, ¶ 4.a.(1)(c).) Respondent alleges that Shinn spent considerable time impeaching Mr. Thompson with evidence of his prior statements and inability to identify petitioner. (68RT 7641-7644, 7646, 7648-7652; 69RT 7666-7667, 7669-7670, 7688-7691, 7740-7741, 7771-7772.) Shinn used this evidence to argue in closing that: Mr. Thompson was "all mixed up" on the stand (95RT 10925-10926, 10934); Mr. Thompson told Officer Lindquist a few hours after the crime that the shooter was the Black man who got out of the rear of the car, i.e., Raynard (95RT 10925-10926, 10935-10937); Mr. Thompson gave different accounts at the grand jury proceedings, the preliminary hearing, and trial (95RT 10934); and Mr. Thompson's statement to Officer Lindquist was sufficient to

establish reasonable doubt (95RT 10937-10938).

291. Respondent denies that "Shinn failed to demonstrate to the jury that each of the changes in Mr. Thompson's recall made his version of events a closer fit with the state's theory. His testimony at the first trial nailed down the prosecution's theory. By suddenly 'remembering' that he saw petitioner, and not the darker skinned black man from the back seat, outside the car shooting, Mr. Thompson joined the other mistaken witnesses who thought they saw petitioner shoot the victim. Mr. Thompson is also the only witness who testified that petitioner slid across the front seat and exited through the driver's door. [Citation.]" (Petn. 108, ¶ 4.a.(1)(d).) Respondent alleges that Shinn specifically noted that Mr. Thompson gave different accounts at the grand jury proceeding, the preliminary hearing, and trial (95RT 10934) and his testimony on the stand was "exactly the way–the theory–that Mr. Watson had" (95RT 10934-10935). Respondent alleges that Pamela Cummings also "testified that petitioner slid across the front seat and exited through the driver's door." (73RT 8164.) Respondent alleges that Mr. Thompson's identification of petitioner as the shooter outside the car was consistent with his preliminary hearing testimony and statement to the police sketch artist (2CT 667-671, 693-697; 68RT 7639-7640; 3Supp. 2d CT 667) as well as: Gail Beasley's report to the police, her grand jury testimony, her preliminary hearing testimony, and her testimony at the penalty phase retrial (Exh. 12; 1Supp. CT 198-200, 205-208; 2CT 519-524, 530, 540, 561, 565-566; Retrial 19RT 2030-2037, 2056-2057); Marsha Holt's report to the police, her grand jury testimony, her preliminary hearing testimony, her trial testimony, and her testimony at the penalty phase retrial (Exh. 42; 1Supp. CT 215-218, 222-223; 2CT 324-329, 335; 68RT 7527-7529; Retrial 18RT 1928-1938, 1952, 1957); Pamela Cummings's trial testimony, and her testimony at the penalty phase retrial (73RT 8164-8170; Retrial 21RT 2500-2503, 2523-2524); and Shannon Roberts's report to the police, his grand jury

testimony, his preliminary hearing testimony, and his trial testimony (Exh. 40; 2Supp. CT 522-530, 534; 3CT 711-717, 720, 725-726; 69RT 7781-7785, 7789).

292. Respondent denies that "Shinn inexcusably and inexplicably failed to present to the jury the highly suspect nature of the changes in Mr. Thompson's testimony. The defense theory was that petitioner was not the shooter; therefore, there could be no tactical reason for failing to demonstrate the inherent unreliability in Mr. Thompson's suspicious and convenient post-grand jury memory." (Petn. 108, ¶ 4.a.(1)(e).) Respondent alleges that Shinn engaged in numerous attempts to discredit and impeach Mr. Thompson and argued to the jury that his testimony was unreliable. (68RT 7641-7644, 7646, 7648-7652; 69RT 7666-7667, 7669-7670, 7688-7691, 7740-7741, 7771-7772; 95RT 10925-10926, 10934-10938.) Moreover, there is no reasonable probability any additional efforts by Shinn in this regard would have made a difference in the verdict, especially in light of the other evidence of guilt. (68RT 7527-7529; 69RT 7781-7785, 7789; 73RT 8164-8170; 74RT 8298-8304, 8310, 8322–8323, 8343-8344, 8348-8349.)

293. Respondent denies that "Trial counsel failed to investigate and introduce the prior inconsistencies that would have discredited Shannon Roberts, who was only eleven years old when he witnessed the shooting, and failed to select petitioner as the shooter until he testified at the trial. [Citations.]" (Petn. 108, ¶ 4.a.(2).) Respondent alleges that Shinn was well aware of Mr. Roberts's failure to identify petitioner, and, through cross-examination of Mr. Roberts, Shinn established: Mr. Roberts failed to identify petitioner in a live lineup that occurred a few days after the shooting (69RT 7794-7795); he failed to identify petitioner at the preliminary hearing (69RT 7795-7796); although he initially testified that he had identified petitioner at the grand jury proceedings (69RT 7798-7799), he then said he could not remember (69RT 7800-7801), and eventually admitted he did not identify petitioner at those proceedings (69RT

7802, 7816-7817); he did not know why he was unable to identify petitioner at the preliminary hearing but he was able to do so at trial (69RT 7802); he did recognize and identify Raynard at the grand jury proceedings as the person who later picked up the gun (69RT 7802, 7815); and he identified Pamela at the grand jury proceedings as the driver (69RT 7816).

294. Respondent denies that "Shinn ineffectively cross-examined Mr. Roberts on his newfound ability to identify petitioner as the person he saw shoot the victim." (Petn. 109, ¶ 4.a.(2)(a).) Respondent alleges that Shinn's cross-examination, which elicited Mr. Roberts's failure to identify petitioner on three prior occasions, was within the standards of competence. (69RT 7794-7796, 7798-7802, 7815-7817.) Respondent denies that "Shinn's cross-examination failed to elicit that prior to his testimony at the trial, he was unsure what the shooter looked like." (Petn. 109, ¶ 4.a.(2)(a).) Respondent alleges that Mr. Roberts knew, prior to his trial, that the shooter had light skin, appeared to be possibly of mixed race, and he had a mustache and curly hair. (Exh. 40; 3CT 728-729.) He also gave a description of the shooter to a sketch artist, which resulted in a full facial portrait of the shooter. (2Supp. CT 534, 536; 3CT 730-731; 69RT 7789-7790; 3 Supp. 2d CT 669 [Def. Exh. R].) Respondent admits that "Mr. Roberts's description of the shooter ranged from Mexican or bi-racial (White and Black) [citation], to light black skin [citation], to white [citation]." (Petn. 109, ¶ 4.a.(2)(a).) Respondent alleges that when Mr. Roberts testified at preliminary hearing that the shooter was White, he also testified that he thought petitioner was White. (3CT 713-714, 725-726.) Respondent denies that "By the time of the trial Mr. Roberts did not know the race of the shooter, only that petitioner was that person. [Citation.]" (Petn. 109, ¶ 4.a.(2)(a).) Respondent alleges that Mr. Roberts never "knew" what the shooter's race was; rather, he only provided descriptions of what race the shooter appeared to be. Mr. Robert's knowledge of the appearance of the shooter's race continued at trial as

it had previously: Mr. Roberts said the shooter "looked like he was light complected," "[a]lmost black," and agreed that the shooter was very light-skinned and looked almost White. (69RT 7782, 7788.)

295. Respondent denies that "More importantly, Shinn failed to impeach Mr. Roberts's in-court identification of petitioner with his preliminary hearing testimony. At the preliminary hearing, Mr. Roberts frankly admitted that he did not really know what the shooter looked like. [Citation.] Petitioner's jury never heard this critical and exculpatory admission." (Petn. 109, ¶ 4.a.(2)(b).) Respondent alleges that Shinn impeached Mr. Roberts's trial testimony with his prior preliminary hearing testimony where Mr. Roberts was unable to identify petitioner as the shooter. (69RT 7795-7796.) At the preliminary hearing, Mr. Roberts said he was not sure what the shooter's *face* looked like (3CT 730), and the jury at trial never heard that admission. But Mr. Roberts did know what the shooter looked like because he provided a description at the preliminary hearing: light skin, curly hair, and a mustache. (3CT 713-714, 726, 728-729).

296. Respondent denies that "Trial counsel's failures allowed the jury to consider and weigh Mr. Roberts's testimony without also knowing that Mr. Roberts himself conceded that his version of events was not reliable. Mr. Shinn's inexplicable failure to alert the jury that, despite his confidence at trial, Mr. Roberts admitted that his memory of the shooting was highly suspect falls well below the standard of care for a capital trial." (Petn. 109, ¶ 4.a.(2)(c).) Respondent alleges that Shinn's cross-examination, which elicited Mr. Roberts's failure to identify petitioner on three prior occasions, was within the standards of competence. (69RT 7794-7796, 7798-7802, 7815-7817.) Moreover, it adequately apprized the jury of any weaknesses in Mr. Roberts's testimony. Finally, there is no reasonable probability any additional efforts by Shinn in this regard would have made a difference in the verdict, especially in light of the other evidence of guilt. (68RT 7527-7529, 7592-7597, 7604; 73RT 8164-8170;

74RT 8298-8304, 8310, 8322–8323, 8343-8344, 8348-8349.)

297. Except as noted, respondent admits "At trial, Ms. Beasley was initially deemed an unavailable witness, and the prosecutor was allowed to have her preliminary hearing testimony read to the jury. [Citation.] Before the close of the state's case, Ms. Beasley was brought to court and trial counsel was given the opportunity to cross-examine her. Despite the wealth of exculpatory evidence he could have obtained, he refused the opportunity and allowed her highly prejudicial preliminary hearing testimony to stand uncontested. [Citation.]" (Petn. 109-110, ¶ 4.a.(3).) Respondent denies that there was a "wealth of exculpatory evidence" that could have been obtained, and denies that counsel allowed the "preliminary hearing testimony to stand uncontested." Shinn objected at trial to the admission of Ms. Beasley's preliminary hearing testimony. (74RT 8271-8273.) Respondent also denies "Trial counsel failed to investigate and introduce the serious inconsistencies among Gail Beasley's various statements, which would have discredited her testimony at trial upon which the prosecutor heavily relied to prove that petitioner shot the victim. . . . Had trial counsel adequately cross-examined Ms. Beasley, the jury would have understood that the inaccuracies and changes in her story made her recall of the shooting highly unreliable, and not worthy of serious consideration during deliberations." (Petn. 109-110, ¶ 4.a.(3).) Respondent alleges that through cross-examination at the preliminary hearing Shinn was able to elicit testimony from Ms. Beasley as follows: after all the shots had been fired she ran to the bedroom where Marsha was just getting up from a bed watching TV (2CT 548-552); she was unable to identify anyone at the lineup (2CT 552); she agreed it would be difficult to identify anyone because she only saw them for about two seconds (2CT 553); she was not focused on anyone in particular (2CT 553); she did not get a good look at the shooter's features (2CT 553); she could not identify anyone at the grand jury proceedings (2CT 553-554); in the two seconds

that she looked outside, she only saw the man shooting, the officer on the ground, and a woman at the back of the car (2CT 580); she agreed that seeing petitioner in the grand jury proceedings, TV, and newspapers helped her identify petitioner (2CT 581-582); she agreed she could not identify anyone except for light complexion, which could fit 1,000 people (2CT 582); and she viewed the shooting from about 40 feet (2CT 592). Respondent alleges that Shinn's cross-examination was within the standards of competence, and that the decision to rely on that prior cross-examination at trial was within the standards of competence.

298. Respondent denies that "Ms. Beasley did not know how much of the shooting she witnessed." (Petn. 110, ¶ 4.a.(3)(a).) Respondent alleges that Ms. Beasley saw the following, as she testified at the petitioner's penalty retrial: a motorcycle police officer pulled over Linda Smith's car (Retrial 19RT 2025-2026, 2050); a White woman talked to the police officer near the rear of the car (Retrial 19RT 2026); petitioner was in the front passenger seat of the car (Retrial 19RT 2027, 2050-2057); a Black man with a dark complexion was in the back seat of the car (Retrial 19RT 2035, 2037); the officer had a pad in his hand as if he were giving the woman a citation (Retrial 19RT 2027); they headed back to the driver's side of the car (Retrial 19RT 2028); the officer bent over (Retrial 19RT 2028); there was a gunshot and the officer fell back as if he had been shot; (Retrial 19RT 2029); petitioner got out of the car (Retrial 19RT 2030, 2094); petitioner walked toward the officer with a gun in his hand (Retrial 19RT 2030); petitioner shot the police officer (Retrial 19RT 2031); the officer fell to the ground (Retrial 19RT 2031-2032); and eventually, petitioner was right over the officer (Retrial 19RT 2033).

299. Respondent denies that "Ms. Beasley saw something on the day Officer Verna was shot, but it was unclear, even to her. Ms. Beasley believed that she saw the shooting take place; however, she cannot consistently recall

how much of the shooting she saw." (Petn. 110, ¶ 4.a.(3)(a)(i).) Respondent alleges that Ms. Beasley saw the shooting as she testified at the petitioner's penalty retrial. (¶ 298, *ante.*) Respondent alleges that Ms. Beasley failed to testify fully to the facts she was aware of at the grand jury proceedings and preliminary hearing because of public pressure not to be a snitch: after the shooting but before going to the lineup, Ms. Beasley was ridiculed by people that "hung out" at the park; they called her a "snitch" and things like that (Retrial 19RT 2044-2045); these people made her feel bad and afraid for her safety (Retrial 19RT 2045); and one day a man from the park came over and told Ms. Beasley that she was a snitch and that her mother's house "could get blowed up" (Retrial 19RT 2045-2046).

300. Respondent admits that "She first told the police that she saw the first shot through the last shot. [Citation.]" (Petn. 110, ¶ 4.a.(3)(a)(ii).)

301. Respondent denies that "By the time she testified at the preliminary hearing, she was unable to determine exactly how much of the shooting she saw. She first testified that she saw all but the first two shots. [Citation.] By the time she was cross-examined by counsel for petitioner's co-defendant, she admitted to seeing all but the first four shots. [Citation.] Ms. Beasley then testified on redirect that she saw all but the first shot. [Citation.]" (Petn. 110, ¶ 4.a.(3)(a)(iii).) Respondent alleges that Ms. Beasley testified at the preliminary hearing: on direct, that she heard two shots, looked out the window, and then heard two more shots (2CT 520-521, 528-529) and that the number of shots she heard was an estimate (2CT 529); on cross-examination by Shinn, that she heard a shot or shots, and then looked out the window as additional shots were fired (2CT 551-552); on cross-examination by Raynard's counsel, that she heard four shots all together, and that she went to the window as she was hearing the shots (2CT 559); and on re-direct, that she heard a shot, looked out the window, and heard three more shots (2CT 573-574). Thus, Ms. Beasley testified consistently

throughout the hearing that she heard approximately one or two shots, looked out the window, and heard the remaining shots; she heard a total of approximately four shots.

302. Respondent denies that "Trial counsel unreasonably failed to cross-examine Ms. Beasley on any of these substantial and glaring inconsistencies. Given the importance placed on this witness by the state, Mr. Shinn had an obligation to discredit her testimony in his closing argument by pointing out that she was unable to consistently remember what she saw for the short time she was on the witness stand." (Petn. 110-111, ¶ 4.a.(3)(a)(iv).) Respondent alleges there were no "glaring inconsistencies" regarding the number and timing of the shots she heard and where Ms. Beasley was when she heard them. While Ms. Beasley's account to the police alleged that she saw much more of the shooting than she testified to at the preliminary hearing, it was reasonable not to elicit a more accurate fuller description of the crime, including her account that the shooter exited the car from the front passenger seat, because such testimony would have been damaging to petitioner's defense. (Exh. 12, p. 158.) Additionally, if Shinn had cross-examined Ms. Beasley at trial, there is a reasonable probability she would have overcome her fears of community pressure (as she did at the penalty retrial), and unequivocally identified petitioner as the shooter. (Retrial 19RT 2050-2057, 2101.)

303. Respondent denies that "Ms. Beasley did not know how many people she saw outside of the car." (Petn. 111, ¶ 4.a.(3)(b).) Ms. Beasley consistently testified that, during the shooting, there were only three people outside of the car: the white female driver, the light skinned male shooter, and Officer Verna. (1Supp. CT 196-201, 205-206; 2CT 518-530; Retrial 19RT 2026-2033, 2036-2037, 2062.) Although Ms. Beasley initially reported seeing the darker skinned Black man from the back seat outside the car (Exh. 12, pp. 156, 158), she later clarified that she did not see the rear passenger outside and

that she had been unsure when she made statement in her initial report (Retrial 19RT 2064, 2078; see also 2CT 539).

304. Respondent denies that "Among the most material of discrepancies and inconsistencies was Ms. Beasley's testimony refuting significant facts in her first statements to the police." (Petn. 111, ¶ 4.a.(3)(b)(i).) Respondent alleges that the discrepancies between her first statement and her subsequent testimony, as to the number of people outside the car, was explained, as noted above. (¶ 303, *ante*; Retrial 19RT 2064, 2078; see also 2CT 539.) Respondent admits that "She initially reported that she saw a black man 'jump out and back in the car' during the shooting. [Citation.] She said this man was black, about 5'8", 165 lbs., 26 years old, wearing a 'jheri' curl hair style, a gray tank top, and gray gym shorts with white piping on the side. [Citation.]" (Petn. 111, ¶ 4.a.(3)(b)(i).)

305. Except as noted, respondent admits that "Despite this very detailed description, including the color of the piping on the man's gym shorts, by the time she testified at the grand jury Ms. Beasley was unable to recall seeing anyone besides the shooter and the driver outside of the car. [Citation.] The most she claimed was seeing the head of a black man in the back seat of the car. [Citation.]" (Petn. 111, ¶ 4.a.(3)(b)(ii).) Respondent alleges Ms. Beasley also testified that she saw Officer Verna outside the car. (1Supp. CT 193-195.) Respondent denies that Ms. Beasley's was "unable to recall" seeing anyone else, and alleges that the discrepancies between her first statement and her subsequent testimony, as to the number of people outside the car, was explained, as noted above. (¶ 303, *ante*.)

306. Except as noted, respondent admits that "Even this memory faded significantly. By the time she testified at the preliminary hearing, she could only 'vaguely' recall seeing someone of an unknown race and gender in the back seat of the car. [Citation.]" (Petn. 111, ¶ 4.a.(3)(b)(iii).) Respondent denies that Ms.

Beasley's memory "faded," and alleges that she did not testify fully to the facts that she remembered because of community pressure not to be a snitch. (Retrial 19RT 2044-2046.)

307. Respondent admits that "Shinn failed to cross-examine Ms. Beasley regarding this third person she initially described in minute detail, as also being outside of the car. Mr. Shinn asked no questions about how Ms. Beasley could give such a detailed description of someone she only 'vaguely' recalled seeing, and only then in the back seat of the car." (Petn. 111-112, ¶ 4.a.(3)(b)(iv).) Respondent denies that "There was no tactical advantage for Shinn to fail to point out to the jury how Ms. Beasley's memory of the third person being outside the car conveniently faded so that her version of events fit the state's theory that the back seat passenger did not leave the car. Nor was there a tactical advantage to fail to point out that her fading memory served the interest of Raynard Cummings and, thus, her mother's friend, Mary Cummings." (Petn. 112, ¶ 4.a.(3)(b)(iv).) Respondent alleges that Ms. Beasley was asked about her prior statement identifying Raynard as being outside the car on direct by the prosecutor, and that she explained she had initially been mistaken in thinking he was outside the car. (2CT 539.) Shinn could have reasonably concluded that further cross-examination of Ms. Beasley on her statements about Raynard would not have been as fruitful as other areas that he did pursue at the preliminary hearing. Respondent also alleges that Mary Cummings was an "acquaintance" of Ms. Beasley's mother (Mackey Como), not a "friend." (Retrial 24RT 3072.)

308. Respondent denies that "Ms. Beasley did not know whether she saw the car drive away." (Petn. 111-112, ¶ 4.a.(3)(c).) Respondent alleges that Ms. Beasley knew that she did not see the car drive away. (1Supp. CT 206; 2CT 530; Retrial 19RT 2038.)

309. Respondent admits that "Hours after the shooting, Ms. Beasley

reported to the police that she saw the car involved in the shooting drive away east bound on Hoyt Street. [Citation.]" (Petn. 112, ¶ 4.a.(3)(c)(i).) Respondent alleges that she also reported, hours after the shooting, that she did not "know what direction they went." (Exh. 12, p. 156.)

310. Respondent admits that "By the time she testified before the grand jury, she no longer recalled seeing the car drive away. [Citation.]" (Petn. 112, ¶ 4.a.(3)(c)(ii).)

311. Respondent denies that "Minimally competent counsel would have recognized the significance of this inconsistency within the context of the evidence as a whole. Trial counsel failed to demonstrate that Ms. Beasley's failure of memory was again highly convenient for the prosecution. When Ms. Beasley was interviewed by the police she did not report seeing anyone pick up something by the fallen officer or see the car stop directly in front of [t]he house, as did several other witnesses. [Citation.] Had Ms. Beasley continued to remember seeing the car take off but not stop to retrieve something by the officer's body – same as if she continued to remember seeing a third man outside the car – her recollection would directly conflict with the prosecution's theory." (Petn. 112, ¶ 4.a.(3)(c)(iii).) Respondent alleges that Ms. Beasley's failure to see the car stop in front of her house and someone leave the car to pick up something was not inconsistent with the other witnesses–her failure to so observe was easily explained by her leaving the window where she observed the petitioner shooting the officer. (2CT 530, 546; accord, 1Supp. CT 201; Retrial 19RT 2033.) For the same reasons, her inability to see the car drive away was consistent with her leaving the window where she observed the shooting; of course, it was uncontested that the car did drive away. Similarly, her failure to remember seeing the rear passenger outside the car was also rationally explained. (2CT 539; see also Retrial 19RT 2064, 2078.)

312. Respondent denies that "Petitioner's jury was never made aware of

Ms. Beasley's convenient, false and manufactured memory lapses. If they had been, they would have had ample reason to give little, if any, weight to her testimony, including her in-court identification of petitioner." (Petn. 113, ¶ 4.a.(3)(c)(iv).) Respondent alleges that Ms. Beasley's memory lapses were either genuine, based on the passage of time, and, to the extent they were manufactured as a result of community pressure, they were inconvenient and made the prosecution's burden more difficult. Accordingly, Shinn's cross-examination of Ms. Beasley was within the standards of competence. (See, e.g., 2CT 548-554, 580-582, 592.) Moreover, it adequately apprized the jury of any weaknesses in Ms. Beasley's testimony as well as the prosecution case as a whole. Finally, there is no reasonable probability any additional efforts by Shinn in this regard would have made a difference in the verdict, especially in light of the other evidence of guilt. (68RT 7527-7529, 7592-7597, 7604; 69RT 7781-7785, 7789; 73RT 8164-8170.)

313. Respondent denies that "Minimally prepared counsel would or should have known that Marsha Holt, as with Ms. Beasley, was the source of an ever-changing story. Shinn's failure to impeach Ms. Holt prevented the jury from knowing that her alleged observations were wholly unreliable." (Petn. 113, ¶ 4.a.(4).) Since petitioner's allegation lacks specificity, and Shinn is unavailable to be interviewed, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (See Petn. 113-114.)

314. Respondent denies that "There was no reliable indication Ms. Holt ever saw the shooter approach the victim before shots were fired." (Petn. 113, ¶ 4.a.(4)(a).) Respondent alleges Ms. Holt consistently and repeatedly said she saw petitioner get out of the car and walk around toward the officer. (Exh. 42; 1Supp. CT 216; 68RT 7531-7532, 7579-7580; Retrial 18RT 1933-1934, 1978-

1979.)

315. Respondent denies that "Ms. Holt repeatedly altered her statement to say she did see the shooter approach the victim before the shooting began [citation]; did not see the shooter approach the victim prior to the shooting [citations]; did see the shooter approach the victim [citation]." (Petn. 113, ¶ 4.a.(4)(a)(i).) Respondent alleges Ms. Holt consistently reported to the police, and testified at the grand jury proceedings, trial, and penalty retrial that she saw the shooter get out of the car and approach Officer Verna. (Exh. 42; 1Supp. CT 216; 68RT 7531-7532, 7579-7580; Retrial 18RT 1933-1934, 1978-1979.) She testified at the preliminary hearing that she saw petitioner sitting in the passenger seat (2CT 324-325), and standing while shooting the officer (2CT 327, 345, 474), but she did not testify she did not see petitioner get out of the car. Ms. Holt also testified that she saw the man in the car, and the next time she saw him he was outside the car (2CT 340), but he may have been walking toward the officer at that time. (See 2CT 342 [when asked if they were standing all together, Ms. Holt said, "Just like he got off the car and came around the car and was talking to the officer."].)

316. Respondent denies that "Ms. Holt's recall was so unreliable that she was incapable of consistently remembering whether she saw the shooter approach the victim throughout the duration of her trial testimony. [Citation.]" (Petn. 113, ¶ 4.a.(4)(a)(ii).) Respondent alleges Ms. Holt testified consistently that she saw petitioner get out of the passenger side of the car, and walk around the car, toward where the officer was. (68RT 7531-7532, 7579-7580.)

317. Respondent denies that "Inexplicably, trial counsel failed to impeach her with her contradictory testimony. The jury remained unaware of Ms. Holt's implausible, changing recollection of having both seen and not seen the shooter approach the victim. Consequently, the jury did not know that her ability to recall what she saw was at best, erratic and thus patently

untrustworthy." (Petn. 113, ¶ 4.a.(4)(a)(iii).) Respondent alleges there was no inconsistency for Shinn to question. (Compare Exh. 42, 1Supp. CT 216, and 68RT 7531-7532, 7579-7580 with 2CT 340, 342.)

318. Respondent denies that "Ms. Holt claimed that she heard and saw the entire shooting; however, she could not consistently state how many shots she allegedly heard or saw." (Petn. 114, ¶ 4.a.(4)(b).) Respondent alleges that Ms. Holt consistently said that she heard approximately five shots. (Exh. 42, p. 1621; 2CT 327, 330, 339, 473; 68RT 7540, 7547, 7569; Retrial 18RT 1954.)

319. Except as noted, respondent admits that "Immediately after the shooting she reported that she heard the first shot, turned to look out the window and saw five more shots. [Citation.]" (Petn. 114, ¶ 4.a.(4)(b)(i).) Ms. Holt did not say that she "saw" five more shots; rather, she reported that five more shots were fired. (Exh. 42, p. 1622.)

320. Respondent denies that "Less than four hours later, her story changed." (Petn. 114, ¶ 4.a.(4)(b)(ii).) Respondent admits that "Now she reported that she heard the first shot, may have seen the next two shots, and saw the last two shots. [Citation.]" (Petn. 114, ¶ 4.a.(4)(b)(ii).) Respondent alleges that Ms. Holt consistently said that she heard the first shot, and then heard four to five additional shots; she did not specify in her first statement how many of the additional shots she had *seen*. (Compare Exh. 42, p. 1622 with Exh. 42, p. 1621.)

321. Respondent denies that "By the time she testified at the grand jury, she recalled seeing and hearing a total of only two to three shots. [Citation.]" (Petn. 114, ¶ 4.a.(4)(b)(iii).) Respondent alleges that, at the grand jury proceedings, Ms. Holt testified she saw petitioner shooting after the first shot but never testified to the total number of shots she heard or saw. (1Supp. CT 219.) While Ms. Holt testified she thought the bullets "hit him here . . . one or two in the chest" (1Supp. CT 217-218), she did not testify that those were the

only bullets she heard fired after the first shot. She also testified at the preliminary hearing and at trial that she heard approximately five shots. (2CT 327, 330, 339, 473; 68RT 7540, 7547, 7569; Retrial 18RT 1954.)

322. Respondent denies that "Trial counsel had no tactical reason for failing to impeach Ms. Holt on her highly impaired ability to accurately recall the event she claimed to have both seen and heard. Ms. Holt was a key prosecution witness, one whom the prosecution strongly urged the jury to rely upon in determining petitioner's guilt. Trial counsel, on the other hand, essentially remained mute on the subject of Ms. Holt's seriously faulty and unreliable memory." (Petn. 114, ¶ 4.a.(4)(b)(iv).) Respondent alleges that the areas of inquiry petitioner proposes for possible impeachment would have failed because Ms. Holt's statements were consistent. Moreover, Shinn's cross-examination of Ms. Holt, which was within the standards of competence, covered the following: Ms. Holt ran into Ms. Beasley in the hallway, not the bedroom (68RT 7553); she had previously testified she had not seen the gun (68RT 7556); she had previously testified she did not see the man shooting the officer (68RT 7561); she denied having previously seen petitioner on TV or in the newspaper (68RT 7562); she previously testified she had seen petitioner on TV and in the newspaper (68RT 7562-7565); she agreed her memory was "kind of hazy" (68RT 7566); some things she could no longer remember (68RT 7566); when she attended the live lineup, she filled out her slip saying she was unable to identify anyone (68RT 7566-7568); she had said that Ms. Beasley spoke to her after the second or third shot (68RT 7571); there was no more shooting after Officer Verna hit the ground (68RT 7574); and a bush obstructed part of her view (68RT 7589). Moreover, it adequately apprized the jury of any weaknesses in Mr. Holt's testimony as well as the prosecution case as a whole. Finally, there is no reasonable probability any additional efforts by Shinn in this regard would have made a difference in the verdict, especially in light of the

other evidence of guilt. (68RT 7592-7597, 7604; 69RT 7781-7785, 7789; 73RT 8164-8170; 74RT 8298-8304, 8310, 8322–8323, 8343-8344, 8348-8349.)

323. As specifically described in the following paragraphs (¶¶ 324-339, *post*), respondent denies that "Trial counsel unreasonably failed to litigate the admissibility of the tainted eyewitness identifications of petitioner, which the prosecution manufactured and introduced as the only means of corroborating the testimony of the only other person who placed petitioner at the scene of the shooting, his co-defendant, Pamela Cummings. Minimally competent investigation and litigation of the issue would have resulted in the suppression and/or otherwise successful challenge to the admissibility and/or credibility of the eyewitness identification on grounds including, but not limited to the following[.]" (Petn. 114-115, ¶ 5.)

324. Respondent denies that "The highly suggestive line-up irrevocably tainted any future eyewitness identification of petitioner." (Petn. 115, ¶ 5.(1).) Since petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an introduction to the more specific allegations that follow. (See Petn. 115-119.)

325. Respondent admits that "The eyewitnesses to the shooting attended a live line-up on June 6, 1983." (Petn. 115, ¶ 5.(1)(a).) Respondent denies that "This line-up was tainted from the moment the witnesses gathered on Hoyt Street to wait for the police bus to take them to the police station. The taint thickened to the point of irreversibility, once the witnesses actually viewed petitioner in line-up number seven." (Petn. 115, ¶ 5.(1)(a).) Respondent alleges that having witnesses who all live on the same street gather at a central point does not taint a subsequent identification. Since there was no taint in waiting together, there was no taint to "thicken[]." Also, the live lineup containing

petitioner was not unduly suggestive so it did not taint any identifications; indeed, many witnesses were unable to identify anyone in the lineup. (Return Exh. 17, pp. 115-116, 119-136.)

326. Respondent denies that "The state intentionally ensured that the eyewitnesses would come to some agreement on the identity of the shooter by forcing the witnesses to gather together to wait for a ride to the police station to view the line-ups. [Citation.]" (Petn. 115, ¶ 5.(1)(b).) Respondent alleges the declarations relied on by petitioner, by two of the people who participated as witnesses in the lineup, have no personal knowledge about the state's intentions. Respondent alleges that the witnesses were transported together because such transportation was the most efficient way of transporting a large number of witnesses to view the lineup. (See Return Exh. 17, p. 114 [listing approximately 40 people who viewed lineups].) Respondent admits that "the gathered witnesses compared what each had seen and who they saw do it: 'We waited on the street for awhile before the bus arrived and talked to each other while we waited about the shooting and what each of us had seen.' [Citation.]" (Petn. 115, ¶ 5.(1)(b).)

327. Respondent denies that "Once at the line-up, the police indicated to the witnesses which suspect the police believed was involved in the shooting. Petitioner, and petitioner alone, appeared to the witnesses as if he had just been severely beaten. The witnesses could not help but notice the bruising and blood on petitioner's, and only petitioner's, face[.]" (Petn. 115, ¶ 5.(1)(c).) Respondent alleges that, at the live lineup, petitioner had a large bruise or scrape on one side of his face, a scar on his neck, and he had shaved his mustache. (Retrial 17RT 1730-1731, 1765; Retrial 18RT 1828-1829, 1944; Retrial 19RT 2047-2048; Retrial 20RT 2291.) The abrasion on the side of petitioner's face occurred when petitioner was removed from the car upon being arrested; the scar on petitioner's neck resulted from petitioner's attempt to commit suicide the

night he was arrested; petitioner shaved his own mustache. (Retrial 19RT 2157; Return Exh. 16.) Thus, the police did not intentionally or negligently do anything to indicate that petitioner was the person they believed was involved in the shooting.

328. Respondent denies that "'In the line-up, Mr. Gay looked like he had just been beaten up, his face was cut and his face was smeared with what looked to be dried blood. He was the only one in the line-ups I saw who looked like he had just been beaten and it suggested to me that he must be the man the police wanted us to identify.' [Citation.]" (Petn. 115-116, ¶ 5.(1)(d).) Respondent alleges that the scrape on petitioner's face and the scar on his neck did not give him the appearance that he had been beaten. (Return Exhs. 16, 17, pp. 115-116.) Moreover, Petitioner's appearance made it more difficult for witnesses to identify petitioner; it did not suggest to the witnesses that petitioner was the person who they were meant to identify. (2CT 587-588 [Gail Beasley]; 68RT 7550, 7568, 7587 [Marsha Holt]; Retrial 17RT 1729-1731 [Sabrina Martin]; Retrial 17RT 1764-1765 [Rosa Martin]; Retrial 18RT 1944 [Marsha Holt]; Retrial 19RT 2042, 2047 [Gail Beasley].)

329. Respondent denies that "'The first line-up with light skinned men included a man who was beaten up very badly. His face was bruised and the skin on his cheek was cut and scabbed. It was obvious that this was the man that the police thought had committed the crime because he was the only person in all of the line-ups with any injuries[.]' [Citation.]" (Petn. 116, ¶ 5.(1)(e). Respondent denies this based on the allegations above. (¶ 328, *ante*.)

330. Respondent denies that "'We saw several different line-ups. In one group, there was a light skinned black man who was very badly beaten up. He appeared to have several bruises on his face and two black eyes. It was obvious to me that the police thought this man was involved in the officer's shooting, because he was the only person in all of the line-ups who clearly had been

beaten-up.' [Citation.]" (Petn. 116, ¶ 5.(1)(f).) Respondent denies this based on the allegations above. (¶ 328, *ante*.)

331. Respondent denies that "During petitioner's line-up, another witness openly discussed within earshot of all those present her opinion that petitioner was probably the suspect. Despite this serious breach of line-up protocol the witnesses were not admonished to disregard this verbal selection of petitioner." (Petn. 116, ¶ 5.(1)(g).) Respondent alleges that all the witnesses were separated as much as possible while viewing the lineups, the witnesses were all admonished not to talk to each other while the lineups were on the stage, the witnesses were all admonished to make their own identifications, and the witnesses all followed the admonitions. (83RT 9536-9543.) Respondent alleges that Deputy District Attorney Watson was present during the lineup and did not hear any such discussion. (Return Exh. 7, ¶ 9.)

332. Respondent denies that "Not surprisingly, since petitioner did not shoot the victim, no eyewitness selected him during the live line-ups. The building taint of the pre-lineup discussion, the suggestive line-up, and the verbal identification of petitioner by a witness unassociated with the shooting began to set in more quickly for some than others." (Petn. 116, ¶ 5.(2).) Respondent alleges that Petitioner did shoot and kill Officer Verna. (1Supp. CT 198-200, 205-208, 215-218, 222-223, 522-530, 534; 2CT 324-329, 335, 519-524, 540, 667-671, 711-717, 725-726; 68RT 7527-7529, 7592-7597, 7604; 69RT 7781-7785, 7789; 73RT 8164-8170; Retrial 17RT 1796-1798; Retrial 18RT 1823, 1928-1938, 1952, 1957; Retrial 19RT 2030-2037, 2056-2057; Retrial 21RT 2500-2503, 2523-2524.) Respondent alleges that the witnesses who viewed petitioner in the lineup, but did not identify him, did not fail to identify him because he was innocent; rather, they failed to identify him for a variety of other reasons, including but not limited to, petitioner's changed appearance, community pressure not to be a "snitch," and a desire to simply not be involved

in the case. (2CT 587-588; 68RT 7550, 7568, 7587, 7647; Retrial 18RT 1829, 1944; Retrial 19RT 2042, 2044-2045, 2047.) Respondent alleges that if the pre-lineup discussion, the lineup, and the verbal identification of petitioner by a witness unassociated with the shooting had occurred and was suggestive, then the witnesses who went to observe the lineup would have identified petitioner.

334. Respondent denies that "Ms. Holt was able to identify petitioner only after she was shown additional photos of him, in an unrecorded police interview that took place immediately after the line-up and recognized his photograph as being someone she had seen in the lineup. [Citation.]" (Petn. 117, ¶ 5.(2)(a).) Respondent alleges that Ms. Holt recognized petitioner when she saw him in the lineup but was a little unsure because he had shaved and had scars and bruises. (68RT 7568, 7587; Return Exh. 17, p. 117.) She also did not want to be involved in the case. (2CT 455.) Ms. Holt told officers that, without the scar, petitioner looked "exactly like the man she saw the night of the incident." (68RT 7587-7588; Return Exh. 17, p. 117.) Afterwards, they showed her additional pictures of petitioner without the injuries, and Ms. Holt identified petitioner. (68RT 7568.) Also, prior to the lineup, on the day of the shooting, Ms. Holt identified the passenger, who was possibly "Latin or White/Negro mix," as the shooter. (Exh. 42.)

335. Except for the word "suddenly," Respondent admits that "Ms. Beasley also failed to identify anyone during the line-up; however, like her friend, Ms. Holt, during an undocumented police interview immediately after the line-up, she was suddenly able to identify a photograph of petitioner. [Citation.]" (Petn. 117, ¶ 5.(2)(b).) Respondent alleges that Ms. Beasley, like Ms. Holt, indicated at the lineup that petitioner "looked like the shooter, but scar on face and hair closer made [her] unsure." (Return Exh. 17, p. 118.) Respondent denies that "Despite this [post-lineup] identification, Ms. Beasley, who admitted to seeing the shooter for only two seconds [citation] could not

make a positive identification at either the grand jury or the preliminary hearing – each time she could only say that petitioner resembled the shooter. [Citation.]" (Petn. 117, ¶ 5.(2)(b).) Respondent alleges that Ms. Beasley saw petitioner for more than two seconds but that she agreed that it was difficult to identify someone whom she only saw for two seconds because she was a poor judge of time and she had been pressured to not to testify. (2CT 519, 553; Retrial 19RT 2044-2045.) Respondent alleges that Ms. Beasley testified before the grand jury: that when she saw the man outside the car shooting the officer, a Black person remained in the back seat of the car; that the shooter was a "light; very light complected" Black man; petitioner was the same complexion as the shooter; and that viewing a photograph of petitioner, but ignoring the injuries on his face and neck, petitioner looked "very close" to the shooter. (1Supp. CT 205-208.) Respondent alleges that Ms. Beasley testified at the preliminary hearing: that when she saw the man outside the car shooting the officer, a person remained in the back seat of the car; that the shooter was a "very light" complected Black man, unlike Raynard; that viewing a photograph of petitioner, petitioner had a "good resemblance" to the shooter; and that, on a scale of 1 to 10, petitioner was a 9½ in terms of resemblance to the shooter. (2CT 519-524, 530, 540, 561, 565-566.)

336. Respondent also alleges that, prior to the lineup, on the day of the shooting, Ms. Beasley identified the front seat passenger, a "male Black light skin," as the shooter. (Exh. 12.) Then, after the shooting but before going to the lineup, Ms. Beasley was ridiculed by people that "hung out" at the park; they called her a "snitch" and things like that. (Retrial 19RT 2044-2045.) These people made her feel bad and scared for her safety. (Retrial 19RT 2045.) One day a man from the park came over and told Ms. Beasley that she was a snitch and that her mother's house "could get blowed up." (Retrial 19RT 2045-2046.) Consequently, Gail Beasley did not identify anyone at the lineup because she

had felt pressure in her community not to be a "snitch." (Retrial 19RT 2044-2045.) After the lineup, Ms. Beasley spoke to a detective and told him that number four in the lineup, petitioner, was the shooter. (Retrial 19RT 2046-2047.)

337. Except as noted, respondent admits "When first interviewed by the police, Mr. Thompson described the shooter as a darker skinned black man who sat in the back seat of the car." (Petn. 117, ¶ 5.(2)(c).) Respondent denies that Mr. Thompson described the shooter as "darker skinned," and alleges that he described the shooter as "medium to dark complexion." (Exh. 45, p. 1641.) Respondent denies that "Mr. Thompson explained to the police sketch artist that he could only describe the fair skinned front passenger's left profile since that was all he saw. [Citation.]" (Petn. 117, ¶ 5.(2)(c), citing Exh. 45 at 1641.) Respondent alleges that Mr. Thompson had the sketch artist draw a picture of the shooter, who he said had very light skin and a mustache. (68RT 7639-7640.) Respondent admits that "Robert Thompson did not identify petitioner as the shooter until he testified at the preliminary hearing," but denies this occurred "after the police had coached and helped him to remember a different version of events and then, only after he had been told that petitioner was in the courtroom. [Citation.]" (Petn. 117, ¶ 5.(2)(c).) Respondent alleges that no one ever told Mr. Thompson what to say, and he did not talk to any officers between the grand jury proceedings and the preliminary hearing. (69RT 7692-7693, 7719; see Return Exh. 7, ¶ 6.) Respondent alleges that Deputy District Attorney Watson did not tell Mr. Thompson, prior to his preliminary hearing testimony, that the shooter was "supposed to be Gay or Cummings." (Return Exh. 7, ¶ 6; cf. 3CT 692.) Respondent admits the following colloquy occurred during the preliminary hearing:

> [By Mr. Shinn] Q: And the fact that Mr. Gay was sitting in the court today that helped you identify him, didn't it?

A: Yes. [Citation.]

(Petn. 117, ¶ 5.(2)(c); see 3CT 707.) Respondent alleges that Mr. Thompson was able to identify petitioner as the shooter at both the lineup and the grand jury proceedings but failed to do so because, among other reasons, he did not want to get involved; prior to coming to the preliminary hearing Mr. Thompson thought he would be able to identify petitioner as the shooter based on his observations of him at the time of the crime. (3CT 707-709; 68RT 7644, 7647, 7653; 69RT 7657-7658, 7664, 7666, 7668; Retrial 18RT 1860-1863.)

338. Respondent denies that "Eleven-year-old Shannon Roberts was never able to honestly identify petitioner as the shooter [citations]; however, he did identify him as such for the first time during his testimony at trial. [Citation.] The only reason he did so was because either a police officer or someone from the district attorney's office pointed to petitioner as he sat in the courtroom and told Roberts that petitioner was the shooter [citation]:

> As far as I knew, by the time I testified at Mr. Gay's trial, I had not seen the shooter since the day of the crime. Before I entered the courtroom to testify at Mr. Gay's trial, the detectives asked me if I could see Mr. Gay in the courtroom. I could not identify him, so they had to point him out to me, and they told me that he was the shooter. Later, while I was testifying, I was asked if I could point out the man I had seen. I pointed to the man the officers had shown me before I entered the courtroom. If it had not been for the detectives, I would not have identified Kenneth Gay as the shooter, because I was not sure what the shooter looked like. [Citation.]

Had it not been for this blatant state misconduct, Mr. Roberts would not have identified petitioner as the shooter before the jury." (Petn. 118, ¶ 5.(2)(d).) Respondent alleges that, on the day of the shooting, Shannon Roberts identified the shooter as the man in the front passenger seat who was "Mexican or

Black/Caucasion" with a mustache and said that the rear seat passenger never left the car. (Exh. 40.) Respondent alleges that such a statement could not have been coached by the officer taking the statement who had little knowledge of the crime itself and had no reason to coax a statement that would implicate petitioner since petitioner was not even a suspect at that time. (See also Return Exh. 7, ¶ 6.) Respondent alleges that Mr. Roberts was not coached prior to testifying at the grand jury since Mr. Roberts did not identify petitioner's photograph and instead testified consistently with his prior statement, that a "real light black" man who was the passenger was the shooter and that the rear passenger, a Black man, never got out of the car during the shooting. (2Supp. CT 522-530, 534; see Return Exh. 7, ¶ 6.) Respondent alleges that Mr. Roberts was not coached prior to testifying at the preliminary hearing since Mr. Roberts did not identify petitioner as the shooter and instead testified consistently with his prior statement, that a "White" man was the shooter, not a Black man who got out of the car after the shooting. (3CT 711-717, 720, 725-726, 734; see Return Exh. 7, ¶ 6.) Respondent admits that Mr. Roberts directly identified petitioner for the first time at trial, but alleges that it was not the product of any coaching since he had never been coached prior to making any of his earlier statements. (See Return Exh. 7, ¶ 6.)

339. Respondent admits that "Each of the eyewitnesses to the shooting were given many opportunities to see petitioner, his photograph, or a likeness of him prior to testifying at trial. The television and newspaper media were saturated with petitioner's likeness or photograph. . . . In addition to the voluminous and prominent publications of petitioner's photograph [citation] or likeness, the witnesses also were exposed to his photograph during their testimony before the grand jury." (Petn. 118-119, ¶ 5.(3).) Respondent denies that "The media saturation was so intense that several witness[es] testified that seeing his photograph in the news media influenced their identification of

petitioner. [Citations.] . . . Such repeated exposures to petitioner's photograph, unfairly and irreparably influenced the witnesses' false, misleading and unreliable selection of petitioner." (Petn. 118-119, ¶ 5.(3).) Respondent alleges that Robert Thompson said, at the grand jury proceedings, that the media had "destroyed" or "distorted" his mind when he failed to identify petitioner (2Supp. CT 462; 69RT 7687), but he meant to express frustration with the media who had falsely reported that no one in the neighborhood had tried to help Officer Verna or the investigation (Retrial 17RT 1781, 18RT 1825-1826); he later explained that he could have identified petitioner, from seeing him at the time of the crime, but did not do so because he did not want to get involved. (3CT 707-709; 68RT 7644, 7647, 7653; 69RT 7657-7658, 7664, 7666, 7668; Retrial 18RT 1860-1863.) Mr. Thompson also felt somewhat responsible for the officer getting shot because he felt his hammering at the time of the murder might have distracted the officer in some way. (Retrial 17RT 1789.) Respondent alleges that Gail Beasley agreed, at the preliminary hearing, that the media coverage had helped her identify petitioner as a possible suspect, but in fact, she was not influenced by the media and instead hedged her testimony because she felt pressure from her community not to be a "snitch." (2CT 581-582; Retrial 19RT 2044-2045.) Respondent alleges that reports given by Marsha Holt, Gail Beasley, and Shannon Roberts to police immediately after the crime (Exhs. 12, 40, 42) and the description of the shooter that Mr. Thompson gave to the sketch artist (2CT 693-697; 68RT 7639-7640; 3Supp. 2d CT 667 [Def. Exh. N, the sketch drawn at the instructions of Mr. Thompson]), which were all necessarily uninfluenced by any subsequent media coverage, were all consistent with, and showed the guilt of, petitioner.

340. As specifically discussed in the following paragraphs (¶¶ 341-342, *post*), respondent denies that "Shinn failed to defend petitioner from the state's false charge of murder. Trial counsel's failings included but were not limited

to the following[.]" (Petn. 129, ¶ 9.)

341. Respondent denies that "Despite literally being handed a long list of exculpatory and impeachment witnesses, Shinn failed to not only interview these witnesses, he also failed to use their previous statements and prior testimony to support petitioner's innocence." (Petn. 129, ¶ 9.a.) Since petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be an summary of the more specific allegations that precede. (See Petn. 60-78, 104-114.) Respondent also denies this allegation for the same reasons the corresponding allegations above are denied. (See ¶¶ 99-210, 275-322, *ante*.)

342. Respondent denies that "Despite the obvious need for expert testimony, Mr. Shinn consulted no experts." (Petn. 129, ¶ 9.b.) Since petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be a summary of the more specific allegations that precede. (See Petn. 78-103.) Respondent also denies this allegation for the same reasons the corresponding allegations above are denied. (See ¶¶ 211-274, *ante*.)

343. Respondent denies that "Counsel's failings individually and cumulative deprived petitioner of his state and federal constitutional rights to the effective assistance of counsel and a fair and reliable determination of guilt and penalty. But for counsel's unprofessional failings the result of the guilt phase would have been different." (Petn. 129-130, ¶ 10.) Since petitioner's allegation lacks specificity, respondent believes there is a good faith basis to believe the facts are untrue. (See *People v. Duvall*, *supra*, 9 Cal.4th at pp. 474, 485.) Respondent acknowledges that this allegation appears to be a summary of the entire claim. (See Petn. 59-130.) Respondent alleges that petitioner was not

prejudiced by any act or omission that fell below the standards for competent counsel in light of the strong evidence of guilt. (68RT 7527-7529, 7592-7597, 7604; 69RT 7781-7785, 7789; 73RT 8164-8170; 74RT 8298-8304, 8310, 8322–8323, 8343-8344, 8348-8349.)

CONCLUSION

Based upon this Return, petitioner's request for habeas corpus relief should be denied.

Dated: January 15, 2009

Respectfully submitted,

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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; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. 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 23, 2009, I served the attached **CAPITAL CASE - RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail system of the Office of the Attorney General, addressed as follows:

SEE ATTACHED SERVICE LIST

On January 23, 2009, I caused original and 10 (10) copies of the **CAPITAL CASE - RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** in this case to be delivered to the California Supreme Court at **300 South Spring Street** by **Personal Delivery**.

That I caused a copy of the above document to be deposited with the clerk of the Court from which the appeal was taken.

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 January 23, 2009, at Los Angeles, California.

M. Louie
Declarant

Signature

LEW:ml
LA2005XH0001
60375404.wpd

Case Name: **In re Kenneth Earl Gay, On Habeas Corpus.**

Case No.: **CAPITAL CASE - S130263**

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