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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re KENNETH EARL GAY On Habeas Corpus	**CAPITAL CASE** Case No. S130263 (*People v. Kenneth Gay*, Los Angeles County Superior Court No. A392702, Honorable Dana Senit Henry, Judge

PETITIONER'S AMENDED TRAVERSE

GARY D. SOWARDS (Bar No. 69426)
PATRICIA C. DANIELS (Bar No. 162868)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: 415-348-3800
Facsimile: 415-348-3873

Attorneys for Petitioner Kenneth Earl Gay

DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: 415-348-3800
Facsimile: 415-348-3873

Attorneys for Petitioner Kenneth Earl Gay

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	)	**CAPITAL CASE**
	)	Case No. S130263
KENNETH EARL GAY	)	(*People v. Kenneth Gay*, Los Angeles County Superior Court No. A392702, Honorable Dana Senit Henry, Judge
On Habeas Corpus	)	

PETITIONER'S AMENDED TRAVERSE

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

By this verified traverse, petitioner, through counsel, responds to the Return to the order to show cause as follows.

I.

By this reference, petitioner expressly incorporates each and every material fact alleged in the petition for writ of habeas corpus and Exhibits 1-89 filed in support of the claims and facts alleged in the petition in *In re Kenneth Earl Gay*, S130263 (hereinafter "Petition"), as if each fact and allegation contained therein were fully set forth in this traverse. *People v. Romero*, 8 Cal. 4th 728, 739 (1994); *In re Sixto*, 48 Cal. 3d 1247, 1256 (1989); *In re Lewallen*, 23 Cal. 3d 274, 277 (1979). Petitioner further expressly incorporates by this reference the facts and evidence contained in Exhibits 90 through 96 filed in support of the traverse as though fully set forth herein; and, expressly incorporates the factual and legal discussion contained in Petitioner's Reply to Informal Response for Writ of Habeas Corpus and in the attached supporting memorandum of points and

authorities as though fully set forth herein. *In re Gay*, 19 Cal. 4th 771, 781, n. 7 (1998).

II.

Petitioner, through counsel, admits that he is in the custody of the warden of, and is incarcerated in, San Quentin State Prison, in San Quentin, California Department of Corrections and Rehabilitation, pursuant to a judgment of conviction and sentence of death imposed by the Los Angeles County Superior Court in Case No. A392702, but denies his incarceration is lawful or the judgment and commitment are valid.

For reasons more fully set forth in the petitions and supporting exhibits, and incorporated hereby, petitioner alleges that his convictions were unlawfully obtained in violation of his state and federal constitutional rights including, but not limited to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt and penalty, to counsel including the right to the effective assistance of conflict-free counsel, and to present a defense by trial counsel's numerous and harmful conflicts of interest and trial counsel's grossly prejudicial failure to conduct a minimally adequate investigation in order to demonstrate, in the guilt phase, that petitioner did not participate in the murder of Officer Paul Verna.

III.

Petitioner excepts to respondent's general denials to the allegations in Claim Two that are purportedly based on (1) trial counsel Daye Shinn's unavailability for respondent to interview; (2) petitioner's failure to allege specific facts, acts or omissions; (3) the absence of any prejudice in light of the evidence of petitioner's guilt; and/or (4) respondent's asserted good faith belief that the factual allegations in the petition are untrue. (*See, e.g.*,

Return at 3, ¶ 6; 5, ¶ 12; 11-12, ¶ 29; 25, ¶ 66; 29-30, ¶ 78; 37, ¶ 89; 38, ¶ 90.)

(A) Petitioner affirmatively alleges that respondent's general denials, unsupported by any factual bases, were expressly disapproved by this Court in *In re Gay*, 19 Cal. 4th 771, 783, n.9 (1998), and *In re Lewallen*, 23 Cal. 3d 274 (1979); and that respondent has again engaged in the disapproved practice in the Return.

(B) Petitioner further affirmatively alleges that the respondent's asserted bases for its general denials are contradicted by the facts and record in this case including, but not limited, to the facts as more fully detailed below, that:

1. Shinn's current unavailability has not at any relevant time impaired respondent's ability to conduct a legitimate investigation of the *bona fides* of petitioner's allegations, *see People v. Duvall*, 9 Cal. 4th 464, 484-85 (1995), and does not provide any legitimate reason to doubt the truth of the factual allegations.

a. Shinn passed away in 2006 (Exhibit 90, Death Certificate for Daye Shinn) and was until then readily available and prepared to cooperate with respondent in addressing all material facts relating to his conflict of interest and fraudulent, deficient performance in representing petitioner. Such availability and cooperation included, but was not limited to, providing respondent a declaration, during the preparation of which respondent intentionally or negligently failed to exercise due diligence in having Shinn address material factual issues including, but not limited to, his motives for fraudulently inducing petitioner to give a tape recorded statement falsely confessing to the robberies. *In re Gay*, 19 Cal. 4th at 783, n. 9

("Although a declaration by Shinn accompanies the Return, it does not mention petitioner's statement regarding the robberies").

b. Shinn also testified at an evidentiary hearing conducted in response to the Court's issuance of an Order to Show Cause related to penalty phase issues, and in State Bar disciplinary proceedings leading to Shinn's disbarment. The incredibility of Shinn's sworn testimony in both proceedings showed him to be, *inter alia*, a self-serving liar and perjurer who failed to adhere to the most fundamental professional responsibilities to his clients. In addition to misrepresentations, Shinn consistently claimed self-serving, implausible failures of recollection, including as to events described in the declaration he provided to respondent's counsel. (*See, e.g.*, EH 1 RT 96-98.)[1] *See also In re Gay*, 19 Cal. 4th at 808, n.17 ("Our review of Shinn's testimony confirms that as to matters of which he had any recollection, his answers were evasive, inconsistent, and often nonresponsive").

c. Respondent also repeatedly admits that Shinn committed fraud upon petitioner and the lower court, and knowingly acted "unethically, unprofessionally and contrary to petitioner's interests" for Shinn's own financial benefit. (Return at 29, ¶ 78.) In contrast to the uniform, undisputed evidence of Shinn's double-dealing, ethically and professionally corrupt nature, respondent has not offered a scintilla of evidence to support a good faith suggestion that having an opportunity to interview Shinn might yield

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[1] The reporter's and clerk's transcripts from the evidentiary hearing have an "EH" before the volume number.

any credible or reliable evidence upon which to dispute the factual allegations in the petition.

2. As will be more fully detailed throughout the traverse, Shinn's prejudicial acts and omissions, as well as the material facts that establish his unprofessional and unethical practices and motives, are both specifically detailed in the petition and substantially admitted by respondent throughout the Return.

3. Respondent's reliance on the purported strength of the evidence of petitioner's guilt to excuse Shinn's acts and omissions, cites only to the Court's summary of the evidence reviewed in the automatic appeal in *People v. Cummings & Gay*, 4 Cal. 4th 1233 (1993). (*See, e.g.*, Return at 37, ¶ 89; 38, ¶ 90.) As a result of trial counsel's numerous failings, the evidence available for the Court's review, and upon which it was required to base its prejudice analyses in its decision on the direct appeal, was misleadingly and prejudicially incomplete.

a. Respondent wholly ignores the Court's subsequent analysis and conclusions that, in light of weaknesses in the prosecution's case, Shinn's incompetence was actually prejudicial as to the robberies because it is possible that either the jury would not have convicted petitioner, or the trial judge would have granted a motion for acquittal on the robbery charges. *In re Gay*, 19 Cal. 4th at 793.

b. Respondent also ignores the Court's decision in *People v. Gay*, 42 Cal. 4th 1195, 1226 (2008), which concluded that exclusion of a lingering doubt defense at the penalty retrial was prejudicial error because "[t]he defense could have had particular potency in this case, given the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing descriptions given by the prosecution eyewitnesses."

c. Respondent similarly fails to acknowledge the overwhelming evidence of petitioner's actual innocence, as alleged in the petition and supported by the exhibits, which must be considered in assessing the Sixth Amendment implications of Shinn's conflicted, deficient performance. *See Williams v. Taylor*, 529 U.S. 362, 397 (2000) (state court determination that deficient performance was harmless was unreasonable because court failed to evaluate totality of evidence, including "both that adduced at trial, and the evidence adduced in the habeas proceeding").

4. Respondent offers no other basis to assert a good faith belief that the verified factual allegations in the petition are untrue.

IV.

Petitioner affirmatively alleges that he is entitled to relief for a violation of his Sixth Amendment rights upon a showing that Shinn actively represented interests that conflicted with petitioner's interests, and that such conflicts, individually and cumulatively, adversely affected the adequacy of Shinn's performance. *See, Mickens v. Taylor*, 535 U.S. 162, 171, 175 (2002); *Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980). Petitioner further affirmatively alleges that respondent has admitted the essential material facts that establish the predicate for relief. As more fully set forth in the memorandum of points and authorities, such admissions include, but are not limited to, the following:

a. Respondent admits the existence of an active conflict of interest that arose from Shinn's involvement in a capping operation, which led to his fraudulent appointment as petitioner's trial counsel, and burdened his representation prior to the guilt phase and throughout the trial proceedings.

(1) "'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.'" (Return at 2, ¶ 1 [inner citation omitted].)

(2) "'The fraudulent means included, but were not limited to, employing and exploiting the services of Marcus McBroom.'" (Return at 2, ¶ 2 [inner citation omitted].)

(3) Shinn acted "'with the intent to defraud the court and thereby engineer an appointment as petitioner's attorney,'" by "'making or causing knowingly false and misleading representations to be made to the trial court.'" (Return at 3-4, ¶¶ 7-8 [inner citation omitted].)

(4) Along with McBroom and Fred Weaver, M.D., Shinn operated "'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.'" (Return at 5, ¶ 11 [inner citation omitted].)

(5) "'Pursuant to the capping arrangement, Shinn retained Weaver in any cases in which McBroom had arranged for Shinn to be counsel.'" (Return at 5, ¶ 12 [inner citation omitted].)

(6) "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." (Return at 29, ¶ 78 [inner citation omitted].)

b. Respondent admits that the active conflict arising from the capping scheme directly and adversely affected the adequacy of counsel's representation and resulted in Shinn's deficient performance.

(1) "'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.'" (Return at 6, ¶ 13 [inner citation omitted].)

(2) "'Shinn 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 . . . work on petitioner's case.'" (Return at 6, ¶ 14 [inner citation omitted].)

(3) "'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.'" (Return at 6, ¶ 15 [inner citation omitted].)

(4) "'Shinn unreasonably failed to arrange for Weaver to perform any assessment of petitioner in a reasonably timely fashion,'" did not contact Weaver "'until after the conclusion of the guilt phase,'" "'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,'" and restricted Weaver to rendering "'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.'" (Return at 6-7, ¶¶ 16-17, 19 [inner citation omitted].)

(5) Respondent explicitly does not dispute that minimally competent and timely investigation of potential guilt phase mental state defenses would have produced substantial, reliable evidence that would have supported a meritorious *mens rea* defense; or that unconflicted counsel would have conducted such an investigation as a prerequisite to making an informed and intelligent selection from among reasonably available defenses. (Return at 2, fn. 1; Petition at 35, 85-86.)

c. Respondent admits the existence of an active conflict of interest arising from Shinn's awareness and/or belief that the Los Angeles District Attorney's Office was investigating him for embezzlement of client funds and might be investigating him for murder.

(1) "'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.'" (Return at 10, ¶ 25 [inner citation omitted].)

(2) "'Shinn's embezzlement of [client Oscar] Dane's funds,'" which was the subject of the District Attorney's investigation, "'was motivated by improper personal interests

including, but not limited to, the need to cover up his fraudulent behavior toward other clients,'" to wit: '"his misappropriation of approximately $90,000 from Rebecca and Alexander Korchin.'" (Return at 10-12, ¶¶ 26-27, 29 [inner citation omitted].)

(3) Shinn knew 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.'" Such knowledge motivated Shinn '"to appear cooperative with the District Attorney's Office and other investigating agencies.'" (Return at 11-12, ¶¶ 28, 30 [inner citation omitted].)

(4) Investigations by Los Angeles Sheriff's Detective Charles Gibbons and the District Attorney's Supervising Investigative Auditor, Hassan Attalla, '"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 funds, and that Shinn had consistently skimmed off the interest as it accrued in each account.'" (Return at 16, ¶ 45 [inner citation omitted].)

(5) '"Shinn thereafter continued to obstruct and delay the investigation,'" which '"required Detective Gibbons thereafter to obtain successive search warrants authorizing seizure of Shinn's banking records,'" beginning in '"the summer of 1984'" and continuing '"during petitioner's capital murder trial proceedings, through and including May 18, 1986.'" (Return at 17, ¶¶ 48-49 [inner citation omitted].)

(6) Shinn also '"thought the [Los Angeles] district attorney's office and sheriff may have been investigating him in

connection with the murder of [attorney Lewis] Jones.'" (Return at 18-19, ¶¶ 51, 53 [inner citation omitted].)

(7) "'Shinn falsely claimed that'" a fire in Lewis' office accidentally destroyed "'the records showing [Shinn's] proper handling of [his client Dane's] funds,'" and such "'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.'" (Return at 15, ¶ 43; 23, ¶¶62-63 [inner citation omitted].)

d. Respondent admits that the active conflict arising from Shinn's awareness and/or belief that the Los Angeles District Attorney's Office was investigating him for embezzlement of client funds and might be investigating him for murder directly and adversely affected the adequacy of counsel's representation and resulted in Shinn's deficient performance.

(1) "'Approximately three weeks after being interviewed by Detective Gibbons in the intensifying criminal embezzlement investigation that eventually led to Shinn's disbarment, Shinn . . . induc[ed] petitioner to confess . . . to several robbery charges.'" (Return at 32, ¶ 81 [inner citation omitted].)

(2) "'Shinn informed petitioner,'" that "'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'"; "'[h]owever, there was no such agreement.'" (Return at 33, ¶ 82 [inner citation omitted].)

(3) "'As a result of Shinn's false, misleading . . . statements and behavior, 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.'" (Return at 34, ¶ 85 [inner citation omitted].)

(4) "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.'" (Return at 36, ¶ 87 [respondent's emphasis; no inner citation given].)

(5) "'Shinn elicited . . . testimony from prosecution investigator Officer [Jack] 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;'" as well as "'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.'" (Return at 42-43, ¶ 96 [inner citation omitted].)

(6) "'Shinn made no effort to interview or present the readily available, reliable, credible and persuasive testimony of . . . [Deputy Sheriff] William McGinnis,'" who "'could have testified truthfully that Cummings made admissions and/or confessions to being the sole shooter who killed the decedent,'" and such testimony "'affirmatively exculpated petitioner, and inculpated co-defendant Cummings.'" (Return at 41, ¶ 94 [inner citation omitted].)

e. Respondent admits that despite the fact that "minimal investigation" would have resulted in Shinn's "successful prosecution, imprisonment and disbarment," he "was never criminally prosecuted or imprisoned for any fraudulent or criminal behavior toward his clients." (Return at 12, ¶ 30.)

f. Respondent admits the existence of an active conflict of interest arising from Shinn's "'State Bar disciplinary matters and/or lawsuits by former clients,'" that "were occurring during Shinn's representation of petitioner." (Return at 24, ¶ 65.)

(1) "Shinn received a letter from the state bar, dated April 19, 1982, notifying Shinn that [Rebecca and Alexander Korchin] had filed a complaint against him." (Return at 25, ¶ 67.)

(2) "'On July 26, 1983, the Korchins filed a lawsuit against Shinn for mishandling their client funds.'" (Return at 26, ¶ 69 [inner citation omitted].)

(3) "'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.'" (Return at 26, ¶ 70 [inner citation omitted].)

(4) "'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.'" (Return at 26, ¶ 68 [inner citation omitted].)

(5) "'In the . . . fall of 1983, Oscar Dane reported to Deputy Los Angeles 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.'" (Return at 10, ¶ 26 [inner citation omitted].)

(6) "Shinn showed 'lack of candor and cooperation to' the Danes," "he 'repeatedly provid[ed] inconsistent and

contradictory versions of events' regarding his dealings with the Danes, and . . . Shinn's testimony at the 1990 [State Bar] hearing on the Dane matter was found to be not credible." (Return at 28-29, ¶ 77 [inner citation omitted].)

g. Respondent admits that Attorney Shinn was in fact "an unethical, unsavory blowhard who would promise his clients anything just to make a dollar, and" who did "not understand[] the rudimentary elements of the law.'" (Return at 28, ¶ 76.)

h. "'Shinn's unlawful and dishonest conduct in [petitioner's and John Kim's] cases demonstrated the accuracy of his reputation in the legal community,"' (Return at 28, ¶ 76 [inner citation omitted]) as consistent with Justice Werdegar's inference that Shinn sought appointment to "meet his own financial needs" "rather than to represent petitioner as well as possible." (*In re Gay*, 19 Cal. 4th at 832).

V.

In response to respondent's denials and allegations with respect to Claim Two, petitioner denies all allegations in the Return except those specifically admitted and further alleges, excepts and denies as follows:

1. Petitioner excepts to the sufficiency of respondent's general denial. (Return at 3, ¶ 6.) Petitioner affirmatively alleges Shinn died in June 2006. Petitioner affirmatively alleges that up to that date, respondent had access to and the cooperation of Shinn including, but not limited to his willingness to be interviewed by the Attorney General and execute a declaration at respondent's behest. (*E.g.*, EH 1 RT 96-98 [Shinn unable to recall events contained in declaration he signed for Attorney General].) Petitioner further affirmatively alleges that based on respondent's admission that Shinn was an unethical, unsavory blowhard

who subjugated his clients' interests to the pursuit of his own monetary gain, and lacked an understanding of the rudimentary elements of the law, there is no reasonable possibility that additional interviews with Shinn would have produced any credible basis for respondent to deny material facts.

2. Petitioner excepts to respondent's reliance on petitioner's testimony at the evidentiary hearing in 1996 as a basis for denying that petitioner was coerced into aiding Shinn's plan to defraud the trial court and engineer his appointment as petitioner's attorney. (Return at 4, ¶¶ 8, 9.) Petitioner affirmatively alleges that the context of the excerpted testimony in the exhibit quoted by respondent demonstrates that after Shinn disclosed to petitioner that no group of black business men was prepared to fund his defense, Shinn convinced petitioner "that the only way" to secure Shinn's representation was for petitioner to lie to the court. (Return Ex. 1 at 2-3.) Petitioner's statement that he "thought it was a good idea," refers to accepting Shinn's advice that petitioner threaten "'to go pro per'" if the trial judge did not appoint Shinn. (*Id.* at 3.) Petitioner affirmatively alleges Shinn purposely engendered petitioner's dependence on him for representation in his capital murder case.[2] Petitioner affirmatively alleges

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[2] Petitioner's desperation to maintain Shinn as his lawyer is demonstrated during the following exchange with the trial court:

> The Court: It is my understanding of that motion Mr. Gay, that you are claiming indigency and are unable to continue payment to your attorney, Mr. Shinn, and that you are requesting that Mr. Shinn be relieved.
>
> Defendant Gay: No, Sir. I'm requesting that Mr. Shinn be appointed.

Shinn instructed petitioner he had to follow his unethical instructions to ensure his continued representation. (*See, e.g.*, EH 2 RT 486-87 [Shinn instructed petitioner to lie to court about family finances and to request pro per status if Shinn not appointed].) Petitioner affirmatively alleges petitioner's statement and Shinn's coercion are not inconsistent or mutually exclusive.

3. Petitioner excepts to the sufficiency of respondent's denial that Shinn made "further misleading representations" to the trial court, and to respondent's affirmative allegation that Shinn did not make further misrepresentations. Respondent proffers only a general denial and fails to plead any facts or provide any documentary evidence adequate to indicate the existence of truly disputed material facts. (Return at 4-5, ¶ 10.) Petitioner affirmatively alleges that in addition to the misrepresentations that respondent admits Shinn made in open court (*id.*), Shinn falsely declared under penalty of perjury, to the trial court that:

- he was "returned" [sic] .... by some friends of Defendant KENNEY [*sic*] GAY";
- these friends of petitioner promised to pay his attorney fees;
- the friends have not paid his fees as they promised;
- Shinn discussed the matter of his fees with petitioner's friends and family; and,
- petitioner's friends and family informed Shinn they had no money to pay his fees.

(5 CT at 1336; *see generally id.* at 1334-39, ["Notice Of Motion For Order Allowing Withdrawal Of Attorney Of Record, Declaration Of Daye

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(1A RT 70. *See also id.* at 76 [will go pro per only if Shinn is not appointed]; *id* at 90-91 [petitioner eagerly agrees to Shinn's appointment and "rescinds" his motion to proceed in pro per].)

Shinn And Memorandum Of Points And Authorities In Support Thereof," filed July 5, 1984].) Petitioner affirmatively alleges at the hearing on July 18, 1984 the trial court indicated it had "read and considered" Shinn's motion that was replete with perjured statements. (1A RT 87.) Petitioner affirmatively alleges the perjured statements in the motion Shinn filed on July 5, 1984 were different from and in addition to the falsehoods Shinn had instructed petitioner to tell the trial court. *See In re Gay*, 19 Cal. 4th at 794-95 (Shinn instructed petitioner to falsely tell the trial court his parents had paid a retainer); (Exhibit 18, Declaration of Frances Gay at 197) [petitioner's parents never paid Shinn a retainer and he never asked them to do so].)

4. Petitioner excepts to the sufficiency of respondent's denial that Shinn had any "'pattern and practice'" that led him to fail to consider experts other than Weaver. (Return at 5, ¶ 12.) Respondent's denial is contradicted by and fails to proffer any basis for the reconsideration of the factual findings made by this Court in *In re Gay,* 19 Cal. 4th 771. (Return at 5, ¶ 12.) Petitioner affirmatively alleges that pursuant to such factual findings, this Court already has determined that "in cases in which he had been introduced to the client by McBroom, *Shinn did not consider retaining experts other than Weaver.*" 19 Cal. 4th at 796 (emphasis added). (*See also* EH 2 RT 358-59 [Dr. Weaver testified to Shinn and McBroom's "pattern and practice"]; Exhibit 91, Deposition of Fred Weaver, M.D. at 2132 [same].)

5. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Mr. Weaver only appeared to work on petitioner's case. (Return at 6, ¶ 14.) Respondent's denial is contradicted by and fails to proffer any basis for the reconsideration of the factual findings made by this Court in *In re Gay.* 19 Cal. 4th at 797. Petitioner

affirmatively alleges that pursuant to such factual findings, this Court specifically determined that "Weaver felt that he did not need to do his best. He was just to '*go through the motions*' and he did not do his best." *Id.* (emphasis added.) Petitioner further affirmatively alleges that despite the examples of Weaver's purported case-related activities proffered by respondent (Return at 6, ¶ 14) this Court determined that "[t]he evidence does not support respondent's view of the adequacy of Dr. Weaver's examination." *In re Gay*, 19 Cal. 4th at 796.

6. Petitioner excepts to the denial of the allegation that Dr. Weaver "had no adequate and reliable source of clinically significant data at the time of his meeting with petitioner." (Return at 8, ¶ 21.) Respondent's denial is contradicted by and fails to proffer any basis for the reconsideration of the factual findings made by this Court in *In re Gay,* 19 Cal. 4th at 802 and n.15. Petitioner affirmatively alleges that pursuant to such factual findings, this Court determined that Weaver lacked "detailed information from sources other than petitioner about his symptoms and experiences," which precluded the clinical reliability and accuracy of the data upon which he relied. *Id.*

7. Petitioner excepts to the sufficiency of respondent's denial that Shinn knew or should have known Mr. McBroom and/or Dr. Weaver were unlicensed and unqualified to administer necessary testing including, but not limited to, psychological and neuropsychological testing, and fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 8, ¶ 22.) Petitioner affirmatively alleges that the authority cited by respondent, *In re Gay*, 19 Cal. 4th at 789, n.11, does not support and is contrary to respondent's denial and affirmative allegations. (Return at 8, ¶ 22.) Petitioner further affirmatively alleges that Weaver did not claim to be

licensed or qualified to administer *neuro*psychological tests and, although he claimed to be licensed to administer psychological and psychiatric tests, he in fact did not do so. *In re Gay*, 19 Cal. 4th at 789, n.11. Petitioner further affirmatively alleges that McBroom did not claim to be licensed to administer any testing, did not claim to be trained or qualified to administer *neuro*psychological testing and did not believe he was required to have a license to administer the psychological tests he purportedly administered to petitioner. *Id.* Petitioner affirmatively alleges Shinn would not have paid Dr. Weaver, Mr. McBroom, or a qualified expert to administer neuropsychological testing. (Exhibit 92, Deposition of Marcus McBroom, at 2171 [Shinn said lack of funds prevented further testing]; EH 2 RT 354 [Shinn told Weaver he "had roughly $1,000 available for the case"]; *Id.* at 355 [Shinn only paid Weaver $800]; *In re Gay*, 19 Cal. 4th at 799 [Shinn hired Weaver to determine if petitioner was psychotic and limited him to $1,000, but paid him $800].)

8. Petitioner excepts to the sufficiency of respondent's denial that McBroom failed to select and/or competently administer any appropriate clinical tests, because it proffers only a general denial and fails to indicate the existence of genuine issues of fact. (Return at 9, ¶ 23.) Petitioner admits Dr. Weaver relied on the data from Mr. McBroom's testing in forming his conclusions. (*Id.*) Petitioner affirmatively alleges that McBroom was untrained and unqualified to administer any tests, with or without Dr. Weaver's purported supervision, and that the testing results Dr. Weaver claimed to rely on were inaccurate and unreliable. (*See, e.g.*, Declarations and Exhibits in Support of Petition for Writ of Habeas Corpus, Case No. S030514, Exhibit 10, Declaration of Gretchen White at 2-3.)

9. Petitioner excepts to the sufficiency of respondent's further denial that McBroom failed to properly administer appropriate

testing, and to the sufficiency of respondent's affirmative allegation that McBroom properly administered testing. (Return at 9-10, ¶ 24.) Petitioner affirmatively alleges that in light of McBroom's lack of training, qualification or licensure, the reliability of the tests identified by respondent (*id.*) does not compensate for Shinn's conflicted failure to retain competent mental health experts. Petitioner further affirmatively alleges that respondent erroneously concluded that this Court had previously determined that the allegations "relating to Shinn's appointment with McBroom's assistance and Shinn's capping arrangement with Weaver and McBroom did not state a prima face case for relief from the guilt verdicts." (Return at 10, ¶ 24.) Petitioner further affirmatively alleges that the cited language referred only to this Court's observation that it would not "presume prejudice" on the facts and limited record before it, and therefore it did not address petitioner's guilt phase allegations. *In re Gay*, 19 Cal. 4th at 795.

10. Petitioner further affirmatively alleges respondent's reliance on the necessarily incomplete trial record, which resulted from Shinn's prejudicially deficient performance, and respondent's failure to deny or dispute that competent and timely investigation of potential guilt phase mental state defenses would have produced substantial, reliable evidence that would have supported a meritorious *mens rea* defense and enabled an unconflicted attorney to make an informed and intelligent selection from among reasonably available defenses (Return at 2, fn. 1; Petition at 35, 85-86), demonstrates respondent's inability to dispute the current record. The grant of habeas corpus relief without an evidentiary hearing is warranted. *People v. Duvall*, 9 Cal. 4th at 477; *In re Sixto*, 48 Cal. 3d at 1252; *In re Lewallen*, 23 Cal. 3d at 278; *In re Saunders*, 2 Cal. 3d 1033, 1048 (1970).

11. Petitioner admits deputy district attorney Albert McKenzie handled the investigation into Shinn's embezzlement of client funds and a different deputy district attorney, John Watson, served as petitioner's prosecuting attorney. (Return at 10, ¶ 25.) Petitioner affirmatively alleges that both prosecutors were deputies in the Los Angeles County District Attorney's Office, and that Shinn subjectively believed he could curry favor on his own behalf with the same agency that was prosecuting his client, and that Shinn's motive to obtain leniency for himself explains "why he was so anxious to cooperate with the district attorney" by prejudicially inducing petitioner to admit his involvement in the robberies. *In re Gay*, 19 Cal. 4th at 833 (Werdegar, J., concurring).

12. Petitioner excepts to the sufficiency of respondent's denial that Detective Gibbons made repeated personal telephonic contacts with Shinn. (Return at 11, ¶ 27.) Petitioner affirmatively alleges that respondent's allegation that Detective Gibbons' numerous contacts "were with Shinn's office, not *necessarily* Shinn," (*id.* [emphasis added]) implicitly acknowledges that respondent has no good faith basis to deny the specifics of petitioner's allegation. Petitioner further affirmatively alleges that respondent's unsupported denial does not otherwise create a dispute as to any material fact because Detective Gibbons' repeated contacts with Shinn personally or his office support the inference that Shinn was aware of an ongoing criminal investigation that reinforced his motive to curry favor with the district attorney. Petitioner further alleges that for similar reasons, any dispute as to the precise number of the multiple in-person interviews that Detective Gibbons conducted with Shinn (*id.*) does not create any dispute as to a material fact.

13. Petitioner excepts to the sufficiency of respondent's denial that Shinn's embezzlement of funds was motivated by the need to

conceal his fraudulent behavior towards clients *other than* Rebecca and Alexander Korchin. (Return at 12, ¶ 29.) Petitioner affirmatively alleges that respondent's attempt to deny the scope of Shinn's admittedly fraudulent scheme does not create a dispute to any material factual issue. Petitioner further affirmatively alleges that respondent's denial is inconsistent with Shinn's testimony that the embezzlement of the Danes' money was motivated by the fact that "some other clients may have wanted their money back." (Exhibit 33, State bar of California Decision, *In the Matter of Daye Shinn*, Case No. 85-0-11506 CWS at 544, n.16.)

14. Petitioner admits "that Shinn was never criminally prosecuted or imprisoned for any fraudulent or criminal behavior toward his clients." (Return at 12, ¶ 30.) Petitioner affirmatively alleges that respondent's admission that "a reasonably minimal investigation" would have exposed Shinn to successful prosecution and imprisonment for such activity, demonstrates the absence of any legitimate reason for the district attorney's failure to prosecute Shinn. (*See, e.g.*, Exhibit 80 Declaration of Charles Gibbons at 2090 ["criminal charges should have been filed in this case"].) Petitioner further affirmatively alleges the continuing lack of prosecution was the product of Shinn's explicit or implicit understanding with the prosecution that he would receive such lenient treatment in exchange for his cooperation with the prosecution in securing petitioner's conviction and sentence of death. Petitioner further affirmatively alleges that the lack of any prosecution of Shinn motivated and reinforced Shinn's self-interested cooperation with the prosecution in securing petitioner's conviction and sentence of death. Petitioner affirmatively alleges that the lack of criminal prosecution demonstrates the existence, extent, and illegal nature of Shinn's conflicts of interest and the resulting prejudice suffered by petitioner.

15. Petitioner admits "Shinn attempted to tender the check 'through the office of the Los Angeles County Treasurer.'" (Return at 12, ¶ 31 [quoting Ex. 33 at 538].) Petitioner affirmatively alleges "Shinn attempted to tender a check, *payable to his client Oscar Dane*, in the amount of $172,729.68, through the Office of the Los Angeles County Treasurer." (*Id.* [emphasis added].)

16. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Mr. Dane did not refuse the check from Shinn because Dane wanted more money. (Return at 13, ¶ 32.) The denial is contradicted by the documented fact that Dane refused the check because he "wanted the full amount of $198,623.48 restored to the County and .... a full detailed accounting from [Shinn]." (Ex. 33 at 553.)

17. Petitioner excepts to the sufficiency of respondent's denial that Shinn converted "all" of the embezzled monies to his personal use, and respondent's allegation that Shinn "endeavored to convert only *some* of the monies to personal use." (Return at 14, ¶ 40 [original emphasis].) The purported denial and allegation regarding the intended scope of Shinn's criminal scheme are insufficient to create a dispute as to the material fact that Shinn fraudulently converted the client monies to his personal use. Petitioner affirmatively alleges that respondent admits it has no basis for its denial or allegation because the actual amount of funds that were actually "misappropriated could not be determined." (*Id.*) Petitioner admits Linda Sue Jones was convicted of theft.

18. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn did not set the fire in his office. (Return at 15, ¶ 42.) Petitioner affirmatively alleges Shinn's self-serving, questionably credible testimony is an inadequate basis upon which to rebut petitioner's factual allegations. *See, e.g., In re Gay*, 19 Cal. 4th at 808, n.17

("Our review of Shinn's testimony confirms that as to matters of which he had any recollection, his answers were evasive, inconsistent, and often nonresponsive"); (Ex. 33 at 534, n.6 [discussion of testimony by Shinn deemed "not credible"]).

19. Petitioner excepts to the sufficiency of respondent's denial of the allegations that Shinn made false claims regarding the Danes' check. (Return at 15, ¶ 43.) Petitioner admits Linda Jones was convicted for theft of the check. Petitioner affirmatively alleges Shinn testified that he left a check for over $145,000 lying on top of the desk of his unlocked office the evening of the fire. (*People v. Linda Jones*, Los Angeles County Superior Court Case No, A088857 (hereinafter "*People v. Jones*") 11 RT 1596-97.) Petitioner affirmatively alleges after the check was allegedly stolen, Shinn failed to place a "stop-payment" on it for over 90 days. (*Id.* at RT 2692.)

20. Petitioner excepts to the sufficiency of respondent's denial that Shinn made false representations about the exculpatory nature of the documents lost to the fire. (Return at 15, ¶ 44.) Petitioner affirmatively alleges respondent's citation to the State Bar Opinion in *In re Daye Shinn* (Ex. 33), fails to support respondent's denial that Shinn claimed the fire destroyed exculpatory documents. (*See id.* at 550) Petitioner affirmatively alleges when Deputy Gibbons asked Shinn for "an accounting of what happened to the Danes' money, and where it was, to further the investigation … Mr. Shinn eventually informed me that a fire in his office had destroyed the relevant records, and that he was attempting to reconstruct the necessary information." (Exhibit 80 at 2088.)

21. Petitioner excepts to the sufficiency of respondent's denial that Detective Gibbons "again" met with Shinn on March 1, 1984, and respondent's allegation that "this is the first time Gibbons and Shinn

met." (Return at 16, ¶ 46.) Petitioner affirmatively alleges that respondent's denial and allegation reflect a misapprehension of petitioner's allegation, and fail to dispute that "[o]n or about March 1, 1984, Detective Gibbons met with Shinn *to again question him* regarding the whereabouts of Dane's money," (Petition at 47, ¶ 5.c.(7) [emphasis added].)

22. Petitioner excepts to the sufficiency of respondent's allegation that a "meeting took place on February 22, 1985, before the presentation of evidence" in petitioner's trial, on the grounds that it fails to specify any particular meeting or participant, and does not rebut petitioner's allegations or identify any genuine issue of fact. (Return at 17, ¶¶ 49, 50.)

23. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn was aware that he was being investigated for murder *and* arson by the district attorney, and respondent's allegation that Shinn believed the authorities may have been investigating him for murder. (Return at 18, ¶ 51.) Petitioner affirmatively alleges that Shinn's belief that he was an arson suspect was the reason that he refused to sign releases for Deputy Gibbons. Shinn testified he "didn't know what [Gibbons] was investigating at that time." (Exhibit 34, State Bar of California, Transcript of Proceedings at 730.) Petitioner affirmatively alleges Shinn's defense attorney attempted to exploit the manner in which Shinn's concerns about the murder and arson investigations motivated his duplicitous and dishonest behavior when he argued at the State Bar hearing that Shinn's unethical conduct "it's not a failure to account to the client. It's a failure to account to the detective, and that occurs at a time when there's not only an arson, a murder and a fraud investigation going on." (*Id.* at 1257.) Petitioner further affirmatively alleges that respondent's admission that Shinn thought he may have been the target of a murder investigation, in addition to the embezzlement investigation, renders

immaterial any dispute as to whether Shinn thought he also was the subject of an investigation of the less serious offense of arson.

24. Petitioner excepts to the sufficiency of respondent's denial and affirmative allegations regarding the details of the timing and sequence of events involving the arson in Shinn's office and murder of Lewis Jones. Such denial and allegations fail to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 18-19, ¶ 52.)

25. Petitioner excepts to the sufficiency of respondent's allegation that Shinn was not responsible for the fire in his office and that he did not believe he was an arson suspect. (Return at 19, ¶ 53.) Petitioner affirmatively alleges the relevant allegations regarding Shinn's belief he was a suspect in the arson, in paragraph V.23., *ante*, as if fully set forth herein.

26. Petitioner excepts to the sufficiency of respondent's denial that Shinn had motive to murder Lewis Jones, as well as witnesses to his misappropriation of funds, and respondent's allegations that Linda Jones was convicted for the murder of her husband and theft of the check made out to Shinn's trust account. (Return at 19-20, ¶ 54.) Petitioner affirmatively alleges that respondent's allegation that Lewis Jones had no knowledge of Shinn's embezzlement activity is inconsistent with the State Bar Opinion. (*See generally* Ex. 33.) Petitioner further affirmatively alleges that the hearsay jury verdict, which convicted Linda Jones and which was engineered, in part, by Shinn's false allegations is inadmissible and irrelevant to dispute the verified factual allegations in the petition.

27. Petitioner admits that Linda Jones was not present during the meeting in which Shinn questioned her family members "'for several hours regarding a wide range of issues including, but not limited to

Mrs. Jones' behavior, the extent of her and her family members' knowledge of the case, as well as Mr. Jones' finances.'" (Return at 20, ¶ 56 [inner citation omitted].)

28. Petitioner affirmatively alleges that respondent's admission that Shinn, who believed he may have been a suspect in the Lewis Jones murder case, did not inform Mrs. Jones' family that he could not represent her due to a conflict until after the "wide-ranging" discussion described in the foregoing paragraph (Return at 21, ¶ 57) further demonstrates that Shinn's professional activities were always motivated by and the product of unethical, self-dealing objectives.

29. Petitioner excepts to the sufficiency of respondent's denial that Shinn exploited information obtained from the Jones family to shift suspicion for the Jones murder from himself; and respondent's allegations regarding Shinn's limited cooperation as a prosecution witness. (Return at 21, ¶ 58.) Petitioner affirmatively alleges that the denial and allegations rely only on Shinn's self-serving testimony at Jones' trial, fail to provide any facts or documentation to dispute that Shinn influenced the police investigation regarding the Jones murder, and otherwise fail to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact.

30. Petitioner excepts to the sufficiency of respondent's denial that Shinn testified untruthfully at Jones' trial as part of a scheme or plan to avoid liability for the murder, and respondent's allegation that Shinn testified truthfully. (Return at 22, ¶ 59.) The denials and allegation are based on Shinn's presumed credibility and veracity as a testifying witness, and thus fail to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges the State Bar Court specifically found that Shinn was

untruthful when he testified that he and Mr. Jones were not law partners. (Ex. 33 at 547 [Finding of Fact No. 70 relating to "the wife of Respondent's law partner, Lew Jones."].) Petitioner affirmatively alleges Shinn's self-serving, questionably credible testimony is not an adequate basis upon which to dispute petitioner's factual allegations. *See, e.g., In re Gay*, 19 Cal. 4th. 808, n.17 ["Our review of Shinn's testimony confirms that as to matters of which he had any recollection, his answers were evasive, inconsistent, and often nonresponsive"]; (Ex. 33 at 534, n.6 [discussion of testimony by Shinn deemed "not credible"]).

31. Petitioner excepts to the sufficiency of respondent's denial that Shinn sought to frustrate the embezzlement investigation because of his fear the investigation was being used to gather evidence against him in the murder of Lewis Jones. (Return at 22, ¶ 60.) Petitioner affirmatively alleges Shinn testified before the State Bar Court that he was concerned about being a murder suspect. "I think at that time [Gibbons] thought I was involved with Linda Jones in killing her husband or something to take the money. I think at that time he asked me to sign a release on my various trust -- and I said, 'Why?'" (Ex. 34 at 730.) Petitioner denies respondent's allegation that the murder and arson investigations "were completely separate," (Return at 22, ¶ 60) and affirmatively alleges that Deputy Gibbons was involved in the murder investigation because he was assigned to investigate the alleged forgery of the Dane check by Linda Jones. (*In re Linda Sue Jones*, Los Angeles County Superior Court Case No. A088857, Petition for Writ for Habeas Corpus, Exhibit 84 at 16.)

32. Petitioner excepts to the sufficiency of respondent's denial that Shinn was aware the police knew he had a motive to set the fire in his office. (Return at 22-23, ¶ 61.) Petitioner affirmatively alleges Shinn

was ordered to give his copier to law enforcement as part of their investigation, thus furthering, if not engendering, Shinn's belief that an arson investigation would be conducted. (Exhibit 66, Testimony of Daye Shinn, *People v. Linda Jones*, Los Angeles County Superior Court Case No, A088857, at 1983, 1991; *People v. Jones*, 11 RT 1597, 1604.) Petitioner affirmatively alleges in arson investigations the initial considerations are whose property burned and who would benefit from the fire. (*People v. Jones*, 13 RT 1904-05.) Petitioner affirmatively alleges had the fire in Shinn's office been properly investigated, it would have been determined to have been arson, and not an electrical fire, because the side of the copier with wiring remained unburned. (*See id.* at 1910-21.)

33. Petitioner excepts to the sufficiency of the Return and denies respondent's allegations that the fire in Shinn's office was started by the copier. (Return at 23-24, ¶ 64.) Petitioner affirmatively alleges had the fire in Shinn's office been properly investigated, it would have been determined arson, and not an electrical fire, because the side of the copier with wiring remained unburned. (*See People v. Jones*, 13 RT 1910-21.)

34. Petitioner excepts to the sufficiency of respondent's denial that Shinn was unable to maintain a consistent story regarding the date and circumstances of the fire in his office, as it is unsupported by factual allegations or documentary evidence. (Return at 24, ¶ 65.)

35. Petitioner excepts to the sufficiency of respondent's general denial of the allegations that Shinn's representation of petitioner was burdened by his conflicting disciplinary and legal demands; Shinn's incompetence and lack of ethics was revealed by his past performance; and, respondent's allegation that Shinn's past failures did not establish his general incompetence and unethical behavior. (Return at 24-25, ¶ 66.) Petitioner affirmatively alleges that respondent's denial is contradicted by

this Court's finding that Shinn "labored" under the pressure of these other conflicting demands. *In re Gay*, 19 Cal. 4th at 828. Petitioner further affirmatively alleges that Shinn was actively involved in dealing with the conflicting demands of the State Bar investigation and lawsuits by former clients the entire time he represented petitioner. (*See* Petition at 52, ¶¶ (e)(1)-(5) [brief timeline of Shinn's legal and ethical troubles while he represented petitioner].) Petitioner affirmatively alleges that Shinn would not be an unbiased or credible witness to his own competence, thus making his unavailability irrelevant. (*See, e.g.*, Exhibit 9, Deposition of Daye Shinn, September 7, 1988 at 88 [Shinn found no need to retain his case files since he has "never had a murder case of mine reversed"].) Petitioner affirmatively alleges Howard Price, petitioner's co-counsel, had the opportunity to observe Shinn in action over an extended period of time. Petitioner affirmatively alleges Mr. Price concluded that Shinn "visibly disturbed and upset" at least one of petitioner's sitting jurors with his offensive manner; failed to prepare for trial, appeared uninterested in the trial proceedings to the point he "seemed actually to be asleep"; and, generally failed to act as competent capital trial counsel for petitioner. (Exhibit 8, Declaration of Howard Price at 55-58.) Petitioner affirmatively alleges Edwin Printemps knew that Shinn "was not well regarded in the criminal defense community." "He had a reputation of being an unethical, unsavory blowhard, who would promise his clients anything, just to make a dollar. To make matters worse, he also had a reputation for not understanding the rudimentary elements of law." (Exhibit 82, Declaration of Edwin Printemps, at 2093-94.). Petitioner affirmatively alleges that numerous attorneys and court staff have formed opinions about Shinn's lack of "technical competence" or "ability to understand and/or his willingness to adhere to the most fundamental" responsibilities of an attorney since they

have had the opportunity to observe Shinn in and out of court. (Petition at 51, ¶ 5.e.) Petitioner affirmatively alleges that even former deputy district attorney Watson, noted "based upon his personal observations, 'As a lawyer, [Mr. Shinn] puts a lot ahead of his clients.'" (Exhibit 2, Declaration of Martin Dodd at 21.)

36. Petitioner excepts to the sufficiency of respondent's denial of the allegations that Shinn was informed the State bar had begun an investigation into his misappropriation of over $90,000, which fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 25-26, ¶ 67.) Petitioner affirmatively alleges Shinn received a letter from the State Bar informing him of the Korchin's complaint and requesting that he "assist this office in evaluating the above complaint" by furnishing a "written explanation of the matter within three weeks. (Exhibit 35, State Bar of California, Exhibits, *In re Matter of Daye Shinn*, Case No. WEC 50746 at 1593-94.) Petitioner affirmatively alleges the letter was signed by a State bar "Special Investigator." (*Id.* at 1594.)

37. Petitioner excepts to the sufficiency of respondent's allegation the lawsuit filed by the Steinbergs was dismissed for lack of prosecution. (Return at 26, ¶ 68.) Petitioner affirmatively alleges that on July 8, 1987, the Los Angeles Superior Court issued a "Notice of Intention To Dismiss." (Exhibit 68, *Steinberg, et al. v. Shinn*, Los Angeles Superior Court, Case No. WEC 76558, at 2001-02.) Petitioner affirmatively alleges the docket does not indicate the case *Steinberg v. Shinn* was ever dismissed. (*Id.*)

38. Petitioner excepts to the sufficiency of respondent's denial that Mr. John Kim was another of Shinn's victims, and that Shinn utilized the services of Dr. Weaver and Mr. McBroom. (Return at 26, ¶ 72.)

Petitioner affirmatively alleges that Mr. Kim understood Shinn to premise Mr. Kim's constitutionally protected rights to a jury trial on Mr. Kim's ability to come up with "more money to hire a *private psychiatrist.*" (Exhibit 67, *John Kim v. Day Shinn*, Complaint For Damages, Los Angeles Superior Court Case No. C519627, at 4 [emphasis added].) Petitioner affirmatively alleges Shinn had defrauded John Kim, pursuant to the same plan, scheme and capping operation used to defraud the court in petitioner's case, and during the same period of time Shinn was working with Weaver and McBroom. (*See, e.g.*, Ex. 91 at 2125, 2132 [Weaver worked with Shinn for 25 years on cases brought to him by Marcus McBroom] *see also* EH 2 RT 359 [McBroom worked on those cases he brought to Weaver].)

39. Petitioner excepts to the sufficiency of respondent's denial that Shinn's description of himself as a "criminal trial specialist" was intended to convey the false and misleading impression that Shinn was a "*certified* criminal law specialist." (Return at 26-27, ¶ 73 [original emphasis].) Petitioner affirmatively alleges that in context, including Shinn's unethical, self-dealing admitted by respondent, the only reasonable interpretation of Shinn's representation was that it was intended to misrepresent his credentials as including certified criminal law specialty. Petitioner further affirmatively alleges that irrespective whether "Shinn's experience was mainly in criminal law," in light of the incompetent performance prompting this Court's inquiry, Shinn's disbarment, and Shinn's reputation in general (*see generally* Ex. 82, at 2093-94; Ex. 8, at 55-58), even his self-description as being a *non*-certified "criminal law specialist" would have conveyed a knowingly false and inflated representation of his qualifications.

40. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn's admittedly fraudulent behavior toward

another client, Mr. Kim, was part of his modus operandi. (Return at 27, ¶ 74.) Petitioner affirmatively alleges that respondent has no basis to deny the allegation in good faith and that as a matter of law, the similarities between petitioner's and Mr. Kim's cases including, but not limited to, Shinn's virtually identical exploitation of the racial and ethnic background of his victimized clients, are sufficient to establish Shinn's modus operandi.

41. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Mr. Kim suffered from an impaired mental state that was exacerbated by Shinn's fraudulent behavior. (Return at 28, ¶ 75.) Petitioner affirmatively alleges at the time of his trial, Mr. Kim had been diagnosed with "temporary reactive psychosis and hysterical personality disorder." (Ex. 67 at 1996.)

42. Petitioner excepts to respondent's general denial that other cases also demonstrated Shinn's reputation for unethical behavior. (Return at 28, ¶ 76.) Petitioner affirmatively alleges that Shinn's reputation "of being an unethical, unsavory blowhard, who would promise his clients anything, just to make a dollar," and "for not understanding the rudimentary elements of law," which respondent admits was accurate (Return at 28, ¶ 76), was based on Shinn's dishonest conduct in other cases, in addition to petitioner's and Mr. Kim's ." (*See* Ex. 82 at 2093-94.)

43. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation that Shinn continued his "pattern of and practice of bad faith, dishonesty and concealment" and fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 28, ¶ 77 [citing Petition at 53, ¶ 5.f.].) Petitioner affirmatively alleges that respondent's denial is contradicted by the evidence, and respondent's earlier admissions, which demonstrate that up through the date of Shinn's disbarment he

continued to lie and perjure himself in an effort to conceal his wrongdoing and abandonment of his clients "despite his many years as an attorney, respondent lacks basic understanding of the most fundamental responsibilities of an attorney as embodied in the provisions of the Business and Professions Code and the Rules of Professional Conduct." *In the Matter of Daye Shinn*, 1992 WL 700258 at 9 (Cal.Bar Ct.)

44. Petitioner excepts to the sufficieney of respondent's denial of the allegation that Shinn's admittedly undisclosed and unethical conflicts prejudicially compromised his purported representation of petitioner. (Return at 29, ¶ 78.) Petitioner affirmatively alleges that respondent's reliance on the evidence reflected in this Court's opinion on the automatic appeal, *People v. Cummings & Gay*, 4 Cal. 4th at 1257-1267 (1993), (*see* Return at 29-30, ¶ 78), is inadequate to cure the error of Shinn's unethical and conflicted performance. Petitioner further affirmatively alleges that the evidence of petitioner's purported guilt was not strong in light of:

a. the absence of eyewitness and other evidence, which raised a reasonable possibility that but for Shinn's incompetence the jury would have acquitted petitioner of the robbery charges or the trial judge would have dismissed them (*In re Gay*, 19 Cal. 4th at 793);

b. absent petitioner's statement of responsibility for the robberies – which Shinn prejudicially induced him to make – the prosecution would have been deprived of its strongest theory of motive for the homicide; and

c. "the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing

descriptions given by the prosecution eyewitnesses." (*People v. Gay*, 42 Cal. 4th at 1226).

45. Petitioner further affirmatively alleges that respondent's admission that Shinn did not apprise independent counsel of his multiple conflicts of interests, which made Shinn reasonably aware that he was acting contrary to petitioner's interests (Return at 29,¶ 78) conclusively demonstrates that petitioner was denied his constitutional right to conflict-free representation and entitles him to habeas corpus relief.

46. Petitioner excepts to respondent's denial of the allegations regarding the failure of the District Attorney's Office and law enforcement to inform petitioner or the trial court of the conflicts of interests that interfered with Shinn's effective representation of petitioner; and respondent's allegation that Deputy District Attorney John Watson had no knowledge of any facts that constituted a conflict of interest. (Return at 30, ¶ 79.) Petitioner affirmatively alleges representatives of the police department and the District Attorney's Office were present when Shinn induced petitioner to "confess" to robberies after receiving *Miranda* warnings. (58 RT 6249.) Petitioner affirmatively alleges former deputy district attorney John Watson and former Los Angeles Police Detectives John Helvin and Jack Holder were present when Shinn allowed petitioner to "confess" after receiving and waiving Miranda rights. (*Id.*) Petitioner affirmatively alleges former Deputy District Attorney Watson was present when Shinn affirmatively, expressly, and on the record declared a conflict of interest between petitioner's interests and his. (58 RT 6282.) Petitioner affirmatively alleges Shinn declared the conflict of interest during the Evidence Code section 405 hearing on the admissibility of the tape recorded statements Shinn induced petitioner to make. (*Id.* ["there is a conflict between my client and myself now"].)

47. Petitioner affirmatively alleges that, singularly and cumulatively, (a) Deputy District Attorney Watson's misrepresentations to the trial court that no conflict existed, (b) Shinn's failure to detail the full extent of the multiple conflicts of interests that Shinn, as admitted by respondent (Return at 29, ¶ 78), knew to be contrary to petitioner's interests, and (c) the trial court's arbitrary and erroneous failure to conduct appropriate inquiry in response to Shinn's declaration of conflict deprived petitioner of counsel and rendered the trial a nullity. (*See* 58 RT 6282 *et seq.*) Petitioner affirmatively alleges respondent's inadequate denial of the allegations based on a harmless error analysis with only those facts presented in the direct appeal opinion, indicate respondent is willing to rely on the record, and permit the Court to grant petitioner relief without conducting an evidentiary hearing. *People v. Duvall*, 9 Cal. 4th at 477; *In re Sixto*, 48 Cal. 3d at 1252; *In re Lewallen*, 23 Cal. 3d at 278; In re Saunders, 2 Cal. 3d at 1048.

48. Petitioner excepts to the sufficiency of respondent's denial of the allegation that as a result of Shinn's conflicts of interests, he abandoned petitioner, wholly failed to give him constitutionally adequate representation at his capital trial, and did not subject the prosecution's case to meaningful testing. Petitioner affirmatively alleges that respondent's recitation of boilerplate bases for denying the allegation fails to address the evidence presented in the habeas proceedings, ignores the judicial finding made by this Court as discussed above, and otherwise continues to rely on the incomplete evidence reflected in the trial record, which was the product of Shinn's failings.

49. Petitioner excepts to the sufficiency of respondent's denial that Shinn's motive for admittedly inducing petitioner to confess to the robberies three weeks after an interview with Deputy Gibbons was to

curry favor with the prosecution, and to the sufficiency of respondent's denial that petitioner falsely confessed. (Return at 32. ¶ 81.) Petitioner affirmatively alleges "Shinn's own pending criminal investigation may help explain why he was so anxious to cooperate with the district attorney." *In re Gay*, 19 Cal. 4th at 833 (Werdegar, J., concurring). Petitioner further affirmatively alleges that despite the gross misappropriation of his client's funds, and the ease with which Shinn could have been successfully prosecuted and imprisoned, the Los Angeles District Attorney's Office failed to prosecute Shinn. (*See* Return at 12, ¶ 30 [respondent alleges Shinn never criminally prosecuted]; *see also* Ex. 80 at 2090 [Deputy Gibbons believed Shinn should have been criminally prosecuted].) Petitioner further affirmatively alleges petitioner would not have confessed to, or been convicted of, *inter alia*, the Kenn Cleaners, Salads Plus, and Pizza Man robberies for which there was insufficient evidence. *In re Gay*, 19 Cal. 4th at 792-93. Petitioner further affirmatively alleges that there was no logical or rational reason for unconflicted counsel to induce his client to confess to the robberies and thereby, respondent admits, permit "'the prosecution to prejudicially portray petitioner as an *admitted* serial robber who killed a police officer to avoid arrest and prosecution for the robberies.'" (Return at 36, ¶ 87 (respondent's italics; inner citation omitted).)

50. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn intentionally misled petitioner to believe he had reached an agreement with the prosecution regarding his testimony, and the sufficiency of respondent's allegation regarding the limited nature of Shinn's representation of the agreement. (Return at 33, ¶ 82.) Petitioner affirmatively alleges that based on respondent's admission that in fact "there was no such agreement," (*id.*) Shinn's contrary statements to petitioner were false and Shinn had no reason to believe there was such an

agreement when he misinformed petitioner that one existed. To the extent that respondent disputes that Shinn misled petitioner to believe the prosecution would not prosecute him for capital murder if he confessed to the robberies, petitioner affirmatively alleges that both Shinn and respondent admit that Shinn misinformed petitioner that the purpose of the interview with the District Attorney was to determine whether petitioner would be a "witness for the prosecution" (*id.*; 52 RT 6274-75, 6276), which explicitly and implicitly signifies that in such a role petitioner would not also be on trial for capital murder.

51. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn intentionally misled petitioner to believe his statements would not be used at trial if no agreement was reached. (Return at 33-34, ¶ 83.) Petitioner affirmatively alleges that the denial is contrary to this Court's finding that Shinn "falsely assur[ed] petitioner that the statement would not be admissible at trial." *In re Gay*, 19 Cal. 4th at 781. Petitioner further affirmatively alleges that respondent's citation of this Court's opinion in *In re Gay*, *id.* at 792, does not support the allegation that Shinn "'believed that he had this understanding [with the prosecution]'" based on his "'past experiences with the District Attorney's Office.'" (Return at 34, ¶ 83 [inner citation omitted].) The quoted language is from the findings of the referee at the habeas corpus evidentiary hearing, which were not expressly adopted by the Court, and conflict with the Court's express finding quoted above and its finding that "Shinn misled petitioner into making" the confession. *In re Gay*, 19 Cal. 4th at 793. Petitioner further affirmatively alleges that in the absence of an explicit agreement, Shinn's past experience with the District Attorney's Office gave him no reasonable basis to believe he nevertheless had an "understanding" regarding an implicit agreement. Even Shinn's self-serving, tentative and

evasive testimony demonstrates at minimum that, consistent with his past experiences, any agreement would have been discussed explicitly before a client made "a taped confession":

> I think the reason I did that was because I think there was maybe – I *don't recall* now – an agreement before we went into the room. I don't want to speculate. *Usually what I do* is – I don't know *in this particular case* – but *usually* what we do is if we try to negotiate some kind of a plea bargain, we *would talk about it before* we go into such a room and have a taped confession.

(Return Ex. 2 at 5 [emphasis added].)

52. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn induced petitioner to submit to coaching on the facts of the robberies, as well as to give the district attorney the false, coached version of the robberies. The sole basis for respondent's denial is the self-serving deposition testimony of Daye Shinn. (Return at 34, ¶ 84; *see* Return Ex. 3 at 7.) Petitioner affirmatively alleges that aside from Shinn's well-deserved reputation as an unethical liar, Shinn has repeatedly attempted to conceal his deceit by pleading lack of memory for important conversations with petitioner. (58 RT 6281.) Petitioner affirmatively alleges during the hearing regarding the admissibility of the petitioner's taped statements, Shinn testified that he did not recall petitioner's testimony that Shinn instructed him to lie about the robberies, even though petitioner had finished giving that testimony approximately 30 seconds before Shinn's professed memory lapse. (*Id.*) Petitioner affirmatively alleges Shinn also testified at the admissibility hearing, that he did not recall the conversation he had with petitioner about the robberies. (*Id.*) Petitioner affirmatively alleges that before and since the time of petitioner's evidentiary hearing, several tribunals had commented negatively on Shinn's credibility or

expressly noted his inability to recall. After the superior court *ordered* Shinn to assist counsel on habeas corpus, he testified at his deposition that he "could not recall whose idea it was for petitioner to admit participating in the robberies," and he "could not recall who initiated the interview, did not recall why he and petitioner went to the prosecutor's office, and did not recall what they were trying to accomplish." *In re Gay*, 19 Cal. 4th at 783, n. 8; *see also id.*, at *808*, n.17 ["Our review of Shinn's testimony confirms that as to matters of which he had any recollection, his answers were evasive, inconsistent, and often nonresponsive"]; (Ex. 33 at 575-76 [noting Shinn's "inconsistent and contradictory" testimony].)[3]

53. Petitioner excepts to the sufficiency of respondent's denial of the allegation that as a result of Shinn's overbearing and coercive statements and conduct petitioner gave a false and unreliable confession to the robberies. Respondent's denial fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 34, ¶ 85.) Petitioner affirmatively alleges and incorporates herein the relevant allegations regarding the inadequacy of Shinn's deposition testimony from paragraph IV.52., *post*, as if fully set forth herein. Petitioner affirmatively alleges Shinn made petitioner believe the only way the prosecutor would believe and give him a deal, is if he falsely confessed to all the charged robberies. (58 RT 6278-79.) Petitioner affirmatively alleges petitioner would not have confessed to, or been convicted of, *inter alia*, the Kenn Cleaners, Salads Plus, and Pizza Man

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[3] Similarly, the State Bar Court found Shinn's "testimony often changed dramatically and inconsistently depending upon the nature of the inquiry at the moment and noted "an attorney's fraudulent and contrived misrepresentations to the State Bar may constitute an even greater offense than misappropriation." (Ex. 33 at 580-81.)

robberies for which there was insufficient evidence; or the Designer Florist and repair shop robberies, for which there were significant problems of proof. *In re Gay*, 19 Cal. 4th at 792-93.

54. Petitioner excepts to the sufficiency of respondent's denial of the allegation that absent Shinn's inducement of petitioner to falsely confess, he would not have been convicted of the robberies. (Return at 35-36, ¶ 86.) Respondent's denial is based on the incomplete guilt phase trial record, and fails to plead or provide any basis to refute this Court's findings that there was a failure of proof and/or reasonable doubt as to petitioner's guilt of, *inter alia*, the Kenn Cleaners, Salads Plus, Pizza Man, Designer Florist and repair shop robberies. *In re Gay*, 19 Cal. 4th at 792-93.

55. Petitioner excepts to the sufficiency of respondent's denial that Shinn acted as a second prosecutor by creating evidence that led to petitioner's conviction of the robberies. (Return at 36, ¶ 87.) Petitioner affirmatively alleges that respondent's denial is foreclosed by, and provides no basis to dispute, this Court's finding that Shinn "acted as a second prosecutor by creating the evidence that led to petitioner's conviction of the robberies." *In re Gay*, 19 Cal. 4th at 793. Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding the unlikelihood of petitioner's conviction absent the false confession, from paragraph V.54., *ante,* as if fully set forth herein.

56. Petitioner excepts to the sufficiency of respondent's denial that the prosecution used petitioner's admitted guilt of the robberies as the centerpiece of the State's theory of motive for committing the murder of Officer Verna. (Return at 36-37, ¶ 88.) Petitioner affirmatively alleges that this Court explicitly found, and respondent has intentionally ignored, that the prosecution's primary theory of motive was that petitioner and his

co-defendant committed the capital offense "to avoid arrest and prosecution for the robberies." *In re Gay*, 19 Cal. 4th at 793; (*see* Return at 36-37, ¶ 87, [omitting the foregoing finding citation]); *see also, People v. Gay*, 42 Cal. 4th at 1199 ("The prosecution's theory was that defendant and Raynard Cummings, passing the gun between them, shot and killed Verna so as to avoid arrest for a series of robberies. . . ."). Petitioner affirmatively alleges that the prosecutor did not "argue several motives equally," (Return at 37, ¶ 88) and that any alternative theories of motive did not provide the prosecution with an equally strong argument for petitioner's alleged guilt. (*See, e.g.*, 95 RT 10878.)

57. Petitioner's alleged fear of apprehension for the robberies would, in reason, provide a much stronger motive than a purported fear of apprehension "for being in a stolen car," (*id.*) because mere presence in a stolen vehicle is not a crime, and the prosecution's evidence was that the co-defendant had stolen the car. *People v. Cummings*, 4 Cal. 4th at 1266. The fear of apprehension for being "in possession of a firearm" (Return at 37, ¶ 88) did not provide an equally strong motive because, even according to the prosecution's theory, the firearm belonged to the co-defendant, who exercised exclusive dominion and control over it up until he initiated commission of the offense. (58 RT 6233 ["he carried a .38 through all the robberies, and he had a .38 earlier. He pulled the gun out as Paul Verna was leaning in the driver's window and shot him."].) Petitioner further affirmatively alleges that respondent had the opportunity to present affirmative evidence on this matter. (*See* Return Ex. 7.) Petitioner affirmatively alleges former Deputy District Attorney John Watson's declaration fails to support respondent's allegation the robberies were not the centerpiece of the prosecution's motive for the murder. (*See id.* at 31-33.)

58. Petitioner excepts to the sufficiency of respondent's denial that Shinn's conflicts of interest prevented him from conducting an adequate guilt phase investigation. (Return at 37, ¶ 89.) The purported denial rests solely on respondent's boilerplate allegations regarding Shinn's current unavailability, petitioner's alleged failure to allege specific acts and omissions, the purported strength of the evidence of guilt reflected solely in the trial record, and respondent's purportedly good faith basis for an alleged belief that the allegations are not true. Petitioner affirmatively alleges that, for reasons set forth above, respondent's boilerplate allegations remain inadequate to deny the allegations in the verified petition. Petitioner further affirmatively alleges that respondent explicitly concedes, contrary to its allegation, that petitioner in fact set forth "specific allegations" to support his claim. (Return at 37-38.)

59. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn failed to consult or present the testimony of any expert to refute the prosecution's guilt phase theory. (Return at 38, ¶ 90.) The purported denial rests solely on respondent's boilerplate allegations, as described in the foregoing paragraph; fails to plead any factual allegations or set forth documentary evidence to indicate the existence of material issues of fact; and, inconsistently admits that petitioner in fact set forth "specific allegations" to support his claim. (*Id.*) Petitioner affirmatively alleges Shinn falsely informed the trial court he planned to present the testimony of "two or three psychologists -- regarding eye witness testimony." (Sealed Transcript for March 7, 1985 at 9; *see generally id.* at 8-10.)

60. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn failed to undertake an independent investigation of guilt phase witnesses. (Return at 38-39, ¶ 91.) Petitioner

affirmatively alleges that the documents cited by respondent for the allegations that Doug Payne was appointed "to aid in the investigation," and that he "conducted an investigation," do not indicate that Payne actually or adequately interviewed any witnesses. (*See, e.g.*, 6 CT 1545-46; 1674-75; 7 CT 1848-49; 9 CT 1974-75.) Petitioner affirmatively alleges that Payne "was given inadequate guidance" by Shinn (*In re Gay*, 19 Cal. 4th at 781), and Shinn did not recall any specific investigation that was undertaken by either himself or Payne. (Ex. 9 at 84 [Shinn had no idea what Payne's "investigation consisted of"].)

61. Petitioner excepts to the sufficiency of respondent's denial of the allegations that Shinn presented only a *pro forma* guilt phase defense. (Return at 39-40, ¶ 92.) Petitioner affirmatively alleges that respondent fails to dispute any material facts, and argues only that the phrase "*pro forma*" does not accurately describe the nature of the defense presented by Shinn. Petitioner affirmatively alleges that respondent admits that the defense consisted of testimony from two civilian witnesses who did not observe the shooting, and the co-defendant's wife, who repeated her incriminating testimony against petitioner. (Return at 39, ¶ 92.) Petitioner affirmatively alleges that petitioner was further prejudiced by the purported "addition" of testimony from Detective Jack Holder (*id.*), who opined that petitioner was truthful when he admitted guilt for the robberies, but lied when he denied committing the capital murder. Petitioner further alleges that respondent's references to Shinn's perfunctory cross-examination of numerous prosecution witnesses (*id.*) cannot alter the prejudicially ineffective nature of Shinn's desultory performance. Petitioner further affirmatively alleges that Detective Holder's examination elicited no useful information. *See, e.g., People v. Cummings and Gay*, 4 Cal. 4th at 1269-70. (Court lists only Rosa Martin, Rose Perez, and Pamela Cummings as

defense witnesses). Petitioner affirmatively alleges Detective Holder failed to determine what, if anything, Marsha Holt and Gail Beasley could have seen from their vantage points inside the Beasley home because he failed to take the appropriate measurements and failed to take photographs of the crime scene from inside the Beasley home, where Gail Beasley and Marsha Holt stated they witnessed the shooting. (58 RT 9821, 9823.) Petitioner affirmatively alleges Shinn failed to cross-examine Detective Holder on this vital area of his investigation of the crime. (*See generally* 86 RT 9817-9825.) Petitioner affirmatively alleges that the purportedly "breathtakingly credible" assessment the trial court attributed to Pamela Cummings' testimony (Return at 40, ¶ 92) is refuted by the trial prosecutor's determination that Cummings breached her plea agreement through her "repeated refusal ... to be truthful in her testimony in the case of *People v. Kenneth Gay and Raynard Cummings*." (Exhibit 22, Letter From John Watson to Commissioner Irwin H. Garfunkel at 240.) Petitioner further affirmatively alleges that the prosecution duplicitously and corruptly vouched for the purported credibility of Cummings' testimony only when a version acceptable to the prosecution was presented for the purpose of resentencing petitioner to death.[4]

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[4] In contrast to the versions proffered by the prosecution, Cummings first reported the shooting to her sister, Debra Cantu, and described how a dark skinned, African-American male sitting in the back seat of the car was the person who shot Officer Verna. This man exited the back seat and continued shooting the officer. (2 Supp. CT 548-49.) Ms. Cummings' initial eye-witness account of the shooting corroborates the scientifically based re-enactment petitioner's experts have produced. (Retrial Defense Exhibit 535 For ID Only. Petitioner affirmatively alleges Ms. Cummings came the closest to the truth with this version of events, because she accurate described the lone shooter, and lied only about his true identity.

62. Petitioner excepts to the sufficiency of respondent's denial of the allegation that Shinn failed to interview and present the credible testimony of exculpatory eyewitnesses. (Return at 40-41, ¶ 93.) Petitioner affirmatively alleges that Shinn failed wholly or adequately to direct, guide or supervise his investigator in the performance of any minimally adequate investigation. *See In re Gay*, 19 Cal. 4th at 781 (Payne "was given inadequate guidance" by Shinn). Petitioner affirmatively alleges Detective Holder interviewed Ms. Martina Jimenez on February 18, 1995, and wrote an interview report, which included Ms. Jimenez's address, and was disclosed to Shinn in discovery. (Exhibit 43, Los Angeles Police Department Interviews of Martina Elizabeth Jimenez at 1630.) Shinn never interviewed Ms. Jimenez. (Exhibit 27, Declaration of Martina Elizabeth Jimenez at 498.) Petitioner affirmatively alleges Shinn knew where Mr. Ejinio Rodriguez lived. (Return Ex. 6 at 30.) Petitioner affirmatively alleges Ejinio Rodriguez was not interviewed by Shinn. (*Id.*)

63. Petitioner excepts to the sufficiency of respondent's denial of the allegations that Michael David Gaxiola could testify that Cummings confessed to being the sole shooter and that any incarcerated witness would have been available, credible, and given testimony exculpatory to petitioner. (Return at 41, ¶ 94.) Petitioner affirmatively alleges that but for the State's gross misconduct the police report that documented Mr. Gaxiola's interview would have contained the exculpatory information that Cummings specifically told Mr. Gaxiola he alone murdered Officer Verna. (*See* Exhibit 32, Declaration of Michael David Gaxiola, at 521-22 [Gaxiola informed police Cummings confessed to being sole shooter]; *but cf* Exhibit 14, Los Angeles Police Department Interview of Michael Gaxiola at 164-65 [report contains Cummings confessing to what could be construed as one shot].) Petitioner affirmatively alleges the

State found Mr. Flores credible enough to testify against Mr. Cummings. 103 RT 11613-62; (Exhibit 6, Declaration of John Jack Flores at 37.) Petitioner further affirmatively alleges that respondent's admission that Shinn made no effort to interview and present the readily available, reliable and credible testimony from Deputy McGinnis that would have persuasively exculpated petitioner (Return at 41, ¶ 94) conclusively demonstrates that Shinn's performance was prejudicially deficient under any applicable Sixth Amendment standard.

64. Petitioner excepts to the sufficiency of respondent's denial that Shinn unreasonably and prejudicially presented the testimony of robbery victim Chris Poehlmann, who had failed to identify petitioner but identified Cummings. (Return at 41-42, ¶ 95.) Petitioner affirmatively alleges any purportedly exculpatory information should have been elicited from Billy Sims. (*See* 86 RT 9759-72 [robbery committed by Sims and an armed Cummings in Lakeview Terrace area].)

65. Petitioner excepts to the sufficiency of respondent's denial of the allegation that petitioner was prejudiced by Shinn's presentation of testimony from Police Detective Holder there had been no "tacit" agreement about a plea bargain, and that Holder believed petitioner truthfully confessed to the robberies, while lying when he denied involvement in committing the capital murder. (Return at 42-43, ¶ 96.) Petitioner affirmatively alleges that neither Shinn's argument that "the prosecution had been 'underhanded,'" nor the eventual reversal of the robbery convictions on appeal is sufficient to cure the prejudice. (Return at 43, ¶ 96.) Petitioner further affirmatively alleges that respondent admits that Shinn elicited Detective Holder's otherwise inadmissible opinion that petitioner was guilty of both the robberies (because he truthfully admitted them) *and* the murder (because he untruthfully denied his guilt). (*Id.*)

Petitioner further affirmatively alleges that respondent cannot credibly deny that the testimony was prejudicial because respondent previously admitted petitioner's admission of the robberies "'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.'" (Return at 36, ¶ 87 [respondent's italics].) Petitioner further affirmatively alleges that this Court's reasoning finding it "difficult to conclude that the jury's consideration of this number of robberies committed shortly before the murder did not weigh heavily" on the jury's penalty determination, *In re Gay*, 19 Cal. 4th at 828, applies with equal force to the jury's determination of guilt.

66. Petitioner excepts to the sufficiency of respondent's denial that the use of the slides, showing petitioner holding a gun, during the prosecutor's opening statement was prejudicial. (Return 43, ¶ 97.) Petitioner further excepts to the general denial that Shinn attempted to curry favor with the district attorney's office because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (*Id.*) Petitioner admits the slides were presented to petitioner's jury prior to Cummings' successful motion to exclude. (*Id.*) Petitioner affirmatively alleges Shinn should have made his own timely motion to exclude the prejudicial slide show. (*See* Sealed Transcript for February 25, 1985 at 10 [petitioner expresses concern Shinn failed to object to slides demonstrating pass-the-gun theory despite acknowledged lack of evidence gun was passed].)

67. Petitioner excepts to the sufficiency of respondent's denial of the allegations that as a result of his conflicts of interest Shinn denied petitioner the right to conflict-free counsel and denied him effective representation at all critical stages of the proceedings. The purported denial

rests solely on respondent's boilerplate allegations regarding the alleged strength of the evidence of guilt reflected in the trial record and fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges the direct appeal opinion in this case is inadequate "documentary support" for a harmless error analysis in light of the previous nine volumes of documentary evidence petitioner previously has presented in these habeas proceedings. Petitioner affirmatively alleges respondent's repeated reliance on the direct appeal record indicates his willingness to rely on the current record, and permits the Court to grant petitioner the relief requested without conducting an evidentiary hearing. *People v. Duvall*, 9 Cal. 4th at 477; *In re Sixto*, 48 Cal. 3d at 1252; *In re Lewallen*, 23 Cal. 3d at 278; *In re Saunders*, 2 Cal. 3d at 1048.

VI.

In response to respondent's admissions, denials and allegations with respect to Claim Three, petitioner denies all allegations in the Return except those specifically admitted and further alleges, excepts and denies as follows:

Respondent purports to read this Court's Order to Show Cause (OSC) in an unreasonably narrow fashion. Respondent has carved out, as inapplicable, all claims and allegations relating to trial counsel's prejudicial failure to investigate and present evidence regarding petitioner's mental state and the prosecution's misconduct. Respondent disregards a multitude of allegations and claims on the ground they relate only to evidence that would "have diminished [petitioner's] *culpability* for participating in the murder," and therefore are not encompassed in the directive of the OSC to

address counsel's failure to investigate evidence that petitioner did not *participate* in the murder. (Return at 44 [emphasis added].)

To be sure, trial counsel's paramount deficiencies relate to his failure to investigate and present a wealth of information that conclusively establishes petitioner's innocence and that Raynard Cummings acted alone in shooting the victim. This evidence includes the facts, which respondent *admits*, that Cummings *repeatedly* confessed his *sole* responsibility for the crime, including in his confession to *law enforcement*. (*Compare, e.g.*, Petition at 68, ¶ 1.b.(9)(c); 69, ¶ 1.b.(9)(c)(ii); 70, ¶ 1.b.(9)(c)(ix); 71-72, ¶ 1.b.(9)(c)(xiii); *and* Return at 64, ¶ 156; 67, ¶ 164; 69, ¶ 167.) The prejudice of trial counsel's failings in this regard was compounded by the failure to dispel any false and misleading notion that petitioner willingly participated in any aspect of the crime (e.g., as a passive observer, or responding to Cummings' command to retrieve physical evidence at the scene). Counsel's deficiencies in this regard included the failure to investigate and present evidence of petitioner's mental state as well as to challenge the prosecution's misconduct. Additionally, the OSC most certainly encompassed counsel's substantive deficiencies in failing to request a mistrial and other appropriate remedies for the prosecution's "knowing presentation of perjured evidence," including "false testimony," as well as "for discovery violations" and the presentation of false argument." (Compare Petition at 125-29 and Return at 45, ¶ 98.)

Nothing in this Court's Order indicated that respondent was relieved of the obligation to show cause why Shinn's failings in any of these regards do not entitle petitioner to relief. Respondent's purported reasoning to the contrary is specious and disingenuous.[5] Consequently, those unanswered

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[5] Indeed, respondent later cites Cummings' confession to a fellow inmate in which he claimed that Petitioner *acquiesced* to Cummings' stated intention

allegations must be deemed "admitted." *See, e.g., People v. Duvall*, 9 Cal. 4th at 479 ("Thus, when the return effectively admits the material factual allegations of the petition and traverse by not disputing them, we may resolve the issue without ordering an evidentiary hearing.") (internal citations omitted); *In re Harris*, 5 Cal. 4th 813, 823 n.2 (by failing to dispute them, the Return "effectively admit[ted] the material factual allegations of the petition and traverse,"). Respondent having admitted, "there are no disputed factual questions as to matters outside the trial record," at a minimum, the merits of petitioner's ineffective assistance of counsel claims involving mental health evidence can be decided in petitioner's favor "without an evidentiary hearing." *People v. Duvall*, 9 Cal. 4th at 478 [inner quotation omitted].

To the degree the Return responds to the allegations in the Petition it only generally denies the bulk of the verified factual allegations and fails to create any dispute as to the material facts and explicitly concedes petitioner's entitlement to relief on the pleadings.

1. Petitioner excepts to the sufficiency of the Return because it only generally denies the allegation that Mr. Shinn's failure to investigate and present evidence of petitioner's innocence was prejudicial, and fails to plead any factual allegations or set forth documentary evidence to indicate

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to shoot the victim. (Return at 65, ¶ 156.) According to respondent, "such testimony would have shown that, even *if petitioner was not the shooter*, he was guilty as an aider and abettor," thus giving trial counsel a purportedly tactical reason not to introduce evidence of Cummings' confession. (*Id*; [emphasis added].) Putting aside the inadmissibility of Cummings' reported hearsay to implicate *petitioner*, and Cummings' lack of credibility, respondent's reliance on potential evidence of aiding and abetting liability – which must be relevant to establish defendant's *state of mind* – belies any reasonable suggestion that trial counsel's failure to investigate *mens rea* evidence was not encompassed by the OSC.

the existence of genuine issues of fact. (Return at 45, ¶ 99.) Petitioner affirmatively alleges Shinn died in June 2006. Petitioner affirmatively alleges from prior association, respondent is, or should have been, well aware that Shinn had no qualms about talking to or signing declarations for the Attorney General. (*See* EH 1 RT 96-98 [Shinn unable to recall events contained in declaration he signed for Attorney General].)

2. Petitioner excepts to the sufficiency of the Return because it only pleads a general denial, absent any factual allegations or documentary evidence, to the allegation that Shinn failed to undertake an adequate investigation of readily available, materially exculpatory information he received in discovery, as well as from petitioner. (Return at 46, ¶ 100.)

3. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation Shinn failed to interview and present the testimony of eyewitnesses who reported seeing a shooter who did not match petitioner's physical description, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 46, ¶ 101.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Shinn's unavailability in paragraph VI.1., *ante*.

4. Petitioner excepts to the sufficiency of respondent's allegation that no one at the Rodriguez home volunteered to the defense investigator, Douglas Payne, that Ejinio "Choppy" Rodriguez had witnessed the shooting, because it fails to indicate the existence of genuine issues of fact. (Return at 46-47, ¶102.) Petitioner affirmatively alleges that trial counsel Shinn was, or should have been, aware Mr. Ejinio Rodriguez resided at that residence because Shannon Roberts gave Mr. Ejinio Rodriguez's exact address in his preliminary hearing testimony. (Exhibit 53, Preliminary Hearing Testimony of Shannon Roberts at 1751.) Petitioner affirmatively

alleges that Shinn was under a professional, Sixth Amendment obligation to ensure that Ejino Rodriguez was interviewed and that such obligation imposed a continuing duty to supervise the investigation and take all reasonable steps necessary to contact Rodriguez. Petitioner further affirmatively alleges that Mr. Payne's notes do not support respondent's allegations that Mr. Payne asked if anyone at the Rodriguez home had witnesses the shooting, whether Ejino Rodriguez resided or was at the location or whether he had witnessed the shooting. (Return at 47 ¶ 102, citing Return Ex. 6 at 30.)[6] Petitioner further affirmatively alleges that Mr. Payne's notes fail to indicate that he asked to speak to Mr. Ejinio Rodriguez. (Return Ex. 6 at 30.)

5. Petitioner excepts to the sufficiency of the Return in generally denying the allegation that Mr. Ejinio Rodriguez would have testified the shooter was the man with "dark skin," not the man with the lighter skin. (Return at 47, ¶ 103.) Petitioner affirmatively alleges that the contents of a subsequent summary of Mr. Rodriguez' recollection of events prepared by a Public Defender investigator in May 1999 do not dispute the fact that Mr. Rodriguez would have given such testimony, the admissibility of such testimony, nor the reasonable probability that it would have produced a

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[6] Trial counsel Shinn knew, or reasonably should have known, that Mr. Ejinio Rodriguez witnessed the shooting, based on even a cursory reading of Shannon Roberts' grand jury and preliminary hearing testimony (Exhibit 52, Grand Jury Testimony of Shannon Roberts, July 13, 1983 at 1729; Exhibit 53, Preliminary Hearing testimony of Shannon Roberts, August 26, 1983 at 1750-51)) or from a minimal review of the discovery (Exhibit 40, Los Angeles Police Department Interviews of Shannon Roberts at 1615; Exhibit 44, Los Angeles Police Department Interviews of Walter Roberts at 1636); and counsel therefore should have explicitly directed Mr. Payne to conduct an interview of the witness or to report why, despite reasonable efforts to do so, such an interview could not be conducted.

result more favorable to petitioner in the guilt phase of his trial. (*See* Return at 47, ¶ 103, citing Return Ex. 18.) Petitioner affirmatively alleges that in contrast to Mr. Rodriguez's February 2003 declaration, the May 1999 report inaccurately identifies the witness as "Ijinio" [sic] Rodriguez, and describes only a subset of information covered in Mr. Rodriguez's declaration; the May 1999 report is not expressly acknowledged or endorsed as accurate by Mr. Rodriguez; and is not signed under penalty of perjury. Petitioner affirmatively alleges Mr. Rodriguez was never interviewed by the police or by Shinn. Petitioner further affirmatively alleges that Mr. Rodriguez's February 2003 declaration provides additional, non-contradictory detail to his May 6, 1999 statement, such as recalling another person (the "Blonde woman"); the skin color of the man who retrieved the gun after the shooting ("much lighter skin"), and seeing someone "standing over" the police officer during the shooting (the "black man who had dark skin"). (Exhibit 24, Declaration of Ejinio Rodriguez at 245.) Petitioner affirmatively alleges Mr. Rodriguez's more detailed subsequent declaration is no less – and in fact much more – reliable than the actual contradictory statements and testimony of the prosecution witnesses respondent alleges are reliable and credible. (*See* Return at 89, ¶ 222; *post* at VI.172-174. [Thompson first reported and testified the dark skin man was the sole shooter; then testified petitioner was the sole shooter; then testified both petitioner and the dark skinned man were shooters; returned to the dark skinned man was the sole shooter; then testified both were shooters]; Return at 129 ¶ 307; *post* at VI.193.-198. [Ms. Beasley first reported a third person outside the car along with a detailed clothing description; then reported third person never left the car; then testified third person remained in back seat and claimed petitioner was the shooter, but described him as wearing clothing actually worn by Cummings]; Return at 131-33, ¶¶ 314-21; *post* at

VI.204-212 [Ms. Holt's reports and testimony regarding the number of shots fired and whether or not she saw petitioner approach the victim varied widely throughout her trial testimony, and two witnesses in the house with her at the time in question testified that she was unaware of the shooting until informed of it by Beasley].)

6. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that Mr. Rodriguez would have testified that the light skinned man who was not involved in the shooting jumped out of the car and picked up the officer's gun, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 47, ¶ 104.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Rodriguez's testimony, as if fully set forth herein. Petitioner affirmatively alleges that he "stepped out, picked up … the murder weapon which had been dropped or thrown down at the scene," *People v. Cummings and Gay*, 4 Cal. 4th at 1258, and not Officer Verna's gun (*see id.*).

7. Petitioner excepts to the sufficiency of respondent's general denial that Mr. Rodriguez saw the shooting of Officer Verna. (Return at 48, ¶ 105.) The return fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact, yet offers only a general denial to the allegation. Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Rodriguez's testimony, as if fully set forth herein.

8. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Mr. Rodriguez's name and address appeared in Shannon Roberts' grand jury and preliminary hearing testimony and trial

discovery, and affirmatively alleges that it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 48, ¶ 106.) Petitioner affirmatively alleges that references to Mr. Rodriguez "in the referenced documents" (Return at 48) by his nickname of "Choppy," rather than his formal, given name, Ejinio, did not reasonably excuse trial counsel from conducting and supervising an investigation that included conducting an interview with the witness. Petitioner affirmatively alleges the documents cited in the Petition provided trial counsel with sufficient information to identify, locate and interview Mr. Rodriguez. Petitioner affirmatively alleges Shannon Roberts testified before the Grand Jury that he was with "Choppy Rodriguez and Walter Roberts." (Exhibit 52, Grand Jury Testimony of Shannon Roberts at 1729.) Petitioner affirmatively alleges Robert Walters told the police he was with a friend "known only as 'Choppy' in front of Choppy's house on Hoyt Street (approximately five houses away from the crime)." (Exhibit 44 at 1637.) Petitioner affirmatively alleges Shannon Roberts testified to Choppy's exact address in his preliminary hearing testimony. (Exhibit 53 at 1751.) Petitioner affirmatively alleges Shinn unreasonably failed to make any attempt to obtain Mr. Rodriquez's first name. (*See* Return Ex. 6 at 30 [Interview of several Rodriguez family members and neither the name "Choppy" nor "Ejinio" noted].)

9. Petitioner excepts to the sufficiency of respondent's general denial that the admitted failure by Shinn to interview Ejinio Rodriguez deprived petitioner of the testimony of an exculpatory witness. (Return at 48, ¶ 107.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Ejinio Rodriguez's testimony, as if fully set forth herein.

10. Petitioner excepts to the sufficiency of respondent's allegation the investigator, Douglas Payne, went to Ms. Jimenez's home and discovered her family had moved. Said allegation is irrelevant and fails to create any genuine dispute of a material fact. (Return at 48, ¶ 108.) Petitioner affirmatively alleges trial counsel Shinn knew, or should have known, Ms. Jimenez's new address in Tijuana, Mexico, because it was typed on a police report that was disclosed in discovery. (Exhibit 43, Los Angeles Police department Interviews of Martina Elizabeth Jimenez at 1630.)

11. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Ms. Jimenez would have testified the shooter had a "very dark" complexion, thus excluding petitioner. (Return at 49, ¶110.) Said allegation fails to indicate the existence of any genuine issue of fact or to set forth documentary evidence. Petitioner alleges Ms. Jimenez has been consistent and unwavering regarding a vital material fact: her description of the shooter as having a "very dark" or "chocolate" skin tone and being "ugly." (Exhibit 27, Declaration of Martina Elizabeth Jimenez at 498; Ex. 43 at 1630.) Petitioner affirmatively alleges the prosecution's failure to disclose their interview with Ms. Jimenez several months prior to petitioner's retrial, is a sound basis for determining the prosecution found her consistently exculpatory statement highly reliable and credible. (*See* Return Ex. 9 at 36 [Jimenez states she was interviewed by Stephens and Morrison].) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Ms. Jimenez's testimony, as if fully set forth herein.

12. Petitioner excepts to the sufficiency of respondent's general denial that Ms. Jimenez would have testified the dark skinned man shot several times without stopping or handing the gun to the passenger. The

denial fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 50, ¶ 111.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Ms. Jimenez's testimony, as if fully set forth herein.

13. Petitioner excepts to the sufficiency of respondent's general denial that the testimony describing the rapidity of the shooting would have undermined the prosecution's theory that Cummings had time to pass the gun to petitioner. (Return at 50, ¶ 112.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Ms. Ruela's testimony, as if fully set forth herein.

14. Petitioner excepts to the sufficiency of respondent's general denial that Ms. Jimenez would have conclusively excluded petitioner as having fired any shots. (Return at 50, ¶ 113.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Ms. Jimenez's testimony, as if fully set forth herein.

15. Petitioner excepts to the sufficiency of respondent's allegation that in an attempt to discover potential witnesses Mr. Payne went to Mr. Walter Roberts' residence where he was informed the current residents did not know where Walter Roberts had moved. (Return at 50, ¶114.) Said allegation fails to plead any facts creating a disputed issue, or to explicitly or implicitly establish the reasonableness of the investigation conducted and supervised by trial counsel. Petitioner affirmatively alleges that Walter Roberts informed the police that he and Shannon Roberts were brothers. (Ex. 44 at 1637 ["Witness Roberts said he was with his brother (Shannon Roberts -Age 11)"].) Petitioner affirmatively alleges trial counsel Shinn

knew Shannon Roberts had moved to San Jose and that the familial relationship would have reasonably enabled counsel and his investigator to locate and interview Walter Roberts. (Return Ex. 6 at 30.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Walter Roberts' testimony, as if fully set forth herein.

16. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Walter Roberts saw the driver exit the car and stand over the officer while rapidly firing two more shots at him. (Return at 50-51, ¶ 115.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Walter Roberts' testimony, as if fully set forth herein.

17. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Mr. Roberts would have described the shooter as a clean-shaven black man with a medium complexion and three to four inch afro wearing dark clothes. (Return at 51, ¶ 116.) The denial fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Walter Roberts' testimony, as if fully set forth herein.

18. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Mr. Roberts' description would have excluded petitioner. (Return at 51-52, ¶ 117.) The denial fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact.

19. Petitioner excepts to the sufficiency of respondent's general denial because it fails to plead any factual allegations or set forth

documentary evidence and offers only a general denial to the allegation Mr. Gustavo Gomez's testimony would have been helpful to disprove the pass-the-gun theory. (Return at 52, ¶ 119.) Petitioner affirmatively alleges that Mr. Gomez saw, and reported to the police the day of the shooting, a man he described as more closely resembling Raynard Cummings than petitioner with a "chrome plated" gun in his hand. (Return Ex. 10 at 37; *see also* Exhibit 81, Declaration of Gustavo Gomez at 2091). Petitioner affirmatively alleges the prosecution's pass-the-gun theory failed to account for Cummings being in possession of a gun.

20. Petitioner excepts to the sufficiency of the Return because the denial fails to plead facts or set forth documentary evidence that rebuts the allegation Mr. Gomez "watched as a tall African American man with a gun in his hand got out after the car and then back in again. Once the man was in the car again, the car drove away on Gladstone Street" (Ex. 81 at 2091). (Return at 63, ¶ 121.) Petitioner affirmatively alleges Mr. Gomez, like Ms. Jimenez, and Mr. Roberts, was consistent as to the relevant material fact – the man he described with the gun did not match petitioner's physical description, but it was highly similar to Raynard Cummings' physical description. Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Gomez's testimony, as if fully set forth herein.

21. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that Mr. Gomez's testimony would have contradicted the prosecution's theory and demonstrated that Cummings was in possession of at least one gun, and it fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 52-53, ¶ 122.) Petitioner affirmatively alleges Mr. Gomez specifically differentiated between Cummings, the "tall

African American man" and petitioner "who had a much lighter complexion than that of the man I had seen with the gun." (Exhibit 81, Declaration of Gustavo Gomez at 2091.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.5., *ante*, regarding the reliability and relative credibility of Mr. Gomez's statements, as if fully set forth herein.

22. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Ms. Linda Orlik could and would have testified that all the shots were fired rapidly in a short period of time. (Return at 53, ¶ 125.) Petitioner affirmatively alleges that respondent's reliance on Marsha Holt, who was the only witness to describe a gap of thirty seconds to two minutes between the first two shots (*see* Exhibit 55, Preliminary Hearing Testimony of Gail Beasley at 1805 [the shots were "bunched together ... one after another"]; 69 RT 7684 [Thompson testified the shooting "all took place, I think, within 15 seconds"][7]; 69 RT 7787 [Shannon Roberts testified the second shot quickly followed first shot]), does not logically dispute the fact that Orlik would have given exculpatory testimony or that it would have been found credible by the jury. Petitioner affirmatively alleges when asked to demonstrate the time between the first and second shot, Ms. Holt's demonstration yielded a time of 4.42 seconds. (68 RT 7583.) Petitioner further affirmatively alleges Ms. Holt truthfully testified "Then the second could seem like 30 seconds to me, because I don't time nothing," (*id.* at 7584), and further confessed that she was not

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[7] Thompson's testimony that the shooting lasted about 15 seconds is well within the range of 14 to 19 seconds determined by Dr. Solomon. (Exhibit 17, Report of Kenneth Solomon, Ph.D. at 177.)

"very good at estimating time" (*id.*; Retrial 18 RT 1983)[8]. (*See, e.g.*, Retrial 18 RT 1936 [Holt's time estimate ranges from two to thirty seconds]; *id.* at 1949 [Holt testifies thirty seconds *or less* between first and second shot].) Petitioner further affirmatively alleges Ms. Holt did not know how much time elapsed between the first and second shot because she neither saw nor heard the shooting. (2 CT 548 [Marsha Holt was "sitting on the bed next to her mother"]; 1 Supp CT 281 [Celeste Holt did not "really hear the shots," Gail Beasley informed her what was happening]); 2 CT 549 [Gail Beasley testified Ms. Holt was watching television during the shooting and did not know anything had happened until Ms. Beasley informed her of the shooting]; Exhibit 20, Evidentiary Hearing Testimony of Don Anderson at 2223 [Holt told Don Anderson she did not see the shooting].)

23. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that testimony such as Ms. Orlik's would have demonstrated the shooting happened too fast for a gun to have been passed from the back to the front seat of the car. (Return at 53, ¶ 126.) Said denial fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively

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[8] [By Ken Lezin]: And now when you say 30 seconds, are you a good estimate of time?

[By Marsha Holt]: No. I told you that in the beginning.

Q: Okay. All right. And so it could have even been just a few seconds; is that right?

A: It's possible. I know it was say 30 seconds or less. I mean, you can get a lot done in 30 seconds.

Q: Well, if I were to give you a starting time, would you be able to tell us when the time between the first and the second shots that you heard was?

A: I don't think I probably would. It's been so long.

Q: Okay.

A: I mean, I don't even think you understand it's been 17 years. I believe you don't understand that.

(Retrial 18 RT 1983.)

alleges and incorporates the relevant allegations in paragraph VI.22., *ante*, regarding the credibility of Ms. Holt's testimony of a thirty second to two minute gap between the first and second shots, as if fully set forth herein.

24. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that this evidence would have helped undermine the prosecution's pass-the-gun theory. (Return at 53-54, ¶ 127.) Said denial fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges the eyewitness and scientific evidence strongly indicates "all of the shots were fired rapidly in a short amount of time," a conservative estimate being between eight to ten seconds. (Ex. 17 at 176-77; Petition at 64; *see id.* at 99.) Petitioner affirmatively alleges the documentary evidence upon which respondent relies fully supports petitioner's argument the shooting happened too quickly for petitioner to have fired any of the shots outside of the car. (Return at 54 "[*See* Ex. 17, p. 175 [it would have taken petitioner seven seconds to exit the car after the firing of the first shot"].)

25. Petitioner excepts to respondent's allegation that Mackey Como said she had no information that could help the defense when interviewed by the defense investigator. (Return at 54, ¶ 128.) Petitioner affirmatively alleges Ms. Como possessed relevant and highly incriminating information regarding the sudden and unexpected visit of Raynard Cummings' mother hours after the shooting. (Declarations and Exhibits in Support of Petition for Writ of Habeas Corpus, Case No. S030514, Tab B - Declaration of Antonio Samaniego at ¶ 4 (hereinafter "Declaration of Antonion Samaniego") [Como also mentioned threats by Cummings family prior to Gail Beasley's testimony]; Exhibit 49, Los Angeles County Public Defender Investigation Report of Mackey Como at 166; Retrial 24 RT 3072-73.)

26. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Ms. Como would have provided evidence to undermine the prosecution's theory the darker skinned passenger did not exit the car. (Return at 54, ¶ 129.) The denial fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.25., *ante*, regarding the relevance of Ms. Como's testimony, as if fully set forth herein.

27. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Ms. Como would have provided important information regarding Cummings' involvement in the shooting of Officer Verna. (Return at 54, ¶ 131.) The denial fails to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.25., *ante*, regarding the relevance of Ms. Como's testimony, as if fully set forth herein.

28. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that after her son's visit Mary Cummings visited Ms. Como, whom she had not seen in a long time. (Return at 64-65, ¶ 132.) Said denial fails to plead any factual allegations or documentary evidence. Petitioner affirmatively alleges Hoyt Street did not remain "sealed off" the entire evening of June 2, 1983. Petitioner affirmatively alleges "*After the ambulance took the body away*, Mary Cummings, an acquaintance and the mother of Raynard Cummings, walked into the yard and spoke with Como for a few minutes." *People v. Gay*, 42 Cal. 4th at 1210 (emphasis added); (Retrial 24 RT 3072 [Mary Cummings arrived after ambulance left]).

29. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Ms. Cummings visited with Ms. Como long enough to gather information about the shooting. (Return at 55, ¶ 133.)

Said denial fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.28., *ante*, regarding the timing of Ms. Cummings visit to Ms. Como, as if fully set forth herein.

30. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation Ms. Como found Ms. Mary Cummings' visit unusual, and the Return fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 55, ¶ 134.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.28., *ante*, regarding the regarding the timing of Ms. Cummings visit to Ms. Como, as if fully set forth herein.[9] Petitioner affirmatively alleges "it was not usual" for Mary Cummings to visit Mackey Como at that time. (Retrial 24 RT 3072-73.)

> [By Mr. Lezin]: Was Mary Cummings that a frequent visitor to your house?
>
> [By Mackey Como]: No.
>
> Q: Was it *usual* for her to be coming to your house at that time in the afternoon?
>
> A: No.
>
> Q: And had it been a while since you had seen her at all?
>
> A: Yes.

(*Id.* [emphasis added]. *See also* Ex. 49 at 1666 ["While Mary Cummings

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[9] Petitioner notes respondent's highly selective intra-testimony credibility determinations. Ms. Como earlier testified Mary Cummings arrived after the ambulance left (Retrial 24 RT 3072), testimony that respondent not only ignored but affirmatively denied (*See* Return at 54-55, ¶¶132-135.)

had visited her house in the past, she had not been there in some time and this particular visit was unusual in nature."])

31. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or offer any documentary evidence to indicate the existence of genuine issues of fact, and instead offers only general denials and legal conclusions to the allegation that Ms. Como's testimony would have allowed counsel to argue Ms. Cummings had no reason to inquire about the shooting unless witnesses had observed Cummings outside of the car. (Return at 55, ¶ 135.) Petitioner alleges Ms. Como's conversation with Mary Cummings was relevant, admissible, non-hearsay evidence. Petitioner affirmatively alleges Mary Cummings questions to Ms. Como would not be offered for the truth of the matter asserted. Petitioner affirmatively alleges Mary Cummings' was technically an alleged coconspirator because the police believed Raynard Cummings gave her the murder weapon after the crime. (Ex. 6 at 44 [Cummings told Jackie Flores that Mary Cummings knew location of murder weapon]; 4 Supp. CT 752-53 [Eula Heights asked if she found gun in the clothes she took to Mary Cummings' house].) Therefore, Mary Cummings' questions would have been admissible hearsay under the "coconspirator's statement" exception. CAL. EVID. CODE § 1223 (West 2010).

32. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegations that trial counsel's failure to present Ms. Como's testimony prevented the jury from coming to similar conclusions, and the Return fails to plead any factual allegations or set forth documentary evidence. (Return at 36, ¶ 136.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.25., *ante*, regarding the relevance and admissibility, respectively, of Ms. Como's testimony, as if fully set forth herein

33. Petitioner excepts to the sufficiency of respondent's allegation that Mary Cummings would not have cooperated with petitioner's defense team. Said allegation is unresponsive to the allegation that Eula Heights feared her sister Mary Cummings and her nephew Raynard Cummings. (Return at 56, Petition, ¶ 137.)

34. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation Eula Heights committed perjury after being threatened by her sister, Mary Cummings, and that she feared both Mary Cummings and her nephew Raynard Cummings, and the Return fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 56-57, ¶ 138.) Petitioner affirmatively alleges that Ms. Heights informed Detective Holder she decided to lie to the police and commit perjury because "she feared retaliation" from her sister Mary Cummings who "is a very vicious person." (Exhibit 47, Los Angeles Police Department Interview of Eula Heights at 1658.)

35. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation Ms. Heights' perjury included, but was not limited to, describing Raynard and Pamela Cummings' actions after the shooting, and the Return fails to plead any factual allegations or offer documentary evidence to indicate the existence of genuine issues of fact. (Return at 57, ¶ 139.) Petitioner affirmatively alleges Eula Heights lied about a material fact that was directly relevant to the recovery of the murder weapon. Petitioner affirmatively alleges Ms. Heights lied about Raynard and Pam Cummings leaving her home with their two bags of clothes. (4 Supp. CT 752.)

36. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or documentary evidence and offers

only a general denial to the allegation that Mary Cummings threats against Ms. Heights were part of her ongoing course of conduct to coerce percipient witnesses to conceal their recollection of seeing Raynard Cummings as the sole shooter. (Return at 57, ¶ 140.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.34., *ante*, regarding Mary Cummings' threatening Eula Heights, as if fully set forth herein.

37. Petitioner excepts to the sufficiency of respondent's general denial of the allegation that Mary Cummings reviewed the pretrial transcripts of witnesses, including but not limited to Ms. Heights, and successfully threatened them against testifying. The denial fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 57-58, ¶ 141.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.34., *ante*, regarding Mary Cummings' threatening Eula Heights, as if fully set forth herein.

38. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation that investigation and presentation of Mary Cummings' threats against witnesses would have led to impeachment evidence against Marsha Holt and Gail Beasley, and the Return fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 58, ¶ 142.) Petitioner affirmatively alleges that respondent's assertion that the allegation "lacks specificity" (*id.*) is refuted by, *inter alia*, respondent's explicit acknowledgement of specific evidence. (Return at 58, ¶ 143.)

39. Petitioner affirmatively alleges that respondent's admission that additional evidence impeaching Gail Beasley and Marsha Holt "included, but was not limited to," the fact that Marsha Holt knew Mr. Cummings since childhood and Ms. Como and Mary Cummings were good

friends, is inconsistent with respondent's denial that Mary Cummings was "not a 'good friend'" of Macky Como. (Return at 58, ¶ 143.) Petitioner affirmatively alleges "Ms. Como has also known Mary Cummings, Raynard Cummings' mother, for more than 20 years and considers Mrs. Cummings to be a friend." (Declaration of Antonio Samaniego at ¶ 4.) Petitioner further affirmatively alleges that if Mary Cummings and Ms. Como were mere "acquaintances" and not friends, Mary Cummings appearance at the home of her "acquaintance" Ms. Como – amidst all the commotion the day of Officer Verna's murder – makes her visit all the more suspicious.

40. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that Ms. Beasley and Ms. Holt were familiar with the notoriously vicious Cummings family, and fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 58-59, ¶ 144.) Petitioner affirmatively alleges Eula Heights described her sister Mary Cummings as "a very vicious person." (Ex. 47 at 1658.) Petitioner affirmatively alleges Mary Cummings stabbed at least two men: she first stabbed her then-husband in the chest, "hitting a bone," and later stabbed another man. (Exhibit 64, Declaration of James Cummings at 1965, ¶ 11; Exhibit 65, Declaration of Darrell Cummings at 1973, ¶ 12.) Raynard Cummings had a reputation for having "a quick and violent temper," and "demonstrated that he is capable of serious, pointless violence." (Exhibit 79, Declaration of Richard Delouth at 2084, ¶16; 2086, ¶18.) Petitioner affirmatively alleges Marsha Holt "knew [Raynard Cummings] as we were growing up. You know his mother and my mother were pretty good friends." (Retrial 18 RT 1956; *see also id.* at 1959 [Holt met Raynard because their mother's were good friends and worked together].) Petitioner affirmatively alleges Ms. Beasley received threats from Mary Cummings, "Raynard Cummings or

members of his family prior to Gail's testimony in connection with this matter." (Declaration of Antonio Samaniego at ¶ 4.)

41. Petitioner admits Marsha Holt as well as Pamela Cummings, Robert Thompson, and Gail Beasley all failed to report and/or testify, at one time or another, to seeing a third person outside the car. (Return at 59, ¶ 145.) Petitioner affirmatively alleges with such information, a jury could understand that Ms. Holt's failure to report seeing a third person inside of the car was purely a function of Mary Cummings' sudden intimidating visit to the crime scene. Petitioner affirmatively alleges Ms. Holt was the only close eyewitness to the shooting who failed to ever report seeing a third, or a dark skinned person inside the car. Petitioner affirmatively alleges Gail Beasley's report of the third person inside the car became increasingly vague. Petitioner affirmatively alleges Ms. Beasley first reported to the police she saw a third person outside the car whom she both described and gave detailed description of his clothing. (Exhibit 12, Los Angeles Police Department Interviews of Gail Beasley at 156.) Petitioner affirmatively alleges less than two hours later, Ms. Beasley reports the third person remained in the car during the entire shooting and she could only describe the person as a Black male. (*Id.* at 157.) Petitioner affirmatively alleges; at the grand jury Ms. Beasley testified she only saw the head of the third person in the car, and eventually admitted she told the police the person was Black. (1 Supp. CT 525-26.) Petitioner affirmatively alleges by the preliminary hearing, Ms. Beasley could only "vaguely remember" seeing a person in the backseat, did not see the face, and could not determine the gender or race of that person. (5 CT 522.) Petitioner affirmatively alleges Ms. Beasley's "memory" about the back seat passenger was dramatically refreshed after Raynard Cummings had been convicted, sentenced to death, and his conviction and sentence affirmed by this Court. Petitioner

affirmatively alleges seventeen years later, while testifying at petitioner's penalty phase retrial Ms. Beasley now recalled - for the first time - the back seat passenger had a "dark" complexion, significantly darker than petitioner's. (Retrial 19 RT 2037.)

42. Petitioner excepts to the sufficiency of the Return because it offers non-responsive general denial to the allegation that with such evidence a jury could determine that Ms. Beasley's and Ms. Holt's false reports of seeing petitioner shoot Officer Verna was the result of Mary Cummings' sudden visit to the Como-Beasley household, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 59, ¶ 146.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.28., *ante*, regarding the timing of Ms. Cummings visit to Ms. Como, as if fully set forth herein.

43. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation that Shinn unreasonably failed to interview and call Robin Gay to testify that Pam Cummings told her Raynard Cummings was the sole shooter, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 59, ¶ 147.) Petitioner affirmatively alleges Shinn asked Robin Gay a couple of questions at a pretrial hearing. Petitioner affirmatively alleges Shinn failed to interview Robin Gay *before* the start of petitioner's trial. Petitioner affirmatively alleges Shinn may have briefly spoken to Robin Gay, during a recess at trial, at the insistence of petitioner. (76 RT 8640-41[Shinn requests a recess so "I can have Mr. Gay and Mrs. Gay talk"].) Petitioner affirmatively alleges respondent's citations fail to support his contention Shinn interviewed Robin Gay. (Return at 59, ¶ 147. *See* 61 RT 6717-18 [Shinn inquiring if petitioner and Robin Gay can be

transported together]; 62 RT 6726 [Shinn request hearing on witness tampering]; *id.* at 6766-67 [Shinn is not calling Robin Gay at that time]; 74 RT 8317 [Shinn wants order to "talk" to Robin Gay to give her a change of clothes from her mother]; 76 RT 8588 [Shinn and Robin Gay "didn't have a chance to talk together"]; *id.* at 8640-41 [Shinn requests a recess so "I can have Mr. Gay and Mrs. Gay talk"]; 98 RT 11306 [Robin Gay testifies in petitioner's penalty Shinn told her about petitioner's college program].) Petitioner affirmatively alleges that respondent's allegation "Shinn was in possession of Robin Gay's testimony at the grand jury proceedings," (Return at 59, ¶ 147) does not support any relevant or logical inference to dispute the fact that Shinn did not interview her.

44. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation that Shinn unreasonably failed to call Robin Gay to testify that Pam Cummings told her Raynard Cummings was the sole shooter, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 59-60, ¶ 148.) Petitioner affirmatively alleges Robin Gay was prevented from testifying because of her fear of additional charges. (62 RT 6736-37 [Ms. Gay believed the prosecution threatened additional robbery charges and to prevent her from obtaining parole if she testified on behalf of petitioner]; 74 RT 8471 [Upon advice of counsel, Ms. Gay asserted her Fifth Amendment privilege and refused to testify after the prosecution granted her immunity only as to the murder charges].) Petitioner affirmatively alleges Robin Gay wanted to testify on petitioner's behalf, but codefendant's counsel insisted on cross-examining her on the robberies and the prosecutor threatened to charge her with additional robberies if she

testified about them.[10] (62 RT 6724-67.) Petitioner affirmatively alleges Shinn failed to properly question Ms. Gay and make an adequate record of, and appropriate objection based on, the prosecution's coercion of the witness, during the hearing on former Deputy District Attorney Watson's threats of additions charges.[11]

45. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that Robin Gay's testimony that Raynard Cummings' bragged about killing the officer and petitioner denied doing so would have supported petitioner's innocence and impeached Pamela Cummings' testimony. Petitioner further excepts to the sufficiency of respondent's allegation that Robin Gay would have refused to testify to such facts as speculative and irrelevant to the material, exonerating weight of such evidence; and as failing to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 60, ¶ 149.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.44., *ante*, regarding the absence of Robin Gay's testimony, as if fully set forth herein.

46. Petitioner excepts to respondent's allegation that Robin Gay's unimpeachable testimony "'regarding the person responsible for the shooting,'" (Return at 60-61, ¶ 150 [citing Petition at 67]), was nevertheless

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[10] Deputy District Attorney Watson informed Ms. Gay she would be charged with two additional robberies if she did not "tell the truth." The threat was intended to and did in fact coerce Ms. Gay to adhere to the prosecution's version of the "truth." (*See also* Ex. 22 [Prosecutor Watson's request Pam Cumming's deal be revoked because she was not "truthful"].)

[11] Shinn failed to propound questions that focused on the actual threat, such as: who was judging the "truth" of her testimony; against what would it be judged; what evidence existed to support the additional charges; and why Watson approached Ms. Cummings when he knew she was represented by counsel.

vulnerable to attach on collateral issues. Petitioner affirmatively alleges that having expressly admitted that "'Ms. Gay's testimony was not subject to impeachment with prior inconsistent statements,'" (*id.*), unlike Pamela Cummings, respondent fails to identify any potential, specific and material impeachment evidence that reasonably would have discredited Ms. Gay's testimony.

47. Petitioner excepts to the sufficiency of respondent's allegation that had Robin Gay not been intimidated out of testifying on behalf of petitioner her trial testimony would have been highly consistent with Robert Thompson's police statement and grand jury testimony as well as the statements and testimony of several other eyewitnesses. (Return at 61-62, ¶ 151.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.44., *ante*, regarding the absence of Robin Gay's testimony, as if fully set forth herein. Petitioner affirmatively alleges the statements and testimony of the prosecution witnesses who identified petitioner as the shooter are inconsistent with several eyewitnesses (68 RT 7514-15 [Sheqita Chamberlin]; Ex.27 at 498 [Martina Jimenez]; 68 RT 7360-61 [Oscar Martin]; Ex. 44 at 1636-37 [Walter Roberts]; Ex. 24 at 245 [Ejinio Rodriguez]) and the scientific research and evidence, which took into account eyewitness accounts, that demonstrates only the back seat passenger could have murdered Officer Verna. (*See* Ex. 17 at 179; Retrial 25 RT 3274-75, 3289 [testimony of Dr. Sherry]; Retrial 27 RT 3563-67 [testimony of Dr. Fackler.]; *see generally* Petition at 78-84 [failure to consult eyewitness expert], 95-103 [failure to consult gunshot wound and scene reconstruction experts].)

48. Petitioner excepts to the sufficiency of the Return because it offers only conjecture in the form of a general denial of the unreasonableness of Shinn's admitted failure to call witnesses to the

confessions and admissions Cummings made after his arrest, and the Return fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 62, ¶ 152.) Petitioner affirmatively alleges Shinn never interviewed David Elliot, Norman Pernell, Gilbert Gutierrez, Michael Kanan, John Jack Flores, Michael David Gaxiola, James Edward Jennnings, Alfredo Montes, nor Deputy Sheriff William McGinnis. (Ex. 6 at 37 [Shinn never interviewed Mr. Flores]; Exhibit 32, Declaration of Michael David Gaxiola at 522 [same]; Exhibit 29, Declaration of William McGinnis at 501 [same]; *see generally* Return Ex. 6 [above-named individuals not listed as having been interviewed].) Petitioner affirmatively alleges trial counsel was unable to make a tactical decision whether or not to call these witnesses since he did not know what they had to offer the defense as a result of his failure to interview them. *See In re Gay*, 19 Cal. 4th at 790 ("before counsel undertakes to act, or not to act, counsel must make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation".)

49. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that while incarcerated in the Los Angeles County jail Cummings admitted and confessed his sole responsibility for the murder to any inmates, in addition to "the ones for which petitioner has provided specific allegations," and as to whom respondent admits Cummings made such admissions and confessions, "i.e., Gilbert Gutierrez, Michael Kanan, John Jack Flores, Michael David Gaxiola, and James Edward Jennings." (Return at 62, ¶ 153.) The Return fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact as to the extent of Cummings' admissions and confessions. (*Id.*)

50. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual or rational basis to deny that Shinn did not have a tactical reason to justify his admitted failure to investigate the evidence and witnesses set forth in police reports that described Cummings' numerous admissions and confessions. (Return at 62-63, ¶ 154.) Petitioner affirmatively alleges that the prosecution's failure to call witnesses who heard Cummings admit sole responsibility for the capital murder did not reasonably indicate the existence of a tactical reason for the defense not to call such materially exculpatory witnesses. Petitioner further alleges that the prosecutor's decision whether to call particular witnesses at trial could not have informed any reasonable tactical decisions purportedly made by defense counsel regarding the scope of the pre-trial investigation. Petitioner further alleges that based on respondent's express admission that Shinn possessed the police reports of Cummings' admissions and confessions, the Return fails to indicate the existence of any genuine issue of fact and offers only a general denial to the allegation that Shinn had no tactical reason for failing to call the witnesses to testify. (Return at 62-63, ¶ 154.) Petitioner further affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegations regarding Shinn's unavailability in paragraph III.1.a., *ante*. Petitioner further affirmatively alleges that in addition to the unreasonableness of trial counsel's failure to conduct appropriate pre-trial investigation, the prosecution's decision not to call what appeared to be witnesses helpful to the prosecution's case was, or should have been, a strong indication to Shinn that these witnesses were likely helpful to petitioner's defense.

51. Petitioner excepts to the sufficiency of the Return as failing to proffer any rational or non-speculative basis for denying that Shinn's failure to interview or call Los Angeles County jail inmates Norman Pernell and

David Elliott was prejudicially deficient. (Return at 63, ¶ 155.) Respondent's admission that both inmates were reported to have heard Cummings confess to being the shooter on June 3, 1983, establishes trial counsel's duty to conduct reasonable investigation including, but not limited to, interviewing the witnesses. Petitioner affirmatively alleges that respondent's allegation that the police reports were ambiguous as to whether the witnesses heard Cummings admit that he was "the *sole* shooter" (Return at 63) is unreasonable and does not otherwise raise any inference or possible fact that would have relieved counsel of the duty to investigate further. Petitioner affirmatively alleges Cummings confessed to Elliott "he was *the person* who had *shot and killed* Officer Paul Verna." (Exhibit 61, Identification of witnesses currently in custody at the Los Angeles County jail at 1957 [emphasis added].) Petitioner affirmatively alleges that respondent's admission that the police reports described a person who did not match petitioner's description, but did match Cummings' description, and who admitted shooting the victim required defense counsel to interview and call the witness at trial. Petitioner excepts to respondent's allegation that the fact that the person who admitted shooting the victim was identified only as "Slim," excused trial counsel from further investigating, locating, and interviewing the witness. Petitioner affirmatively alleges that no later than September 1984, Shinn knew, or should have known, that "Slim" was Cummings' nickname. (5 CT 1435, 1438 [Cummings' counsel conceded the "Slim" referred to by Norman Pernell was Cummings].) Petitioner affirmatively alleges Shinn was required to, at a minimum, interview witnesses he knew possessed or might possess information that petitioner was innocent of killing Officer Verna. *See In re Gay*, 19 Cal. 4th at 790.

52. Petitioner excepts to the sufficiency of respondent's allegations that Mr. Flores' testimony would have been impeached with his

prior convictions because it fails to raise a genuine issue of fact, and that Cummings' confession would have implicated petitioner as an aider and abettor because it is based on a legal conclusion and lacks a factual basis. (Return at 64-65, ¶ 156.) Petitioner affirmatively alleges the State found Mr. Flores credible enough to testify against Mr. Cummings.[12] (103 RT 11613-62; Ex. 6 at 37.) Petitioner affirmatively alleges that respondent's allegation that trial counsel's "tactical reasons" for failing to introduce the exculpatory evidence was based on counsel's desire to avoid introduction of incriminating statements attributed to petitioner by Cummings demonstrates that trial counsel's actions were unreasonable as a matter of law, because such hearsay statements were inadmissible. *See, e.g., People v. Aranda*, 63 Cal. 2d 518 (1965) (inculpatory extrajudicial statements of nontestifying codefendant are inadmissible against the other defendant in a joint trial); *Bruton v. United States*, 391 U.S. 123 (1968) (same). Petitioner affirmatively alleges Mr. Flores could have testified Mr. Cummings attempted to elicit his assistance in murdering Robin Gay by way of "poisoned stamps." (Ex. 6 at 37; *see also* 82 RT 11616-19 [testimony regarding Cummings eliciting Flores' assistance in acquiring poisoned stamps].) Petitioner affirmatively alleges Mr. Flores testimony about the faux-cyanide laced stamps would have demonstrated Cummings' desire to get rid of a highly inculpatory witness who heard his confession to being the only person involved in the shooting of Officer Verna and his admissions as to how he murdered the victim. (*See, e.g.*, 3 Supp. CT 716-20 [Cummings confessed and demonstrated to Robin Gay how he alone murdered the

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[12] The impeachable convictions and bad acts respondent cites as potential impeachment of Mr. Flores' testimony (*id.*) were used as actual impeachment evidence when he testified in the penalty phase of Cummings trial for the prosecution. (103 RT 11613-62)

victim]; Exhibit 46, Los Angeles Police Department Interviews of Robin Louise Gay at 1654 [Pam Cummings confessed to Robin Gay that Raynard Cummings was solely responsible for murdering victim].). Petitioner affirmatively alleges evidence of the actual "faux poisoned" stamps would have bolstered Mr. Flores credibility on this and other issues to which he testified.

53. Petitioner affirmatively alleges that respondent's admission that Shinn failed to interview or call Michael David Gaxiola at trial establishes that trial counsel's performance was prejudicially deficient. (Return at 65, ¶ 157.) Petitioner excepts to the sufficiency of respondent's denial that Cummings' reported confession would have exculpated him. (Return at 65-66, ¶ 157.) Petitioner affirmatively alleges that respondent's denial is based on a fundamentally inaccurate and unreasonable reading of petitioner's undisputed documentary evidence. (Return at 65-66, ¶ 157.)[13] Petitioner affirmatively alleges that the documentary evidence indisputably establishes that Michael Gaxiola's statement documented the facts that:

> Cummings told [Gaxiola] 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 [Gaxiola] 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,* 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.

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[13] Respondent's interpretation of the documentary evidence unreasonably quotes selected passages out of context. (*Cf.* Petition at 69, ¶ (9)(c)(iii) [cite from Ex. 32, ¶ 5] with Return at 65-66 (¶ 157 [same].) The resulting distortion of the evidence creates a significant risk of misleading this Court.

(Exhibit 32, Declaration of Michael David Gaxiola at 520-22 [emphasis added].)

54. Petitioner affirmatively alleges that but for the State's gross misconduct, the police report that documented Mr. Gaxiola's interview (Exhibit 14, Los Angeles Police Department Interview of Michael Gaxiola), would have contained the further, exculpatory information that Cummings specifically told Mr. Gaxiola that he alone murdered Officer Verna. (*See* Ex. 32 at 521-22 [Gaxiola informed police Cummings confessed to being sole shooter]; *but cf.* Ex. 14 at 164-65 [report contains Cummings confessing to what could be construed as one shot].) Petitioner excepts to the sufficiency of the allegation that the sum and substance of Gaxiola's statement to the police is accurately reflected in the incomplete police report of the interview. (Return at 66, ¶ 157; *see* Ex. 32.) Petitioner further affirmatively alleges that respondent has failed to deny or otherwise dispute the truthfulness and credibility of Gaxiola's declaration, which sets forth, *inter alia*, the exculpatory evidence he provided to the police.

55. Petitioner excepts to the sufficiency of the Return because it offers only a general denial that there was no tactical reason for Mr. Shinn's failure to investigate and present Mr. Gaxiola's exculpatory testimony to petitioner's jury, and it fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 69, ¶ 158.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding the exculpatory value of Mr. Gaxiola's testimony in paragraph VI.53., *ante*.

56. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial to the allegation Mr. Gaxiola's testimony was highly exculpatory and

constituted essential evidence. (Return at 66, ¶ 159.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding the exculpatory value of Mr. Gaxiola's testimony in paragraph VI.53., *ante*.

57. Petitioner excepts to the sufficiency of the Return because it proffers only a general denial to the allegation that Shinn's admitted failure to interview or call Alfred Montes was prejudicially deficient, fails to plead facts or offer documentary evidence, and consequently fails to indicate the existence of genuine issues of fact. (Return at 66-67, ¶ 160.) Petitioner affirmatively alleges Shinn's failure to investigate, and ultimate failure even to cross-examine Mr. Montes left petitioner's jury with a significantly less emphatic confession by Cummings. Petitioner affirmatively alleges Mr. Montes testified during his codefendant's cross-examination that Cummings did not confess to him he "well, said a few things." (64 RT 7014). Petitioner affirmatively alleges Mr. Montes could have testified that Cummings "bragged to him about how he killed a Los Angeles police officer" and "on several occasions ... told [Montes] that 'The cop I shot had medals.'" (Exhibit 87, Los Angeles Police Department Interview of Alfred Montes at 2107.) Petitioner affirmatively alleges Shinn failed to question Mr. Montes. (64 RT 7033.)

58. Petitioner excepts to respondent's allegation because it is based on a legal conclusion with an inadequate factual basis. (Return at 67, ¶ 161.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding the exculpatory testimony Mr. Montes could have given, in paragraph VI.57., *ante*. Petitioner affirmatively alleges former Judge John Watson's declaration does not support respondent's allegation. Petitioner affirmatively alleges former Deputy District Attorney Watson elicited from Mr. Montes on direct

examination only that Cummings told him "I don't have nothing to lose. I killed a cop that had medals of honor." (64 RT 7008.) Petitioner affirmatively alleges Mr. Montes could have further testified that Cummings actually "*bragged to him about how he killed a Los Angeles police officer*" and "*on several occasions* ... told [Montes] that 'The cop I shot had medals.'" (Ex. 87 at 2104 [emphasis added].)

59. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that Mr. Shinn's failure to cross-examine Mr. Montes prevented petitioner's jury from hearing his significantly stronger testimony, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 67, ¶ 162.)

60. Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Mr. Montes' significantly stronger exculpatory testimony that was never elicited in paragraph VI.58., *ante*.

61. Petitioner affirmatively alleges that respondent's admissions (a) that trial counsel did not interview or call James Edward Jennings at trial, and (b) that Jennings would have testified that Cummings admitted he was the person who repeatedly shot the victim in the upper body area, neck, shoulder area, and the back conclusively establish that trial counsel was prejudicially deficient. (Return at 67-68, ¶ 163.)

62. Petitioner affirmatively alleges that respondent's admission that the report of the police interview with James Edward Jennings reasonably "appears to show that Raynard took credit for shooting all of the bullets that struck Officer Verna," (Return at 68, ¶ 164), further and explicitly demonstrates the prejudice of trial counsel's deficient failure to interview and call Jennings as a witness. Petitioner excepts to the

sufficiency of respondent's dispute whether the documentary evidence demonstrates that Mr. Jennings would have testified that Cummings "repeated" his confessions (*id.*), because such dispute does not concern a material fact. Petitioner affirmatively alleges that respondent's dispute whether Cummings "repeated" his confessions is contrary to and foreclosed by the undisputed documentary evidence, which shows that Jennings would have testified "*at various times*," on "unknown dates" he heard Cummings confess to being solely responsible for the murder of Officer Verna. (Exhibit 5, Los Angeles Police Department Interview of James Edward Jennings at 35 [emphasis added].)

63. Petitioner affirmatively alleges respondent's admissions that (a) trial counsel failed to interview and call Gilbert Gutierrez and (b) Gutierrez testified for the prosecution that "Cummings took full responsibility for murdering Officer Verna," (Return at 68, ¶ 165) conclusively establish that trial counsel was prejudicially deficient. Petitioner excepts to the sufficiency of respondent's dispute whether Cummings was "willing to tell anyone that he shot the officer," or "willing to tell anyone he was the *sole* shooter," (Return at 68-69, ¶ 165) because such dispute does not concern a material fact. Petitioner affirmatively alleges that respondent's dispute is contrary to and foreclosed by a plain reading of Gutierrez' testimony, in which he referred to Cummings' confession to being the sole shooter and then stated "anybody that would listen, [Cummings] would tell them about the great killer, you know." (64 RT 6989.)

64. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence and offers a general denial based on mere conjecture and legal argument to the allegation had Shinn investigated Mr. Gutierrez's statement, it would have

led to additional witnesses who heard Cummings confess to being solely responsible for the crime. (Return at 69, ¶ 166.)

65. Petitioner affirmatively alleges that respondent's admissions that (a) trial counsel did not interview or call Deputy William McGinnis at trial, and (b) Cummings made admissions to McGinnis, which made it "'clear'" to the Deputy "'that Cummings alone pulled the trigger and was the sole person responsible for killing Officer Verna,'" (Return at 69-70, ¶¶ 167-68), conclusively establish that trial counsel was prejudicially deficient.

66. Petitioner affirmatively alleges that Shinn's presence in court while he passively listened to Deputy McGinnis testify at a section 402 hearing outside the presence of the jury did not constitute "investiga[tion]" of the witness and his material, exculpatory testimony. (Return at 69-70, ¶ 167, 169.) Petitioner affirmatively alleges that respondent's allegation and admission that Shinn heard Deputy McGinnis testify outside the presence of the jury (*id.*)[14] further demonstrates the prejudicial deficiency of Shinn's failure to conduct even a minimal investigation into known exculpatory evidence.

67. Petitioner excepts to the sufficiency of the Return because it offers only an unresponsive, general denial to the allegation that Shinn's failure to investigate prevented the jury from hearing highly exculpatory testimony from a law enforcement officer, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 70, ¶ 169.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Shinn's failure to investigate Deputy McGinnis in paragraphs

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[14] Shinn failed to question Deputy McGinnis at this hearing. (65 RT 7036-44.)

VI.65.–66., *ante*. Petitioner affirmatively alleges Deputy McGinnis could have powerfully testified it was his professional opinion that Cummings' "unsolicited" statements were "incriminating and spelled out who the shooter was. … Cummings alone pulled the trigger and was the sole person responsible for killing Officer Verna." (Exhibit 29, Declaration of William McGinnis at 501.)

68. Petitioner excepts to the sufficiency of the Return because it offers only a general denial based on conjecture and legal argument to the allegation that as a result of Shinn's failure to call Deputy McGinnis petitioner was denied a strong exculpatory witness whose testimony would have given credibility to the inmate witnesses with similar exculpatory testimony, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 71, ¶ 171.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Mr. Shinn's unavailability and the availability and exculpatory nature of the inmate witnesses' testimony in respectively, paragraphs VI.1., and VI.48.-64., *ante*. Petitioner affirmatively alleges former Judge John Watson's declaration is silent on the reason deputy McGinnis was not called to testify against Cummings. (Return Ex. 7.) *See In re Gay*, 19 Cal. 4th at 783, n.19 (Court noted with disapproval declaration failed to contain evidence to rebut allegation AG had generally denied). Petitioner affirmatively alleges the prosecution intentionally made a tactical decision not to call Deputy McGinnis because he would have provided credible testimony that would have exonerated petitioner. Petitioner further alleges that the prosecution's decision not to call a credible law enforcement witness who otherwise would have been helpful to the prosecution's theory of the co-defendant's

guilt reasonably should have alerted trial counsel that the witness would be helpful to petitioner's defense.

69. Petitioner excepts to the sufficiency of respondent's allegations of the hypothetical evidence the prosecution would have presented to "discredit" Cummings' confessions that would have been presented if Shinn had presented an adequate and effective guilt phase defense, because they are merely speculative and inconsistent with the documentary evidence. (Return at 71-72, ¶¶ 172-175.) Petitioner affirmatively alleges that such purported evidence did not reasonably undermine the tendency of Cummings' confessions and admissions to exculpate petitioner, and did not provide a reasonable basis to excuse trial counsel from investigating and presenting such evidence. Petitioner affirmatively alleges in his guilt phase closing statement to Cummings' jury, the prosecution argued that unlike Cummings, petitioner never confessed to murdering Officer Verna:

> If you were in jail, you might say to yourself, well, I would never say anything. I don't want to get myself in anymore trouble. That is the approach that Mr. Gay, who is not with us today, that is the kind of approach that he had taken. Kept his mouth shut.

(91 RT 10342.)[15] Petitioner further alleges that former Judge Watson's declaration fails to support respondent's baseless conjecture as to how, if at all, the prosecution could have responded if Shinn had conducted

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[15] Deputy District Attorney Watson gave the above quoted part of his closing argument in Cummings' case on May 21, 1985. He gave the closing argument in petitioner's case on May 28, 1985. Shinn had access to, but failed to use, the prosecution's admission that petitioner never confessed, in order to rebut the argument that petitioner silently adopted Cummings' admission to the shooting to Deputy LaCasella. (*See* 95 RT 10912-15.)

an adequate defense and presented exculpatory witness testimony. (Return Ex. 7); *see In re Gay*, 19 Cal. 4th at 783, n.19 (Court noted with disapproval declaration failed to contain evidence to rebut allegation AG had generally denied). Petitioner affirmatively alleges Shinn should have interviewed and presented the testimony of Deputy Macias that Cummings made the following admissions:

> [Cummings:] 'They don't know who done it. They got 9 witnesses, but after their interviews, they won't remember exactly. How could they ... We'll see.'
>
> [Macias:] You know how to play the game?
>
> [Cummings:] 'You know it. ... He got shot 3 times in the chest and 3 times in the back. That's a fact.'
>
> [Macias:] How's that?
>
> [Cummings:] 'As he was asking for the I.D. that [sic] he was shot in the left shoulder, spun around, at the same time he was trying to get his shit out, then we go out of the car, shot him again and again and again. He fell on one knee then on his face...Mother fucker got what was coming.[16] ... I carry [a gun] all the time, that's the way it is.'

(Return Ex. 4 at 10-11.)

70. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation Shinn unreasonably failed to interview and present impeachment witnesses, and it fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 72, ¶ 176.)

71. Petitioner excepts to the sufficiency of the Return because respondent's allegations offers only a general denial to the allegations trial

[16] Cummings' admission "we got out of the car" would necessarily be sanitized to "Cummings got out of the car" under the *Bruton-Aranda* rule. *People v. Aranda*, 63 Cal. 2d 518; *Bruton v. United States*, 391 U.S. 123.

counsel would have been provided with significant impeachment evidence if he had investigated Robert Thompson, and fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 72, ¶ 177.) Petitioner affirmatively alleges Robert Thompson did not refuse to be interviewed. (Return Ex. 6 at 24.) Petitioner affirmatively alleges Mr. Thompson said he would "*rather not*" talk to the defense when questioned about specifics of the crime. (*Id.*) Petitioner affirmatively alleges Mr. Thomson did not refuse to talk about his mental state and emotional well-being as a result of witnessing the shooting. (*Id.*) Petitioner affirmatively alleges Cecilia Thompson did not decline to be interviewed by trial counsel. (Exhibit 85, Declaration of Cecilia Thompson at 2101; *see* Return Ex. 6 at 24 [Mrs. Thompson was never approached for interview for trial counsel].)

72. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation trial counsel would have been provided with significant impeachment evidence if he had investigated Robert Thompson, and it fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 72-73, ¶ 178.). Petitioner affirmatively alleges Mr. Thompson served in the Vietnam War. (Retrial Peoples Exhibit 322, Ex.322A For ID Only at 7 [transcript of interview].) Petitioner affirmatively alleges while serving in Vietnam, Mr. Thompson witnessed a friend's death. (*Id.*) Petitioner affirmatively alleges Mr. Thompson attributed his wartime experience witnessing his friend die with his ability to accurately and reliably recall witnessing Office Verna's. (Retrial People's Ex. 322A at 7 [transcript for Exhibit 322]).) Petitioner affirmatively alleges at that time, Mr. Thompson had accurately and reliably recalled the facts of the crime.

(*Cf.* Retrial People's Ex. 322 with 2 Supp. CT 457 and Retrial 18 RT 1856-57.)

73. Petitioner excepts to the sufficiency of the Return because it offers only a general denial that as a Vietnam veteran witnessing the shooting of a man in uniform caused Mr. Thompson to experience flashbacks of his wartime experience, and it fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 73-74,¶ 179.) Petitioner affirmatively alleges the evidence for this allegation was obtained *after* Mr. Thompson's death. (Ex. 85 at 2100.) Petitioner affirmatively alleges Mr. Thompson was not questioned about his mental or emotional health or well-being before or after the shooting at any of the proceedings in which he testified. Petitioner affirmatively alleges Mr. Thompson filed for a divorce from Mrs. Thompson on December 16, 1985. (*Robert Thompson v. Cecilia Thompson*, Los Angeles County Superior Court, Case No. NVD 05308.)[17]

74. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that after witnessing the shooting Mr. Thompson's drinking increased as he tried to "forget what he had seen (Ex. 85 at 2101)." (Return at 74, ¶ 180.) Petitioner affirmatively alleges and incorporates the

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[17] Mr. Thompson separated from his wife on September 23, 1985. (*Cecilia Thompson v. Robert Thompson*, Los Angeles County Superior Court, Case No. PD 004377.) Three months later Mr. Thompson commenced, but failed to complete, divorce proceedings against Mrs. Thompson. (*Robert Thompson v. Cecilia Thompson*, Los Angeles County Superior Court, Case No. NVD 05308.) After a six year separation, on January 10, 1992, Mrs. Thompson initiated divorce proceedings which she, too, failed to conclude. (*Cecilia Thompson v. Robert Thompson*, Los Angeles County Superior Court, Case No. PD 004377.)

relevant allegations in paragraph VI.73., a*nte*, regarding the manner in which witnessing the shooting negatively affected Mr. Thompson's already vulnerable mental state, as if fully set forth herein.

75. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial to the allegations the psychiatric symptoms manifested by Mr. Thompson made his later recall and testimony highly unreliable. (Return at 74, ¶ 181.) Petitioner affirmatively alleges and incorporates the relevant allegations in paragraph VI.73., *ante*, regarding the manner in which witnessing the shooting negatively affected Mr. Thompson's already vulnerable mental state, as if fully set forth herein. Petitioner agrees the trial court stated witness testimony was "credible" and "believable." (Return at 74, ¶ 181.) Petitioner affirmatively alleges that Mr. Thompson's testimony was found credible and believable, after completely changing it several times, indicates the degree of prejudice petitioner suffered as a result of Shinn's failure to investigate and present impeachment evidence.

76. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and it offers only a general denial to the allegation the police exploited Mr. Thompson's psychological vulnerabilities and persuaded him to adopt a recollection of events that was closer to the prosecution's theory and no longer exculpatory to petitioner. (Return at 73-74, ¶ 182.) Petitioner affirmatively alleges law enforcement failed to document their numerous contacts with Mr. Thompson. (68 RT 7557 ["Seemed like every day was something [the police] wanted me for. They wanted me for this. They wanted me for that"]; *id.* at 7609 [Detective Holder takes Thompson through a "walk-through of the crime]; *see also* Ex.

85 at 2100 ["two white, male police officers came to our home several times, and stayed for several hours each time talking to Robert about the events. They went over and over what Robert had seen like they were helping him memorize it"].)

77. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a factually unsupported legal conclusion and a general denial of the allegation that the evidence impeaching Mr. Thompson's credibility would have led petitioner's jury to reject his testimony that he saw the light skinned man shooting the officer. (Return at 75, ¶ 183.)

78. Petitioner excepts to the sufficiency of respondent's allegation that Gail Beasley avoided the efforts of both trial counsel and the police to interview her because it fails to indicate the existence of genuine issues of material fact. (Return at 75, ¶ 184.) Petitioner affirmatively alleges Shinn possessed Gail Beasley's work address because it was contained in materials he received in discovery, but he failed to attempt to contact at her at work. (*In re Kenneth Earl Gay*, California Supreme Court Case No. S130598, Exhibit 139, Los Angeles Police Department Chronological Records (hereinafter "Los Angeles Police Department Chronological Records") at 2530.) Petitioner affirmatively alleges Shinn did not know the witness was purposefully "avoiding" the police since he had not spoken to her. Petitioner affirmatively alleges even if Shinn may have possessed knowledge of an eyewitness who "avoided efforts to be interviewed by the police," (Return at 75), such knowledge would have had no bearing on Shinn's duty to make a good faith effort to interview that eyewitness.

79. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to

indicate the existence of genuine issues of fact and offers only a general denial to the allegation that trial counsel's failure prevented him from challenging the reliability of Gail Beasley's memory and credibility. (Return at 75, ¶ 185.)

80. Petitioner excepts to the sufficiency of the Return because it is inconsistent with Ms. Beasley's undisputed declaration describing her emotional and psychological condition, it offers only a general denial of the allegation that Ms. Beasley went into shock when she heard the gunfire and observed the shooting as if in slow motion, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 76, ¶ 186.) Petitioner affirmatively alleges that Ms. Beasley described being "shocked by what [she] saw after hearing the gunfire," (Exhibit 75, Declaration of Gaily Blunt at 2071), and affirmatively alleges Ms. Beasley experienced symptoms consistent with a dissociative state:

> When I looked out the window and saw a man shooting at the officer, it felt like my mind and my body froze ... 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 ... When I did not respond to her, Celeste grabbed my shoulders and shook me, trying to get through to me. While she was shaking me, it seemed like my mind woke up, and I suddenly became aware of my surroundings, including the fact that I was very upset and frightened.

(*Id.*)

81. Petitioner affirmatively alleges that Ms. Beasley's description of her physical and psychological reaction constitutes a layperson's report of clinical symptoms consistent with dissociation. (*See* Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR") (American Psychiatric Association, 2000), at 822.)

82. Petitioner excepts to the sufficiency of the Return because, it is inconsistent with Ms. Beasley's undisputed declaration describing her emotional and psychological condition, and offers only a general denial of the allegation that Ms. Beasley experienced symptoms consistent with a dissociative state. (Return at 76, ¶ 187.) Petitioner affirmatively alleges that Ms. Beasley's apparently awake state was not inconsistent with and did not foreclose a disruption of her usually integrated functions of consciousness, including memory and perception of the environment, which result from dissociative reaction to stressful events. (DSM-IV-TR, at 822.) Petitioner affirmatively alleges that Ms. Beasley's unrefuted declaration, signed under penalty of perjury, states that when she first spoke to the police, her "memory was still foggy from the shock[.]" (Ex. 75 at 2071). Respondent admits the quality of Ms. Beasley's testimony is "based on her ability to report the crime and testify to memory," (Return at 76); and petitioner affirmatively alleges Ms. Beasley's inability to accurately and reliably process and recall the events of the murder are borne out in her inconsistent testimony. (*See* Petition at 109-114 [inconsistencies from police statement to preliminary hearing testimony].[18])

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[18] Petitioner further alleges Ms. Beasley's inability to consistently relate what she allegedly saw continued with her testimony at petitioner's retrial. Two brief examples illustrate Ms. Beasley's inability consistently to "remember" the detail of the shooting. In 1997 Ms. Beasley declared under penalty of perjury that she saw the shooter exit the passenger side of the car and walk around the front of the car (*Cummings v. Calderon*, United States District Court Central District of California, Case No. CV-95-7118 "Amended Petition for Writ for Habeas Corpus," Exhibit 177, Declaration of Gail Beasley-Blunt (hereinafter "Federal Declaration of Gail Beasley-Blunt") at 2 ¶ 5); however, Ms. Beasley testified in 2000 that (1) she did not see the shooter exit the car (Retrial 19 RT 2030). In her 1997 federal declaration, Ms. Beasley state that even though the Ms. Cummings had returned to the car and was again sitting in the driver's seat, she not only saw, but was able to interpret, a gesture the back seat passenger made with

83. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Ms. Beasley's reported recollection of the event was influenced by conversations with other eyewitnesses. (Return at 76-77, ¶ 188.) Petitioner affirmatively alleges Ms. Beasley consistently described petitioner wearing clothing that fit only the description of the clothing worn by the back seat passenger, Cummings, whose head, she testified, was the only part of him she could see. (1 Supp. CT 208 [shooter wearing red shirt and jeans]; 2 CT 524-25 [shooter wearing red shirt and dark colored pants].)

84. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that trial counsel's failure to interview Ms. Beasley allowed petitioner's jury to rely on the testimony of a witness who has admitted she cannot consistently remember a single version of events. (Return at 77, ¶ 189.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Ms. Beasley's impaired mental state at the time she witnessed the shooting, in paragraph VI.82., *ante*. Petitioner admits the trial court found the witness testimony

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his hands ("I would characterize the rear passenger's hand gestures as meaning 'Whoa! What the hell did you do?'") and saw the back seat passenger "reach[] out with both hands toward the front passenger in what I would describe as an attempt to stop the front passenger from exiting the vehicle and shooting the officer again." (Federal Declaration of Gail Beasley-Blunt at 2 ¶ 7.) At the retrial, Ms. Beasley testified that all she could tell about the back seat passenger was that it was a Black male and that "he had an afro. That's about it." (19 RT 2035.)

credible and believable (*id.*); however, petitioner affirmatively alleges that such a finding could be made in light of Ms. Beasley's inconsistent recollection of the facts and serves to indicate the high degree of prejudice petitioner suffered by Shinn's failure to investigate and present evidence impeaching Ms. Beasley's credibility and reliability.

85. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Shinn failed to investigate and present evidence to impeach Shannon Roberts' credibility and testimony. (Return at 77, ¶ 190.) Petitioner affirmatively alleges Shinn knew Shannon Roberts had moved to San Jose. (Return Ex. 6 at 30.) Petitioner affirmatively alleges Shinn did not attempt to contact Mr. Roberts in San Jose. (*Id.* at 20-30.)

86. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Shinn failed to investigate and present evidence to impeach Mr. Roberts' credibility and testimony. (Return at 78, ¶ 191.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding trial counsel's failure to investigate and present evidence to impeach Mr. Roberts' testimony, in paragraphs VI.87.–91., *post.*

87. Petitioner excepts to the sufficiency of the Return because it is inconsistent with Mr. Roberts' undisputed declaration, and offers only a general, unsupported denial of the allegation the police took advantage of Mr. Roberts' and coached his statement, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine

issues of fact. (Return at 78, ¶ 193.) Petitioner affirmatively alleges Mr. Roberts, like Ms. Beasley, was able to describe someone who resembled petitioner. Petitioner affirmatively alleges Mr. Roberts, like Ms. Beasley, saw petitioner either standing on the sidewalk during the shooting or saw petitioner after the shooting had stopped. Petitioner affirmatively alleges Mr. Roberts was unsure about exactly what he had witnessed and

> [w]hen I told the detectives that I could not remember something, or was not sure about a fact, they tried to help me remember by telling me what they understood had happened. For instance, they would ask me questions about what I had seen and if I could not remember they would tell me what other people had said, and ask if I agreed that those things had happened. The detectives acted very happy and proud of me.

(Exhibit 83, Declaration of Shannon Roberts at 2095.)

88. Petitioner excepts to the sufficiency of the Return because it is inconsistent with Mr. Roberts' undisputed declaration, and offers only a general, unsupported denial of the allegation the police made extra efforts to make Mr. Roberts feel special so he would testify to the statements the police fed him, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 78, ¶ 194.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Mr. Roberts' identification of petitioner and his being coaching by the police in paragraph VI.87., *ante*.

89. Petitioner excepts to the sufficiency of the Return because it is inconsistent with Mr. Robert's undisputed declaration, and offers only a general, unsupported denial of the allegation the police rewarded Mr. Roberts for adopting their version of events even though it was not what he recalled happened, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 79, ¶ 195.) Petitioner affirmatively alleges and incorporates

herein as if fully set forth the relevant allegations regarding Mr. Roberts' identification of petitioner and his being coaching by the police in paragraph VI.87., *ante*.

90. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations investigation and introduction of such evidence would have corroborated Mr. Payne's testimony that prior to Mr. Roberts' testimony, he saw former Deputy District Attorney Watson and Mr. Roberts looking into the courtroom at petitioner. (Return at 79-78, ¶ 196.) Petitioner affirmatively alleges Mr. Payne testified, as Mr. Roberts affirmed (*see* Ex. 83 at 2096), that Mr. Roberts "looked at counsel table over to where I was sitting next to Mr. Gay" and once inside the courtroom, he focused "on Mr. Gay, several times." (86 RT 9829.) Petitioner affirmatively alleges Shinn stated in closing that Doug Payne "saw Shannon Roberts sitting there with an officer just before the jury came in and Mr. Gay was there. Mr. Cummings wasn't here and Shannon looked over there at Mr. Gay." (95 RT 10967.) Petitioner affirmatively alleges Shinn's closing failed to inform the jury petitioner had been actually pointed out to Mr. Roberts by law enforcement and that this was evidence Mr. Roberts' testimony was actively being shaped and molded by the prosecution.

91. Petitioner excepts to the sufficiency of the Return because it is inconsistent with Mr. Roberts' undisputed declaration, and offers only a general denial of the allegations Mr. Roberts did not know who shot Officer Verna, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 80, ¶ 197.) Petitioner affirmatively alleges that Mr. Roberts' statements "clearly showed" that Mr. Roberts, like most other eyewitnesses, saw petitioner

outside of the car either before or after Cummings fired all the shots at Officer Verna. Petitioner affirmatively alleges Mr. Roberts' "consistent and repeated description of the crime," (Return at 80), is contrary to the prosecution's theory of the crime and the other eyewitnesses version of events. (2 Supp. CT 492-93, 497; 3 CT 716-17; 69 RT 7787, 7810 [Roberts testified the gunman shot the victim from the front of the car]; 2 Supp. CT 527; 3 CT 716; 69 RT 7784 [gunman held gun with both hands while firing].)

92. Petitioner excepts to the sufficiency of respondent's allegation that Shinn interviewed and made a tactical decision not to call Don Anderson to present evidence impeaching Marsha Holt's testimony and credibility. (Return at 80-81, ¶ 198.) Petitioner affirmatively alleges Don Anderson was unable to recall his short conversation with Shinn at the time of petitioner's trial. (Ex. 20 at 223-24.) Petitioner affirmatively alleges, during cross-examination, Mr. Anderson testified he "never" met with Doug Payne, but he did not "personally" meet with Shinn. (*Id.* at 227.) Petitioner affirmatively alleges Mr. Anderson knew he had been contacted by a representative of Shinn's (not "personally contacted"), but he did not know petitioner's investigator's name was Doug Payne. Petitioner affirmatively alleges Don Anderson had no motive to lie about his contact with Shinn since he testified that he received a subpoena and a letter from Shinn regarding petitioner's case. (*Id.* at 224.) Petitioner affirmatively alleges Shinn learned about Mr. Anderson's exculpatory evidence in late February 1985. (EH 5 RT 800, 808.) Petitioner affirmatively alleges Shinn failed to contact Mr. Anderson until well after the trial started, on April 18, 1985. (EH 5 RT 800.) Petitioner affirmatively alleges Mr. Anderson's status as Marsha Holt's husband, prior to her testimony in this case, would have given him greater credibility regarding Ms. Holt's exculpatory

inconsistent statements. (*See* Ex. 20 at 221.) Petitioner affirmatively alleges Mr. Anderson did not testify because Shinn did not understand Mr. Anderson's exculpatory impeachment evidence was admissible as a prior inconsistent statement, pursuant to CAL. EVID. CODE § 1235. (EH 5 RT 862; *see also id.* [Anderson considered a "possibility" to testify on petitioner's behalf].)

93. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Shinn's failure to interview Mr. Anderson prevented the presentation of evidence that would have irreparably impeached the credibility of Marsha Holt. (Return at 81, ¶ 199.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding the significant impeachment value of Mr. Anderson's testimony in paragraphs VI.94.-98., *ante*.

94. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Marsha Holt did not see petitioner shoot Officer Verna. (Return at 81, ¶ 200.) Petitioner affirmatively alleges prosecution witness Gail Beasley would have corroborated Mr. Anderson's impeachment testimony. Petitioner affirmatively alleges Gail Beasley testified that Ms. Holt was unaware of the shooting until Ms. Beasley went into the bedroom and informed her about it, to which Ms. Holt responded "What? What's happening," because she "wanted to know what was going on." (2 CT 549, 550.)

95. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that she frankly admitted she

did not see the shooting, she only heard gunshots, and fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. (Return at 81-82, ¶ 201.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Ms. Holt's admission that she did not see the shooting, in paragraph VI.94., *ante*. Petitioner affirmatively alleges respondent waived any and all denials related to Ms. Holt's admission to Mr. Anderson that she did not see petitioner, or anyone else, shoot Officer Verna. Petitioner affirmatively alleges respondent expressly declined to cross-examine Mr. Anderson on this issue at petitioner's evidentiary hearing. (Ex. 20 at 232 [The only questioning regarding this issue took three lines of transcript: "Q: And she told you that she did not see who shot the police officer; is that right? A: Yes she did."]; *see generally id.* at 226-36 [full cross-examination of Mr. Anderson].)

96. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that Mr. Anderson was Ms. Holt's husband and had been specifically identified as a witness who should be called to testify, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 82, ¶ 202.) Petitioner affirmatively alleges Mr. Anderson and Ms. Holt were married and husband and wife at the time of petitioner's trial. (EH 2 RT 479; Ex. 20 at 221.) Petitioner affirmatively alleges Mr. Anderson did not testify because Shinn did not understand his exculpatory impeachment evidence was admissible as a prior inconsistent statement, pursuant to CAL. EVID. CODE § 1235. (EH 5 RT 862; *see also id.* [Anderson had been considered as a "possibility" to testify on petitioner's behalf].)

97. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to

indicate the existence of genuine issues of fact and offers only a general denial of the allegations trial counsel's failure to present Mr. Anderson's testimony left the jury with the fatal misimpression that Ms. Holt actually witnessed petitioner shoot Officer Verna. (Return at 82, ¶ 203.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegations regarding Ms. Holt's false statement and testimony that she saw petitioner shoot the victim in paragraph VI.94., *ante*.

98. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Shinn's failure to present Mr. Anderson's uncontested impeachment evidence greatly contributed to his erroneous conviction. (Return at 82-83, ¶ 204.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Shinn's failure to present Mr. Anderson's testimony, in paragraph VI.96., *ante*. Petitioner admits the trial court stated it found the witness testimony was "credible" and "believable." (Return at 82, ¶ 205; *see* 107 RT 11999.) Petitioner affirmatively alleges that Ms. Holt's highly questionable testimony was found credible and believable, serves to demonstrate the high degree of prejudice petitioner suffered as a result of Shinn's failure to investigate and present evidence to impeach her false testimony that she saw petitioner shoot Officer Verna.

99. Petitioner excepts to the sufficiency of the Return because it offers only a non-responsive general denial to the allegation that Shinn failed to interview and present Richard Delouth to testify to the evidence he had that significantly impeached the credibility and reliability of both Ms. Holt and Gail Beasley, and it fails to plead any factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact.

(Return at 83, ¶205.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Shinn's failure to present Mr. Anderson's testimony, in paragraph VI.96., *ante*.

100. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations minimal investigation would have uncovered vital evidence that impeached the creditability and reliability of two of the prosecution's key eyewitnesses. (Return at 83, ¶ 206.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegations regarding the vital impeachment evidence that a minimal investigation would have uncovered in paragraphs VI.101-104, *post*.

101.. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that both Ms. Holt and Ms. Beasley were well known drug users in the neighborhood in which the shooting occurred. (Return at 83-84, ¶ 207.). Petitioner affirmatively alleges respondent has waived any and all denials related to Mr. Delouth's knowledge of Ms. Holt and Ms. Beasley's drug use and their reputation as drug users. Petitioner affirmatively alleges respondent had the opportunity to challenge Mr. Delouth's credibility and question him regarding these issues at petitioner's evidentiary hearing, but expressly declined to do so. (*See* EH 1 RT 248-250 [direct testimony regarding Marsha Holt and Gail Beasley's drug use]; *id.* at 254-260 [cross-examination of Mr. Delouth does not include questions related to Holt and Beasley testimony]; *id.* at 260 [respondent declines re-cross-examination].) Petitioner affirmatively alleges Richard Delouth was

intimately aware of Marsha Holt's and Gail Beasley's drug habits from the early 1980's through approximately 1986 because he sold them the drugs they used. (*Id.* at 248-250.)

102. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Mr. Delouth, a drug dealer, was very familiar with the drug habits of two of his most frequent customers, Ms. Holt and Ms. Beasley. (Return at 84, ¶ 208.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding respondent's waiver of all issues related to Mr. Delouth's credibility and knowledge of the drug use of two of his most frequent customers, in paragraph VI.101., *ante*.

103. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Mr. Delouth would have testified that Ms. Holt and Ms. Beasley were consistently under the influence of illegal drugs at the beginning of each month when they received their welfare checks. (Return at 84, ¶ 209.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding respondent's waiver of all issues related to Mr. Delouth's credibility and knowledge of the drug use of two of most frequent customers, in paragraph VI.101., *ante*. Petitioner affirmatively alleges Mr. Delouth was not incarcerated and able to directly witness Ms. Beasley's and Ms. Holt's consistent and habitual drug use and abuse during prolonged periods including "a few months prior to the" shooting, after the shooting, and several years after the shooting." (Return

Ex. 14 at 96, 97; Exhibit 79, Declaration of Richard Delouth at 2084-86, ¶¶ 12-16; *see also* EH 1 RT 248-50.)

104. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only conjecture in the form of a general denial of the allegations that Mr. Delouth's substantial, material impeachment evidence would have cast doubt on the reliability of Ms. Holt and Ms. Beasley's testimony due to the likelihood they were under the influence of street drugs at the time of the shooting. (Return at 84-85, ¶ 210.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegations regarding respondent's waiver of all issues related to Mr. Delouth's credibility and knowledge of the drug use of two of his most frequent customers, in paragraph VI.101., *ante*. Petitioner affirmatively alleges Mr. Delouth's criminal history and friendship with petitioner was not the reason Shinn failed to present his testimony. Petitioner affirmatively alleges Mr. Delouth did not testify for the same the reason Mr. Anderson, a potential witness who was also incarcerated at the time of petitioner's trial, did not testify: Shinn's sheer ignorance of the basic rules of evidence. Petitioner affirmatively alleges Shinn did not understand Mr. Anderson's exculpatory impeachment evidence was admissible as a prior inconsistent statement, pursuant to CAL. EVID. CODE § 1235. (EH 5 RT 862; *see also id.* [Inmate Don Anderson had been considered a "possibility" to testify on petitioner's behalf].)

105. Petitioner excepts to the sufficiency of the Return because it is based on legal conclusions that are unsupported by factual allegations or documentary evidence that generally denies the allegations that Shinn's failure to conduct even a minimal investigation of exculpatory witnesses, including those who possessed evidence to impeach the prosecution's key

witnesses, deprived petitioner's jury of important guilt phase evidence and fell well below the standard of care for capital trial counsel. (Return at 85, ¶ 211.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding the prejudice arising from Shinn's failure to investigate and present evidence that impeached the prosecution's key eyewitnesses, in paragraphs VI.70.–104., *ante*. Petitioner affirmatively alleges Shinn failed to investigate and interview crucial eyewitnesses and interview witnesses to Cummings' repeated confessions. Shinn's failure to "make a rational and informed decision on strategy and tactics founded upon adequate investigation and preparation," *In re Gay*, 19 Cal. 4th at 790, undermined any significant opportunity the jury had to receive evidence of petitioner's innocence.

106. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that trial counsel failed to consult with the necessary experts to present a compelling defense to demonstrate petitioner's innocence of the murder of Officer Verna. (Return at 85, ¶ 212.) Petitioner affirmatively alleges, in paragraphs VI.108.,-129., *post,* and incorporates herein, as if fully set forth, the relevant allegations regarding Shinn's failure to investigate and consult with the necessary experts in order to adequately defend petitioner against a capital murder charge.

107. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that a variety of factors that illustrate what can makes eyewitness identification testimony unreliable were present in the

identifications and testimony of the prosecution's eyewitnesses against petitioner. (Return at 85-86, ¶ 213.)

108. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that post-event information, such as media coverage often interferes with an eyewitnesses memory of the event. (Return at 86, ¶ 214.) Petitioner affirmatively alleges respondent's citation to Dr. Kathy Pezdek's testimony fails to support his allegation:

> [By: Mr. McKinney]. So is it your opinion that eyewitnesses are correct most of the time?
>
> [By: Dr. Pezdek]. I don't have a way of assessing that for all eyewitnesses, but certainly of the cases that come to me with phone calls from defense attorneys, in the majority of those cases, which would be most of the time, my opinion is that I think those eyewitnesses sound like they're correct or more likely to be correct.

(Return Ex. 15 at 107 [emphasis added].) Petitioner affirmatively alleges Dr. Pezdek would not describe petitioner's case as one in which the eyewitness "sound like they're correct or more likely to be correct" (*id.*). (Retrial 8 CT 2171-72 [trial counsel's offer of proof for Dr. Pezdek's expert testimony that had been erroneously excluded at trial].)

109. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that petitioner's photograph received exceptional attention because it was centered in the middle of an article and was larger than the photos of the other codefendants that appeared at the bottom of the article. (Return at 86-87, ¶ 215.) Petitioner affirmatively alleges respondent admits the media coverage of the shooting was "extensive." (*Id.*

at 86.) Petitioner affirmatively alleges petitioner's photograph was over fifty percent larger than the smaller photographs of his codefendants, and it alone was highlighted in the center of the article. (*See* Exhibit 70, News Article, Killing Recounted, Five Arraigned on Variety of Charges in Case, Los Angeles Times (June 8, 1983) at 2018.)

110. Petitioner excepts to the sufficiency of the Return, because despite flatly denying a witness's statement or testimony, it offers only a general denial of the allegations that several prosecution witnesses admitted the media affected their recall of the shooting, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 87, ¶ 216.) Petitioner affirmatively alleges three prosecution eyewitnesses admitted the media coverage affected their memory of the shooting. (2 Supp. CT 438; 3 CT 689 [Robert Thompson]; (1 CT 1869-70) [Gail Beasley]; (68 RT 7563-65; 1 CT 1787-88) [Marsha Holt].) Petitioner affirmatively alleges Robert Thompson, Gail Beasley, and Marsha Holt all failed to identify petitioner in a line-up. (Exhibit 45, Los Angeles Police Department Interviews of Robert Thompson at 1650; Ex. 12 at 159; Exhibit 42, Los Angeles Police Department Interviews of Marsha Holt at 1625.) Petitioner affirmatively alleges the "sketch drawn at the instruction of Thompson" was said to be a sketch of the "shooter" only after Mr. Thompson's story supported the prosecution's theory of the crime. (*See* 2 CT 694 [first time composite said to be sketch of shooter].)[19] Petitioner affirmatively alleges no

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[19] Mr. Thompson did not volunteer this information; the prosecution elicited it through a prejudicially leading question to which there was no objection. Contrary to his statements to the police, Mr. Thompson agreed with Watson that on "June 3, 1983, while this information was still fresh in your mind, you told the officers the suspect you saw with the gun was Caucasian; is that a true statement?" (*Id.*)

documentation exists indicating that Mr. Thompson was asked, or attempted, to describe "the shooter" as opposed to the passenger he saw in the front seat. (*See* 3 Supp. 3 CT 667 [composite sketch drawn from Thompson's description]; Ex. 45 at 1641 [Thompson's description of suspects to police]; *id.* at 1642-43 [Thompson's initial interview to police]; *id.* at 164 [handwritten notes of Thompson's interview "def. a black man"]; Exhibit 93, Los Angeles Police Department Handwritten Interview of Robert Thompson ["I only got a side view of him"]; *cf.* Exhibit 94, Los Angeles Police Department Composite Sketch by Gail Beasley [Gail Beasley's composite labeled "187 suspect"].) Petitioner affirmatively alleges on June 2, 1983, Mr. Thompson described the shooter with features that closely resembled Cummings, and as coming from the backseat. Petitioner affirmatively alleges Mr. Thompson gave the police sketch artist a description that more closely matched petitioner during the time he was at the police station. (*See* Ex. 45 at 1641-47; 68 RT 7639.) Petitioner affirmatively alleges had the police believed that Mr. Thompson, an eyewitness to the shooting, described the shooter in his police report as a Black man, however, when asked to describe the shooter for a composite sketch described a White man, they would have immediately sought, and documented clarification of his descriptions of the shooter.[20] Petitioner

[20] Mr. Thompson even testified at the preliminary hearing that he "told the officers the suspect [he] saw with the gun was Caucasian[.]" (3 CT 694; see also id. at 694-697 [Thompson testified to the description of the shooter he alleged gave the police].) This testimony is susceptible to only two possible interpretations. Either Mr. Thompson did not give such a description of the shooter to the police, and law enforcement's manipulation of Mr. Thompson's memory extended to what he actually reported to the police; or, Mr. Thompson did give this contradictory description to the sketch artist and law enforcement failed ever to disclose it to the defense. Prejudicial state misconduct is responsible for whichever scenario is true.

affirmatively alleges Mr. Thompson was not describing the shooter because he had just given a statement that the shooter was "def. a black man" (Ex. 45 at 1644) with a "medium to dark complexion" (*id.* at 1641) and he testified consistent with that statement at the grand jury. (2 Supp. CT 457.) Petitioner affirmatively alleges the sketch Mr. Thompson directed indicates he saw petitioner sitting in the passenger side of the car, as he initially reported. (Ex. 45 at 1642.) Petitioner affirmatively alleges Mr. Thompson instructed the artist to sketch petitioner's left side because he "only got a side view of him." (Ex. 93.) As instructed, the artist sketched a left profile – the "side view" of the face he saw as petitioner sat in the passenger side of the car. (3 Supp. 2d CT 667.) Petitioner affirmatively alleges had Mr. Thompson been instructed to direct the artist to sketch the shooter, Mr. Thompson would have given a description of the right side of the face – the side that faced him during the course of the shooting. Petitioner affirmatively alleges Mr. Thompson's description of the front passenger is further indication the sketch was not of the person he saw murder Officer Verna. Petitioner affirmatively alleges Mr. Thompson gave a fairly complete description of the back seat passenger's clothing (brown multi colored short sleeve shirt, baggy jeans), but the front passenger's clothing was "unknown." (Ex. 45 at 1641; *but cf.* 69 RT 7679 [Mr. Thompson testified the back seat passenger did not leave the car, he did not even see his foot].)

111. Petitioner excepts to the sufficiency of the Return because it offers only a general denial of the allegation Mr. Thompson admitted exposure to the extensive coverage distorted his memory of the shooting, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 87, ¶ 217.) Petitioner affirmatively alleges media images interfered with Mr.

Thompson's memory of the shooting. "The pictures they were showing of a person with a scar. The picture I seen at the shooting didn't have a scar." (68 RT 7647; *see also* 69 RT 7688). Petitioner affirmatively alleges neither Mr. Thompson nor respondent has explained how Mr. Thompson's statement the media "destroyed" his mind (2 Supp. CT 462) and/or "disrupted" what he saw (3 CT 689) was intended to convey only Mr. Thompson's frustration with the media's alleged report that no one in the neighborhood had attempted to assist Officer Verna.

112. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Gail Beasley admitted the extensive media coverage affected her ability accurately to recall the shooting. (Return at 87, ¶ 218.) Petitioner affirmatively alleges Ms. Beasley failed to identify petitioner at the live line-up held days after the crime (Ex. 12 at 159); she testified petitioner "very close[ly]" resembled" the shooter at the grand jury hearing (1 Supp. CT 208); and, she rated petitioner's resemblance to the shooter as 9.5 out of 10 at the preliminary hearing (2 CT 565). Petitioner affirmatively alleges that if Ms. Beasley's fears of being labeled a "snitch" had been the real issue, and not just a *post hoc* excuse for her unreliable prior statements and inability to identify the shooter, Ms. Beasley's identification of petitioner as the shooter would have become less certain as opposed to more certain at each subsequent legal proceeding.[21] Petitioner

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[21] Deputy District Attorney Morrison's questioning was instrumental in proving Ms. Beasley's "snitch" excuse was pretextual. DDA Morrison made clear that Ms. Beasley experienced this alleged "community pressure in the three days "[b]etween when you went down to the police station to help [the police] with their investigation and when you went to the lineup." (Retrial 19 RT 2044.) Ms. Beasley agreed she was pressured prior to her

affirmatively alleges the only pressure Ms. Beasley endured were threats from Raynard Cummings' family. (Declaration of Antonio Samaniego at ¶ 4) [Beasley received threats from the Cummings].)

113. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Ms. Holt had also been influenced by media coverage of the shooting. (Return at 87-88, ¶ 219.) Petitioner affirmatively alleges Marsha Holt never identified petitioner at the live line-up; she allegedly identified him in an interview after the line-up. (Ex. 42 at 1625; 4 CT 455.)

114. Petitioner excepts to the sufficiency of the Return because it offers only a general denial that prejudicial post-event information intentionally engineered by the state affected witnesses' memory, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 88, ¶ 220.)

115. Petitioner excepts to the sufficiency of the Return because despite flatly denying a declarant's statement of fact it offers only a general denial of the allegations that Shannon Roberts was unable to identify petitioner until he was pointed to by prosecuting officials, and it fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 88-89, ¶ 221.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegations regarding the assistance Mr. Roberts' required, and

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first identification of petitioner. Accordingly, the "community pressure" excuse unravels as her identifications become increasingly stronger.

received from the prosecution, to identify petitioner as the shooter, in paragraphs VI.87.–91., *ante*.

116. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Robert Thompson's story changed several times, with each version becoming more consistent with the prosecution's theory of the crime. (Return at 89-90, ¶ 222.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegations regarding the veracity and credibility of Mr. Thompson's initial statement to the police from paragraph VI.110., *ante*.

117. Petitioner excepts to the sufficiency of the Return because it is inconsistent with Ms. Beasley's undisputed declaration, as well as respondent's admission that the eyewitnesses openly discussed what they believed they saw while waiting for the police bus (Return at 90, ¶ 223), and it offers only a general denial of the allegations that such discussions of the events altered or contaminated the memories of eyewitnesses. Such general, unsupported denial fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. Petitioner affirmatively alleges Ms. Holt, Ms. Beasley, and Mr. Roberts saw petitioner either standing on the sidewalk during the shooting or saw petitioner after the shooting had stopped. Petitioner affirmatively alleges Mr. Thompson saw petitioner sitting in the front passenger seat of the car prior to the shooting.

118. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that eyewitness often unconsciously include

someone they merely observed at the scene of the crime in their memory of the crime. (Return at 90, ¶ 224.) Petitioner admits Dr. Elizabeth Loftus' declaration states eyewitnesses "can" unconsciously include someone they merely observed at the scene of the crime in their recollection of the actual commission of the crime. (Exhibit 7, Declaration of Elizabeth Loftus, Ph.D. at 53.) Petitioner affirmatively alleges prosecution witness Gail Beasley unconsciously and erroneously recalled petitioner whom she had merely seen at the scene of the crime, to be the actual shooter. Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.108., *ante*, regarding respondent's erroneous contention that "eyewitnesses are correct most of the time." (Return at 90, ¶ 224.)

119. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations Ms. Holt and Ms. Beasley only had the opportunity to see petitioner after the shooting had ended and he was retrieving a gun from near Officer Verna's body. (Return at 90, ¶ 225.) Petitioner affirmatively alleges Marsha Holt "didn't see who shot the police officer," because "[t]hey all ducked down when they heard the gunshots. When they went outside it was all over and they just seen somebody getting back in the car and leaving." (Ex. 20 at 223.) Petitioner affirmatively alleges Gail Beasley did not see petitioner fire a single shot at Officer Verna. Petitioner affirmatively alleges that despite testifying to only seeing the head of the person in the back seat, Ms. Beasley described the shooter as "wearing blue jeans and a burgundy short sleeve shirt," (Ex. 12 at 156; *see also* 5 CT 525), which corresponded to the clothes actually worn by Cummings that day. (3 Supp. CT 755 [Eula Heights testified before the Grand Jury that "Raynard

was wearing jeans, burgundy tank top shirt, and burgundy sweatshirt top to that"]; 73 RT 8145-75 [Ms. Cummings testified at trial Cummings wore burgundy pants and a short sleeved burgundy pull-over sport shirt].)

120. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that in light of her description of the shooter wearing Raynard Cummings' clothes, seeing the gun in his hand is an innocent explanation for Ms. Beasley's false report that she saw petitioner shoot the victim. Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.112., 117., and 119., *ante*, demonstrating that Ms. Beasley did not see petitioner fire a single shot at Officer Verna. (Return at 91, ¶ 226.)

121. Petitioner excepts to the sufficiency of the Return because it fails to offer any factual allegations or documentary evidence that indicate the existence of genuine issues of fact and only offers a general denial to the allegation that petitioner's jury was not informed how the "amnesiac effect" might have affected the memories of those eyewitnesses who actually witnessed the shooting. (Return at 91, ¶ 227.) Petitioner affirmatively alleges respondent mischaracterized, and thus overstated, Dr. Pezdek's testimony in his documentary proffer. (*See* Return Ex. 15, at 108-10.) Petitioner affirmatively alleges Dr. Pezdek testified, in response to a hypothetical question, that the amnesiac effect would not be an issue in a case where the eyewitness had *90 seconds* to *socially interact* with the perpetrator and "it wasn't until later" the violence occurred." (*Id.* at 110 [emphasis added].) Petitioner affirmatively alleges, with the exception of Pamela Cummings, none of the eyewitnesses interacted with petitioner, socially or otherwise, prior to the shooting.

122. Petitioner excepts to the sufficiency of the Return because it is inconsistent with Ms. Beasley's undisputed declaration, and offers only a general denial to the allegation that Ms. Beasely admitted experiencing the amnesiac effect once she looked out the window and saw Officer Verna being shot. Such general denial fails to plead any factual allegations or documentary evidence to indicate the existence of genuine issues of fact. (Return at 91-92, ¶ 228.) Petitioner affirmatively alleges Ms. Beasley "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." (Exhibit 75, Declaration of Gail Blunt at 2071.)

123. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Ms. Beasley, under duress from Mary Cummings, altered her faulty memory of the shooting to falsely implicate petitioner. (Return at 92, ¶ 229.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.28., 34., 40.–41.,, *ante*, regarding Mary Cummings' threats to witnesses and her ability to visit Mackey Como the evening of the shooting. Petitioner affirmatively alleges "Gail received threats from Raynard Cummings or members of his family prior to Gail's testimony in connection with this matter." (Declaration of Antonio Samaniego at ¶ 4.)

124. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that two of the prosecution's eyewitnesses were heavy drug users and according to their pattern they would have been under

the influence of drugs at the time of the shooting, thus rendering their observations unreliable. (Return at 92, ¶ 230.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.101.–104., *ante*, regarding the reliability and relevance of Mr. Delouth's evidence regarding Ms. Holt and Ms. Beasley's drug use.

125. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that around the time of the crime, Ms. Holt and Ms. Beasley had a reputation for abusing drugs. (Return 92-93, ¶ 231.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations paragraphs VI.101.–104., *ante*, regarding the reliability and relevance of Mr. Delouth's evidence regarding Ms. Holt and Ms. Beasley's drug use.

126. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Mr. Delouth was well familiar with Ms. Holt's drug use because he sold her drugs, and prior to December 1983, when Ms. Holt was living with Mr. Delouth's aunt, Ms. Holt and Mr. Delouth smoked crack together. (Return at 93, ¶ 232.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.101.–104., *ante*, regarding the reliability and relevance of Mr. Delouth's evidence regarding Ms. Holt and Ms. Beasley's drug use.

127. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that by December 1983 Mr. Delouth was well

familiar with Ms. Beasley's reputation as a drug abuser who would exchange sex for drugs and purchase crack cocaine in front of her young daughter. (Return at 93, ¶ 233.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations paragraphs VI.101.–104., *ante*, regarding the reliability and relevance of Mr. Delouth's evidence regarding Ms. Holt and Ms. Beasley's drug use.

128. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Ms. Holt and Ms. Beasley were habitually under the influence of illegal drugs at the beginning of the month when they received their welfare checks; consistent with such habit and custom they would have been "either high or coming off a high" at the time of the shooting (Ex. 79 at 2085-86). (Return at 93-94, ¶ 234.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.101.–104., *ante*, regarding the reliability and relevance of Mr. Delouth's evidence regarding Ms. Holt and Ms. Beasley's drug use.

129. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that whether or not Ms. Beasley's and Ms. Holt were under the influence of dangerous street drugs at the time of the shooting is only one of several factors that calls into question the reliability of their memory. (Return at 94, ¶ 235.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.101.–104., *ante*, regarding the reliability and relevance of Mr. Delouth's evidence regarding Ms. Holt and Ms. Beasley's drug use.

130. Petitioner affirmatively alleges respondent admits "Trial counsel failed to obtain an assessment of petitioner's mental state at the time of the crime including, but not limited to, the failure to provide the jury with vital evidence that both supported his claim of innocence, and explained why petitioner felt compelled to remain with Cummings after the shooting, and/or negated the mens rea necessary to prove the charges against petitioner." (Petition at 84 ¶ 1.e.; *see* Return at 44-45 [respondent expressly declined to address relevant IAC claims that involved mental health evidence].) Petitioner affirmatively alleges such evidence would have rebutted a first degree murder conviction on an aider and abettor theory. (*See* Return at 65, ¶ 156.)

131. Petitioner affirmatively alleges respondent admits "In furtherance of Shinn's illegal capping scheme, and in advancement of his personal conflicting interests in obtaining money to reimburse the victims of his other professional misconduct, Shinn retained Weaver and McBroom for the expressly limited purpose of going through the motions of conducting a wholly inadequate, pro forma mental state evaluation of petitioner. By design, the limitations of the evaluation prevented Shinn from investigating, evaluating, developing, considering or presenting any reliable and exculpatory mental state evidence." (Petition at 84-86, ¶¶ 1.f-1.f.(8).; *see* Return at 44-45 [respondent expressly declined to address relevant IAC claims that involved mental health evidence].) Petitioner affirmatively alleges such evidence would have rebutted a first degree murder conviction on an aider and abettor theory. (*See* Return at 65, ¶ 156.)

132. Petitioner affirmatively alleges respondent admits "If a competent mental health professional such as David Foster, M.D. had been consulted, he or she could have given strong and compelling testimony regarding petitioner's mental state at and around the time of the shooting. A

psychiatrist could have informed the jury that petitioner showed 'psychiatric symptomatology, corroborated by other evidence of mental disorders and impairments which prevent him from functioning normally, and these disorders and impairments were present at the time of the crimes for which he was convicted and during his trials.'" (Petition at 87-94, ¶¶ 1.g.-1.g.(8)(m); *see* Return at 44-45 [respondent expressly declined to address relevant IAC claims that involved mental health evidence] *see also*; Exhibit 26, Direct Testimony (Declaration) of David Foster, M.D. at 426, ¶ 55a.) Petitioner affirmatively alleges such evidence would have rebutted a first degree murder conviction on an aider and abettor theory. (*See* Return at 65, ¶ 156.)

133. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn failed to consult a criminalist to conduct gunshot residue (GSR) testing on the clothing worn by Cummings and petitioner at the time of the shooting. (Return at 94-95, ¶ 236.) Petitioner affirmatively alleges the police took, or should have taken, petitioner's shirt as evidence. (*See* Exhibit 86, Los Angeles Police Department Interview of Eula Heights at 2103.)

134. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that the gun emitted a voluminous cloud of smoke after each of the six shots, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 95, ¶ 237.) Petitioner affirmatively alleges Robert Thompson testified he saw "smoke twice and there may have been another one, I don't know because I turned my

back[.]" (3 CT 675; *see also* 69 RT 7710 [Thompson saw smoke from gun but did not hear shots].)

135. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Shinn should have consulted an appropriate expert to learn about the discharge of GSR particles. (Return at 95, ¶ 238.)

136. Petitioner excepts to respondent's denial of the allegation that trial counsel should have known that GSR particles are capable of staying on unlaundered clothing almost indefinitely. (Return at 95-96, ¶ 240.)

137. Petitioner admits "the elements of gunshot residue are found in primer of bullets used in guns, rather than in guns themselves." (Return at 96, ¶ 241.)

138. Petitioner excepts to respondent's denial that GSR was detected in several areas of the car used in the shooting. (Return at 96, ¶ 242.) Petitioner affirmatively alleges once "occupational and environmental sources" were excluded, the lead particles that "were consistent" with GSR could conclusively be labeled GSR. (83 RT 9485.)

139. Petitioner excepts to respondent's denial that GSR was detected in several areas of the car used in the shooting. (Return at 96, ¶ 243.) Petitioner affirmatively alleges once "occupational and environmental sources" were excluded, the lead particles that "were consistent" with GSR could conclusively be labeled GSR. (83 RT 9485.) Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn should have had petitioner's and Cummings' clothing worn at the time of the shooting available to him for testing. (Return at 97, ¶

244.) Petitioner affirmatively alleges any lack of evidence that petitioner's shirt exists, if there is such a lack of evidence, was caused by law enforcement's failure to properly document its chain of custody. (*See* Ex. 86 at 2103.)

140. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations Cummings' clothing was collected by law enforcement and entered as an exhibit at trial. (Return at 97, ¶ 246.) Petitioner affirmatively alleges law enforcement obtained, and was in possession of Raynard Cummings clothing. (*See* 73 RT 8216 [Cummings counsel had to obtain Cummings clothing from the bailiff (sweat pants) and Detective Holder (top)].)

141. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that timely testing would have demonstrated that petitioner's clothing contained virtually no GSR, and Cummings' clothing contained an amount of GSR consistent with having fired a gun. (Return at 97-98, ¶ 247.)

142. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation the absence of GSR on petitioner's clothes and its presence on Cummings' clothes would have demonstrated that petitioner could not have fired any of the shots at Officer Verna. (Return at 98, ¶ 248.) Petitioner affirmatively alleges since Robert Thompson twice saw "smoke from the gun" (3 CT 675; *see also* 69 RT 7710), the shooter would have

had to walk through the "smoke," or, at a minimum, had his arm in the "smoke" as he quickly exited the car firing at Officer Verna.

143. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation Mr. Shinn's failure to obtain such readily available evidence of petitioner's innocence was prejudicial. (Return at 98-99, ¶ 249.) Petitioner affirmatively alleges an expert such as Vincent Guinn should have testified that the gunshot residue evidence demonstrated that petitioner could not have fired any of the shots outside of the car, thus defeating the prosecution's theory. (Petition at 124-25; *see also* Retrial 27 RT 3563-65.)[22]

144. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that scientific evidence, such as an analysis of the autopsy report, would have exonerated petitioner and that Mr. Shinn's failure to present such evidence was grossly prejudicial. (Return at 99, ¶ 250.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegations regarding Shinn's unavailability in paragraph III.1.a., *ante*.

145. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that a medical doctor with expertise in gunshot wounds could have presented compelling medical evidence that "tend[ed]

[22] The prosecution's theory was Cummings fired the first shot inside the car and petitioner fired the remaining shots outside the car.

to show petitioner did not participate in the murder or Officer Verna" (*In re Kenneth Earl Gay*, Case No. S130263, Order). (Return at 99, ¶ 251; *see* Petition at 97-98, ¶¶ 2.f..(1)(a)–(b) [sets forth exculpatory nature of medical expert's testimony].) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegation in paragraphs VI.146.-150., *post* regarding Dr. William Sherry's exculpatory testimony that would have assisted in demonstrating that petitioner could not have fired any of the shots that killed Officer Verna.

146. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that such an expert could have testified to then Los Angeles County medical examiner Dr. Cogan's critical error regarding the trajectory of the bullet that created wound number five. (Return at 100, ¶ 252.) Petitioner admits Dr. Hermann testified on behalf of petitioner's codefendant that Dr. Cogan was in error as to the trajectory of gunshot wound number five. (*Id.*) Petitioner affirmatively alleges Shinn cross-examined Dr. Hermann as if he were a hostile witness instead of an expert who possessed testimony exculpatory to his client. (81 RT 9230-42.) Petitioner affirmatively alleges Shinn's cross-examination of Dr. Hermann was primarily comprised of Shinn going over the doctor's credentials and his professional relationship with Cummings' attorneys. (*Id.*) Petitioner affirmatively alleges Dr. Hermann's testimony could have been beneficial but for Mr. Shinn's attempt to undermine Dr. Hermann's credibility and the value of his testimony, which was actually highly exculpatory for petitioner. Petitioner affirmatively alleges Dr. Cogan's medial expertise should have been called into question by Shinn because Dr. Cogan adopted the "bounce back" theory because he was unable to find an alternate explanation for the

appearance of the wound. (87 RT 9895; *see* Exhibit 95, Daily News of Los Angeles, dated February 3, 1987, "Two Differ On Slaying Admission" [Dr. Cogan changes cause of death based on alleged confession].)

147. Petitioner excepts to the sufficiency of the Return because it offers only a general denial to the allegation that contrary to Dr. Cogan's reported findings, bullet wound number five could not have been made by a bullet changing direction after bouncing off a rib, and it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact. (Return at 100, ¶ 253.) Petitioner affirmatively alleges the "peers" who Dr. Cogan testified allegedly agreed with his theory, were all fellow Los Angeles County Medical Examiners. (87 RT 3879.) Petitioner affirmatively alleges when questioned about the validity of the ricocheting bullet, Dr. Cogan's fellow L.A. County Medical Examiners actually "expressed the idea that they had never seen a bullet deflect as much and had never seen a bullet reflected" … where a bullet hits an object and then travels back along the exact same path. (87 RT 9893.) Petitioner affirmatively alleges Los Angeles County Medical Examiner Dr. William Sherry discovered Dr. Cogan's erroneous finding regarding gunshot wound number five, after Dr. Cogan was no longer employed as a medical examiner with the county of Los Angeles. (Retrial 25 RT 3265, 3274-75.)

148. Petitioner excepts to the sufficiency of respondent's allegation that petitioner suffered no prejudice from Shinn's failure to present the testimony of a medical examiner, such as Dr. William Sherry, because Dr. Hermann, testifying for petitioner's codefendant, demonstrated that Dr. Cogan was in error about the trajectory of bullet wound number five and also confused the trajectories of two other wound sites. (Return 100-101, ¶ 254.) Petitioner affirmatively alleges Shinn's cross-examination of Dr.

Hermann was primarily comprised of Shinn going over the doctor's credentials and his professional relationship with Cummings' attorneys. (*See* 81 RT 9230-34, 9237-40; *id.* at 9230 ["Doctor I am not going to ask you very many questions on the medical aspect."].) Petitioner affirmatively alleges Dr. Hermann's testimony could have been beneficial but for Shinn's attempt to undermine Dr. Hermann's credibility and the value of his testimony, which was actually highly exculpatory for petitioner. Petitioner affirmatively alleges without testimony from an expert such as Dr. Sherry, petitioner's jury was left with the prejudicially erroneous impression that petitioner's defense subscribed to the theory bullet number five ricocheted, as described by Dr. Cogan. Petitioner affirmatively alleges demonstrating that wound number five was created by a "shored exit," thus indicating the victim was on the ground when shot, should have been an important piece of petitioner's defense to show that he did not, and, in fact, could not have fired any of the six shots at Officer Verna.

149. Petitioner excepts to the sufficiency of respondent's allegation that Dr. Cogan simply testified "the bullet went from left to right, and upward," and that petitioner suffered no prejudice "in light of Dr. Hermann's testimony." (Return at 101, ¶ 255.) Petitioner affirmatively alleges Dr. Cogan essentially testified the bullet "entered over the left chest. It hit a rib in the back of the body and was deflected and bounced forward" making a partial exit wound. (71 RT 7983-84.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegation regarding Shinn's failure to understand the exculpatory nature of Dr. Hermann's testimony in paragraph VI.148., *ante*.

150. Petitioner excepts to the sufficiency of respondent's allegations that Dr. Sherry agreed with Dr. Cogan's assessment regarding gunshot wound number four and that petitioner suffered no prejudice "in

light of Dr. Hermann's testimony," because they fail to indicate the existence of genuine issues of fact. (Return at 101, ¶ 256.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegation regarding Shinn's failure to understand the exculpatory nature of Dr. Hermann's testimony in paragraph VI.148., *ante*. Petitioner affirmatively alleges Dr. Sherry testified that he agreed with only the autopsy report and photographs produced by Dr. Cogan, not his clinical assessment. (Retrial 25 RT 3267, 3270-71.). Petitioner affirmatively alleges that without testimony from an expert such as Dr. Sherry, petitioner's jury was left with the prejudicially erroneous impression that petitioner's defense subscribed to the theory bullet number five ricocheted, as described by Dr. Cogan. Petitioner affirmatively alleges demonstrating that wound number five was created by a "shored exit," thus indicating the victim was on the ground when shot, should have been an important piece of petitioner's defense to show that he did not, and, in fact, could not have fired any of the six shots at Officer Verna.

151. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that a crime scene reconstruction expert, like Dr. Kenneth Solomon, could have demonstrated the implausibility of the pass-the-gun theory. (Return at 102-03, ¶ 257.) Petitioner affirmatively alleges Marsha Holt was the sole eyewitness or witness (*see, e.g.,* Ex. 28 at 500 [non eye-witness recalled "all the shots were fired rapidly"]) at petitioner's first trial who testified to the gap between shots being thirty seconds to two minutes. Petitioner affirmatively alleges Ms. Holt was unsure how much time elapsed between the first and second shot. "After the first shot -- we just heard the first shot, and I didn't hear nothing for, you know, maybe a

couple of seconds, two seconds. Maybe 30 seconds or so I didn't hear nothing. But then we heard some more shooting coming right behind one another." (Retrial 18 RT 1936; *see also id.* at 1949-50 [second shot thirty seconds or less, remaining shots "right behind each other"]; *id.* at 1982-83 [second shot possibly just a few seconds after first shot, Holt not good at estimating time].) Petitioner affirmatively alleges Ms. Holt's testimony regarding a two minute gap would not preclude Dr. Solomon's scientific evidence based on credible eyewitness accounts: the jury would have the opportunity to decide who was more credible, Ms. Holt or the plethora of other witnesses upon whom Dr. Solomon relied.[23] Petitioner affirmatively alleges the data upon which Dr. Solomon's conclusions are based were not difficult to obtain: such testimony could have been presented by any expert with the requisite background in statistical analysis; the experiments could have been conducted by a knowledgeable investigator, and the statistical analysis by someone well versed in math and physics, such as a math professor.

152. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that an analysis of the crime scene, including witness statements, would have allowed an expert to conclude a

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[23] Given Ms. Holt's susceptibility to impeachment on her alleged witnessing of the event (Ex. 20 at 223 [Holt only heard gunshots]; 2 CT 549, 550 [Ms. Holt was watching TV during shooting]), as well as her capacity to accurately and reliably recall what she may have witnessed (EH 1 RT 248-50 [Marsha Holt's drug use around the time of the crime]; Return Ex. 14 at 96-97 [same]; Ex. 20 at Petition at 83-84 [same], competent trial counsel would welcome the fact the prosecution's theory of petitioner's guilt depended on Ms. Holt's statement that from thirty seconds to two minutes elapsed between the first two shots.

conservative estimate of the time between the first and last shot was eight to ten seconds. (Return at 103, ¶ 258.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegation regarding the reliability and credibility of Dr. Solomon's data in paragraph VI.151., *ante*.

153. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that a crime scene reconstruction expert could have testified that only Cummings, who was sitting in the back seat, could have exited the car in the short time between the first and second shots. (Return at 103, ¶ 259.) Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegation regarding the reliability and credibility of Dr. Solomon's data in paragraph VI.151, *ante*.

154. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that a crime scene reconstruction expert could have testified that the testing data show only the back seat passenger, Raynard Cummings, could have shot at Officer Verna both inside and outside of the car. (Return at 104, ¶ 260.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegation regarding the reliability and credibility of Dr. Solomon's data in paragraph VI.151., *ante*.

155. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that an expert such as Martin Fackler, M.D., with an expertise in wound ballistics, could have corroborated Dr. Sherry's findings and demonstrated petitioner's innocence of the charged murder. (Return at

104, ¶ 261.) Petitioner affirmatively alleges that minimally adequate investigation and presentation of petitioner's mental state and potential *mens rea* defenses would have demonstrated the existence of exculpatory factors that were "so unique about" Cummings and petitioner and tended to show the former was "capable" and the latter "incapable" of shooting the victim. (*Id.*) Petitioner further alleges that the forensic and criminalist experts Shinn reasonably should have consulted could have testified, based on consideration of all the evidence, that petitioner's and Cummings' relative positions in the car made petitioner uniquely incapable and Cummings uniquely capable of firing all the shots. (*See* Petition at 97-103, ¶¶ 2.f.-3.c.)

156. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that an expert such as Dr. Fackler would have confirmed Dr. Sherry's disagreement with Dr. Cogan and agreed with Dr. Sherry's reconfiguration of the trajectory of bullet wound number five. (Return at 104-05, ¶ 262.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding the insufficiency of Dr. Hermann's testimony, Dr. Cogan's erroneous findings, and Dr. Sherry's agreement with Dr. Cogan's autopsy report and photographs in paragraphs VI.146.-147., and 150., *ante*, respectively.

157. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that an expert such as Dr. Fackler would have confirmed Dr. Sherry's disagreement with Dr. Cogan regarding the

trajectory of bullet wound number five. (Return at 105, ¶ 264.) Petitioner affirmatively alleges Dr. Cogan testified that

> Gunshot wound No. 5, this entered the left chest anteriorally. It went into the left lung and then toward the back. It hit a rib. One of the first thoracic – left rib close to the spine. From that point it appears to have been deflected anteriorally … coming out just to the right of the midline on the right side of the chest, producing a partial exit.

(70 RT 7081-82 [emphasis added].) Petitioner affirmatively alleges Dr. Fackler disagreed with Dr. Cogan's trajectory for bullet number five when he testified "[Dr. Sherry's] configuration 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." (Retrial 27 RT 3549 [emphasis added].)

158. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a legal argument and general denial of the allegation that Dr. Fackler would have been able to demonstrate petitioner's inability to exit the car quickly enough to shoot before Officer Verna had the opportunity to draw his weapon. (Return at 100, ¶ 265.) Petitioner affirmatively alleges Dr. Fackler, an expert in gunshot wounds, who was the Director of the Department of Defense Research Program in Wound Balllistics for ten years (27 RT 3544) prior to serving as a doctor in a field hospital during combat in Viet Nam (*id.* at 3543-44), is qualified to offer an opinion on a person's ability to perform certain movements, given certain gunshot wounds. *See* CAL. EVID. CODE § 801 "Opinions of Experts." Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.145.–150., *ante*, regarding why Dr. Fackler's testimony would have been vital to

explaining why petitioner could not have fired any of the shots that killed Officer Verna.

159. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations regarding the order in which the victim received the gunshot wounds. (Return at 106, ¶ 266.) Petitioner affirmatively alleges Dr. Fackler did not endorse the hypothetical sequence of gunshots in which "numbers one and three could have been inflicted after numbers two, four and five." (*Id.*) He testified that he was "not sure if" this gunshot configuration was "equally possible," only that "it's certainly possible." (Retrial 27 RT 3590.) Petitioner affirmatively alleges Dr. Fackler explained

> The reason I grouped 4 and 5 together is because the approximate one foot distance at fire. A person would have had to move the handgun back and forth in order to, say, shoot no. 4, and then if it were interspersed, you'd have to move it away a foot, and then for 5, move it back. That's why it seemed somewhat unlikely to me.

(*Id.* at 3599.) Dr. Fackler further explained the front to back trajectory and greater difference in distance – indicating Officer Verna was moving away from the firing weapon – of gunshot wound three makes it more likely it occurred before gunshot wound two. (*Id.*)

160. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation regarding the order in which the victim received the gunshot wounds and the allegation that Officer Verna would have fallen after he received bullet wound number two. (Return at 106, ¶ 268.) Petitioner incorporates by reference herein, as if fully set forth, the relevant

allegations regarding Dr. Fackler's sequencing of the gunshot wounds in paragraph VI.159., *ante*.

161. Petitioner excepts to the sufficiency of respondent's allegation that "nothing in the bullet wounds themselves demonstrates Officer Verna fell to his knees," because it fails to indicate the existence of genuine issues of fact, (Return at 107, ¶ 269.) Petitioner affirmatively alleges the location and type of bullet wounds suffered by the victim assist in sequencing the shots – including when Officer Verna fell to knees. Petitioner affirmatively alleges Robert Thompson described seeing Officer Verna drop to his knees. (Ex. 45 at 1542 ["As officer dropped to his knees and fell back onto his back…"].)

162. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that bullet wound number four preceded wound number five, and both four and five came after bullet wound number two, which caused Officer Verna to drop to his knees. (Return at 107, ¶ 270.) Petitioner affirmatively alleges that both gunshot wounds numbered four and five had "shored exits" indicating that part of the victim's body was in contact with the ground. (Retrial 27 RT 3558.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.159., and 161., *ante*, regarding gunshot wounds numbered two, one, and three.

163. Petitioner excepts to the sufficiency of respondent's allegation that the bullet wound number five happened before four, which could have been followed by bullet wounds one and three, because it fails to indicate the existence of genuine issues of fact. (Return at 108, ¶ 271.) Petitioner incorporates by reference herein, as if fully set forth, the relevant

allegations in paragraphs VI.159., and 161., *ante*, regarding the correct sequencing of the gunshots.

164. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that bullet wounds number two, four, and five were received after bullet wounds number one and three, all of which were received after bullet wound number six, and that the distance between the shooter and the victim does not prove movement by the victim. (Return at 108-09, ¶ 272.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Dr. Fackler's sequencing of the gunshot wounds in paragraph VI.159., *ante*. Petitioner affirmatively alleges the shooter was moving towards the victim, not away from him, and the varying distances between gunshots "proves … movement by the victim." (Return at 108; *see also* 2 Supp. CT 458 [Thompson testified before the Grand Jury that the victim "pivoted sideways backing away from the car"]; 3 CT 681 [Thompson testified that after the first shot, the victim was "still moving"]; 68 RT 7593-94 [Thompson recalled the victim "backing away" from the car door after the first shot].)

165. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that the shooting happened so quickly Officer Verna was unable to draw his gun completely out of the holster before he fell to the ground. (Return at 109, ¶ 173.) Petitioner affirmatively alleges gunshot wound number six was not necessarily fatal. (Retrial 25 RT 3302.) Petitioner affirmatively alleges the lethality of gunshot wound number six is of no consequence in this case because it was uncontested that Officer

Verna continued to move after receiving the wound

> Morrison: People keep moving even after suffering fatal wounds like right through the heart?
>
> Fackler: Absolutely.
>
> Q: Or through the aorta?
>
> A: Absolutely.

(Retrial 27 RT 3593). Petitioner affirmatively alleges, contrary to respondent's allegation, Marsha Holt's testimony that Officer Verna "had pulled his gun out of the holster, when he fell back his gun hit the ground" (68RT 7573) fully supports petitioner's allegation of the rapidity of the shots fired. (Return 109, ¶ 273.)

166. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that testimony regarding the sequencing and trajectory of the bullet wounds sustained by Officer Verna, in conjunction with evidence that the shooting took between eight and ten seconds, with only 2.5 seconds between the first two shots, would have convinced any jury beyond a reasonable doubt that petitioner could not have fired any of the shots at Officer Verna, and was innocent of the murder charge. (Return at 109-110, ¶ 274.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.151., 155., and 158., *ante*, regarding the importance of this evidence and Ms. Holt's report of a significantly longer gap between shots.

167. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general

denial of the allegation that Shinn failed to undertake the most basic investigation to prove petitioner's innocence. (Return at 110, ¶275.)

168. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn failed to impeach key prosecution witnesses with their prior inconsistent statements to undermine their credibility and raise a reasonable doubt as to petitioner's guilt. (Return at 110-11, ¶ 276.)

169. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegations that Mr. Thompson's new "memory" of the shooting would have been vulnerable to successful impeachment based on prior inconsistent statements. (Return at 111, ¶ 277.) Petitioner affirmatively alleges neither Mr. Thompson, Mr. Watson, Mr. Morrison, nor respondent has explained how the fact that the shooting was a traumatic event, Mr. Thompson's anger at the media, or his sense of responsibility for Officer Verna's murder made him completely change his preliminary hearing and trial testimony to virtually the opposite of what he initially reported to the police and to a version of events that coincided with the prosecution's theory of the crime. Petitioner affirmatively alleges Mr. Thompson's alleged refusal to identify petitioner because he was angry that the media portrayed the neighborhood as not being helpful to the police, is inherently contradictory and no explanation was given how Mr. Thompson determined he had sufficiently punished "the media" so that he could start cooperating with law enforcement and the prosecution. Petitioner affirmatively alleges, taking him at his word, Mr. Thompson was unable to

maintain a single version of events because he felt as if he somehow contributed to Officer Verna's death was important information that should have been explored in front of petitioner's jury because it revealed how fragile and vulnerable – and susceptible to change – Mr. Thompson's memory of the shooting had become. Petitioner affirmatively alleges the suggestive and overbearing conduct of law enforcement officers who visited Mr. Thompson "several times and stayed for several hours each time" as these officers "went over and over" what Mr. Thompson "had seen like they were helping him memorize it" was designed to and did in fact produce the dramatic change in Mr. Thompson's testimony. (Ex. 85 at 2100.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.110., *ante*, regarding Mr. Thompson's erroneous identification of petitioner as the shooter after his definitive, exculpatory police statement and grand jury testimony.

170. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that trial counsel failed to adequately impeach Mr. Thompson new "memory" of the shooting. (Return at 111-12, ¶ 278.) Petitioner affirmatively alleges the "sketch drawn at the instruction of Thompson" (*id.* at 112, ¶ 278) was labeled a sketch of the shooter only after Mr. Thompson's story became consistent with the prosecution's theory. (2 CT 694.) Petitioner affirmatively alleges the discovery disclosed to petitioner at his first trial, his penalty phase retrial, and in post-conviction discovery, includes no documentation that Mr. Thompson was asked to, and ever did, describe "the shooter" to a police sketch artist. Petitioner affirmatively alleges, given the complete lack of documentation in the form of either a police report or a label on Mr. Thompson's sketch, and given his

contemporaneous police report that the shooter was a "medium dark" Black man, the description Thompson gave the sketch artist was not of the shooter, but of the "White" passenger. (*See* 3 Supp. 2d CT 667 [composite sketch]; Ex. 45 at 1641 [Thompson's description of suspects to police]; *id.* at 1642-43 [Thompson's initial interview to police]; *id.* at 1644 [handwritten notes of Thompson's interview "def. a black man"]; *but cf.* Ex. 94 [Gail Beasley's composite labeled "187 suspect"].) Petitioner affirmatively alleges Mr. Thompson was not describing the shooter because he had just given a statement the shooter was "def. a black man" (Ex. 45 at 1644) with a "medium to dark complexion" (*id.* at 1641) and weeks later, he testified consistent with that statement to the grand jury. (2 Supp. CT 453). Petitioner affirmatively alleges and incorporates herein as if fully set forth the relevant allegation regarding Mr. Thompson's composite sketch that corroborates Mr. Thompson's initial assertion that he only saw petitioner sitting in the passenger seat of the car. (Ex. 45 at 1642, 1647; Ex. 93.) Petitioner affirmatively alleges Shinn failed to impeach Mr. Thompson's testimony by calling Officer Lindquist, the police officer who took Mr. Thompson's statement on June 2, 1983. (*But cf.* 69 RT 7757-60 [Watson calls Officer Lindquist in rebuttal to offer Thompson's prior consistent statement that he saw a dark arm coming from the car holding a gun].)

171. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn's failure to adequately cross-examine Mr. Thompson regarding his changed "memory" prevented the jury from hearing and considering his varied reasons. (Return at 112, ¶ 279.)

172. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to

indicate the existence of genuine issues of fact and offers only a general denial of the allegation that until he testified at the preliminary hearing, Mr. Thompson's recall of the shooting was consistent and incredibly detailed. (Return at 112-13, ¶ 280.) Petitioner affirmatively alleges Robert Thompson was clear the "medium shade black" man in the back seat exited the car shooting Officer Verna. "So the guy in the back seat, when I first looked, is very dark. Now, when he's out of the car, and I 'm in the process of getting out of the way, he looked to be about medium shade black." (2 Supp. CT 460.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.110., *ante*, regarding Mr. Thompson's composite not being a sketch of his description of the shooter.

173. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that the police assisted Mr. Thompson "remember" a version of events that was wholly inconsistent with his initial statement and grand jury testimony, but consistent with the prosecution's theory of the crime, even though he never told the police he had difficulty recalling any part of the shooting. (Return at 113-14, ¶ 281.) Petitioner affirmatively alleges Robert Thompson was the only witness law enforcement believed required assistance with "remembering" events he had clearly testified to at the grand jury hearing. Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.75.–76., *ante*, regarding the reliability of Mr. Thompson's post-grand-jury statements and testimony.

174. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general

denial of the allegations that had Shinn adequately questioned Mr. Thompson the jury would have understood Mr. Thompson's initial version of the shooting was a more reliable and accurate version of what he actually witnessed. (Return at 114, ¶ 282.) Petitioner affirmatively alleges Shinn's cross-examination focused almost exclusively on Mr. Thompson's grand jury and preliminary hearing testimony. Petitioner affirmatively alleges Shinn failed to adequately cross-examine Mr. Thompson on his very specific, very detailed statements and suspect descriptions he gave to the police. Petitioner affirmatively alleges Shinn wholly failed to cross-examine Mr. Thompson on the composite sketch: why only the suspect's left side had been described – the side that faced Mr. Thompson as petitioner sat in the front passenger when Mr. Thompson observed him. Petitioner affirmatively alleges Shinn should have called Officer Lindquist to testify to Mr. Thompson's prior inconsistent statement and that Mr. Thompson had no problem recalling the details of the shooting. (*But cf.* 69 RT 7757-60 [Watson calls Officer Lindquist to testify to Thompson's prior consistent statement he saw the back seat passenger with a gun].)[24] Petitioner affirmatively alleges Shinn failed to cross-examine Mr. Thompson on his testimony that the back seat passenger never left the car (69 RT 7679 [Mr. Thompson testified the back seat passenger did not leave the car, he did not even see his foot]), in light of the detailed description he gave the police of the clothing worn by the back seat passenger. (Ex. 45 at

[24] Shinn even failed to take advantage of Watson's calling Officer Lindquist as a rebuttal witness. In two pages of cross-examination, Mr. Shinn repeats Lindquist's qualifications and request he read two paragraphs from his report about the shooter exiting the car; however, he failed to question, or ask Officer Lindquist to read and explain his handwritten notation "def. a black man" (Ex. 45 at 1121). Shinn asked to keep Officer Lindquist subject to recall, but never recalled him. (69 RT 7775.)

1641, 1645.)

175. Petitioner affirmatively alleges that respondent's admission that in Mr. Thompson's initial statement to the police he stated that the back seat passenger was the only person to emerge from the car and shoot the decedent (Return at 115, ¶ 283) conclusively demonstrates the prejudice of trial counsel's failure wholly or adequately to cross-examine him. Petitioner excepts to the sufficiency of respondent's allegations that Mr. Thompson told the sketch artist the shooter was a "white man," (*id.*) on the ground the allegations is erroneous, unsupported, and contrary to the documentary evidence. Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.110., *ante,* regarding Mr. Thompson's composite not being a sketch of his description of the shooter.

176. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Mr. Thompson gave an "unequivocal" description of the shooter, including his clothing, and was unable to describe the clothing of the front seat passenger because he did not see him outside of the car. (Return at 116, ¶ 284.) Petitioner affirmatively alleges the notation "def. a Black man" (Ex. 45 at 1644), indicates Mr. Thompson's unequivocal indication that petitioner was not the shooter because of his fair complexion. Petitioner affirmatively alleges that unlike his participation in the line-up and subsequent proceedings, Mr. Thompson did not testify that he purposefully withheld information from the police during his initial interview (*see, e.g.*, 69 RT 7667-68); therefore, there is no reason to believe his description of the front passenger was not as complete as possible. Petitioner affirmatively alleges there are other witnesses who could address

Mr. Thompson's certainty at the time he was being interviewed by the police; therefore, his unavailability does not excuse respondent's failure to plead factual allegations and/or documentary evidence to indicate the existence of genuine issues of fact. *People v. Duvall*, 9 Cal. 4th at 476.

177. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Mr. Thompson saw the front passenger's face. (Return at 116, ¶ 285.) Petitioner alleges Mr. Thompson admitted that he was unable to identify petitioner at the line-up because he "only got a side view of him." (Ex. 93.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.176., *ante*, regarding the reliability of Mr. Thompson's description of the front seat passenger.

178. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Officer Lindquist's notation that the shooter was "<u>def. black man</u>" (Ex. 45 at 1644 [emphasis in the original]) demonstrated Mr. Thompson's certainty and emphasis on the description of the shooter. (Return at 116-17, ¶ 286.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.176., *ante*, regarding the reliability of Mr. Thompson's description of the front seat passenger. Petitioner affirmatively alleges if the police emphasized Mr. Thompson's description of the shooter, "<u>def. a black man</u>" (Ex. 45 at 1644 [emphasis in the original]) without it originally coming from Mr. Thompson, they would have knowingly altered a witness statement by singling out and placing unwarranted emphasis on a single descriptor.

179. Petitioner excepts to the sufficiency of the Return because it

fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that the description Mr. Thompson gave to the police, of the way the shooter exited the car, was detailed. (Return at 117-118, ¶ 287.) Petitioner affirmatively alleges Mr. Thompson's description of how the shooter exited the car was the most detailed of all the eyewitness accounts.

180. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Mr. Thompson described for the grand jury how the dark skinned back seat passenger exited the car. (Return at 118-19, ¶ 288.) Petitioner affirmatively alleges Mr. Thompson testified it was "his impression" the shooter was a Black man because he was specifically asked "Did you *have any impression* as to the complexion, the skin coloring, of the man that you saw" (2 Supp. CT 457 [emphasis added]); however, he unequivocally testified "he was a medium shade black" when directly asked "the color of the person [Mr. Thompson] saw get out of the car" (*id.* at 460).

181. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that petitioner's jury was left with the erroneous impression that either Mr. Thompson failed to ever describe how the shooter exited the car or his initial description and preliminary hearing testimony on this issue were consistent. (Return at 119, ¶ 289.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the

relevant allegation regarding Mr. Shinn's failure to adequately question Officer Lindquist in paragraph VI.174., *ante*.

182. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn failed to impeach Mr. Thompson with his many inconsistent statements and argue, as Mr. Thompson admitted, that his memory was better at the time of the shooting, thus rendering Mr. Thompson's "new memory" of the shooting highly unreliable. (Return at 119, ¶ 290.) Petitioner affirmatively alleges and incorporates herein, as if fully set forth, the relevant allegation regarding Shinn's failure to adequately question Officer Lindquist in paragraph VI.174., *ante*. Petitioner affirmatively alleges Shinn's failure to impeach Mr. Thompson's testimony and credibility with Mr. Thompson's police report, composite sketch, and the testimony of Officer Lindquist was highly prejudicial. (*See* 107 RT 11999 [trial court admits witnesses – including Mr. Thompson – were "credible and believable"].)

183. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn failed to demonstrate how each of the changes in Mr. Thompson's testimony brought his version of events closer to the prosecution's theory and that Mr. Thompson was the only prosecution non-codefendant witness who testified that petitioner slid across the front seat of the car and exited through the driver's door. (Return at 120, ¶ 291.) Petitioner affirmatively alleges Shinn only argued that Thompson's testimony changed to fit the prosecution's theory of the case. Shinn failed to demonstrate how Mr. Thompson consistently testified to his initial police

statement at the grand jury and how each important fact suddenly changed from completely exculpating petitioner to completely inculpating him during his preliminary hearing testimony, and with another slight change to bring Cummings back into the picture, perfectly fit the prosecution's theory of the crime by the time he testified at trial. Petitioner affirmatively alleges despite the wild variations in Marsha Holt, Gail Beasley's and Shannon Robert's testimony, their stories were never wholly consistent with the prosecution's theory. Petitioner affirmatively alleges Shinn failed to argue that only Mr. Thompson's testimony continued to morph until it perfectly fit the prosecution's theory. Petitioner affirmatively alleges, similar to the reshaping of Mr. Thompson's testimony was the recasting of his unlabeled and officially unidentified composite sketch from the passenger in the car to the shooter. Petitioner admits Pamela Cummings testified she saw petitioner slide across the car seat and exit the driver's side door to shoot Officer Verna; however, petitioner affirmatively alleges Mr. Thompson, unlike Ms. Cummings, was not testifying under the duress of a revocation of a plea agreement to so testify. (*See* Exhibit 22, Letter from John Watson to Commissioner H. Garfunkel; 73 RT 8348 [Ms. Cummings believed if Watson was not satisfied with her testimony he had the power to 'throw her back in jail"].) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.110., *ante* (unreliability of Thompson's testimony and composite); VI.89.–91.., *ante* (unreliability of Shannon Roberts' testimony); and, VI.101.–104., *ante* (unreliability of Gail Beasley and Marsha Holt's testimony and statements).

184. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn had no tactical reason for failing to

present the highly suspect changes in Mr. Thompson's testimony to demonstrate the inherent unreliability of his post-grand jury testimony. (Return at 121, ¶ 292.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.174., and 178., *ante*, regarding Shinn's failure to meaningfully cross-examine and impeach Robert Thompson.

185. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn failed to investigate and impeach Shannon Roberts with his prior inconsistent statements, including his inability to identify petitioner as the shooter until he testified at the trial. (Return at 121-22, ¶ 293.) Petitioner affirmatively alleges Shinn failed to meaningfully cross-examine Mr. Roberts on his prior statement and testimony to establish the likelihood he did not see the shooter as demonstrated by his inability to consistently describe the person he saw shoot the victim. Petitioner affirmatively alleges Shinn failed to apprise the jury that at the preliminary hearing Mr. Roberts admitted "in [his] mind that day [he] was not sure as to what [the shooter's] face actually looked like. (3 CT 730.) Petitioner affirmatively alleges petitioner's jury did not hear how the race of the shooter changed to fit what Mr. Roberts believed to be petitioner's race. (*Id.* 726 [changed description of shooter from "real light black" to white]; *see* Ex. 40 at 1615 [described front seat passenger as "Mexican or Black/Caucasian"]; 2 Supp. CT 500 [described the shooter as "real light black"].)

186. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general

denial of the allegation that Shinn ineffectively cross-examined Mr. Roberts on his ability to identify petitioner as the shooter for the first time at trial and for Mr. Roberts' varied descriptions of the shooters alleged appearance. (Return at 122, ¶ 294.) Petitioner affirmatively alleges Mr. Roberts, in fact, did not know what the shooter looked like, "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." (Ex. 83 at 2096; *see also* Exhibit 23, Declaration of Shannon Roberts at 244 ["I did not actually know who shot Officer Verna"].) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.185., *ante*, regarding Shinn's failure to adequately cross-examine Mr. Roberts.

187. Petitioner affirmatively alleges that respondent admission that trial counsel failed to cross-examine Mr. Roberts with his testimony at the preliminary hearing in which he admitted "he was not sure what the shooter's *face* looked like" (Return at 123, ¶ 295) conclusively demonstrates the prejudice of Shinn's failings. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that because Shinn failed to impeach Mr. Roberts with his preliminary hearing testimony, petitioner's jury never heard that Mr. Roberts had previously testified he did not really know what the shooter looked like. (Return at 123, ¶ 295.)

188. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn's failure to adequately question Mr. Roberts allowed the jury to consider his testimony as reliable despite Mr. Roberts' admission he did not know what the shooter looked like. (Return

at 123, ¶ 296.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.185., and 187., *ante*, regarding the unreliability of Mr. Roberts' testimony. Petitioner affirmatively alleges Shinn's failure to impeach Mr. Roberts, with at a minimum, his preliminary hearing testimony, was highly prejudicial. (*See* 107 RT 11999 [trial court admits witnesses – including Mr. Roberts – were "credible and believable"].)

189. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn failed to investigate and question Gail Beasley at trial so petitioner's jury would have understood the various inaccuracies and changes in her statements and testimony made her testimony wholly unreliable. (Return at 124, ¶ 297.) Petitioner affirmatively alleges the fact that Shinn objected to the introduction of Ms. Beasley's preliminary hearing testimony at trial does not rise to the level of "contest[ing]" Ms. Beasley's account of events at trial. (*Id.*) Petitioner affirmatively alleges Shinn was given the opportunity to cross-examine Ms. Beasley once she was found and brought to court, on April 25, 1985. (79 RT 8949.) Shinn declined to question her immediately, and much to everyone's surprise asked that she be ordered back over a month later on June 6, 1985.

Mr. Shinn: June 6, your Honor.

Your Honor: June 6?

Mr. Payne: May 6.

Mr. Shinn: June 6, your Honor. June 6, 1985.

Mr. Price: June? What happened to May?

. . .

> Your Honor: If in fact she is going to be used as a witness and we are proceeding fairly rapidly, I am not going to delay the trial if in fact –
>
> Mr. Shinn: I understand that. I understand that, your Honor, but I projected my witnesses through the 6th, your Honor.

(*Id.* at 8951.) Shinn presented petitioner's guilt phase defense on May 7-8, 1985. (85 RT 9705 to 86 9830.) The defense rested on May 20, 1985 without calling Ms. Beasley for cross-examination or as a witness on petitioner's behalf. (90 RT 10243.) Petitioner affirmatively alleges Shinn's failure to cross-examine Ms. Beasley about previously testifying she only saw "the head" of the back seat passenger (1 Supp. CT 205), yet she described petitioner wearing clothing that Cummings, the back seat passenger, had worn that day (2 CT 524-25; Ex. 12 at 157) was objectively unreasonable and grossly prejudicial.

190. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley did not know how much of the shooting she allegedly witnessed. (Return at 125, ¶ 298.) Petitioner affirmatively alleges whereas Ms. Beasley's penalty phase retrial testimony may be more consistent with the prosecution's theory, even if it did not post-date petitioner's trial, it is a version of events that is again inconsistent with her prior versions.[25]

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[25] Ms. Beasley could not consistently "recall" a fact as critical as whether or not she saw the shooter exit the car and approach the victim. Ms. Beasley initially reported to the police, and again testified at the preliminary hearing, that she did not see the shooter exit the car. (Ex. 12 at 156; 2 CT 1809, 1847.) In a subsequent interview with the police on June 2, 1983, and in her grand jury testimony, testimony, Ms. Beasley reported that she watched

191. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley saw something the day Officer Verna was shot, but she cannot consistently recall how much of the shooting she saw. (Return at 125-26, ¶ 299.) Petitioner affirmatively alleges Ms. Beasley failed to identify petitioner at the live line-up held days after the crime (Ex. 12 at 159); she testified petitioner "very close[ly]" resembled" the shooter at the grand jury hearing (1 Supp. CT 208); and, rated petitioner's resemblance to the shooter as 9.5 out of 10 at the preliminary hearing (2 CT 565). Petitioner affirmatively alleges that if the witness's fears of being labeled a "snitch" had been genuine, rather than a *post hoc* excuse for her unreliable prior statements, Ms. Beasley's identification of petitioner as the shooter would have become less certain as opposed to more so.[26] Petitioner affirmatively alleges that Ms. Beasley had

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as the shooter walked around the front of the car after he exited the passenger door. (Ex. 12 at 158; 1 Supp. CT 202.) Ms. Beasley's "recall" changed again because she testified at the retrial that she did not see the shooter exit the car. (Retrial 19 RT 2030.) Her "recall" as to the location of Ms. Cummings during the shooting not only varied, but did so in a way that was supported by no other witness: In her police reports and at the preliminary hearing Ms. Beasley placed Ms. Cummings outside of the car during the shooting. (Ex. 12 at 156; 2 CT 1809-10) At the grand jury she testified that she did not see Ms. Cummings during the shooting. (1 Supp. CT 199.) At the retrial, she testified that she saw Ms. Cummings return to the driver's seat in the car and remain seated there during the course of the shooting. (Retrial 19 RT 2028.)

[26] Deputy District Attorney Morrison assisted in demonstrating Ms. Beasley's "community pressure" excuse was fabricated. DDA Morrison helped make clear that Ms. Beasley experienced this alleged "community pressure" in the three days "[b]etween when [she] went down to the police station to help [the police] with their investigation and when [she] went to

suffered threats if she testified. (Declaration of Antonio Samaniego at ¶ 4.) Petitioner affirmatively alleges the threats came from Raynard Cummings family, not from petitioner. (*Id.*) Petitioner affirmatively alleges because the threats did not come from petitioner or anyone associated with petitioner, Ms. Beasley felt safe falsely identifying him as the shooter. (*See* Retrial 19 RT 2037 [For the first time, after Mr. Cummings conviction, death sentence, and affirmance of same Ms. Beasley admitted she saw that the back seat passenger had a "dark" complexion, significantly darker than petitioner's complexion].)

192. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley testified to seeing various number of shots – either all but the first two or all but the first four – at the preliminary hearing. (Return at 126, ¶ 301.) Petitioner affirmatively alleges regardless of respondent's unreasonable interpretation of the word "consistent," Ms. Beasley's testimony of the number of shots she heard varied each time she testified, including – as respondent set forth – even while she testified in a single proceeding. (*See id.*) Petitioner affirmatively alleges Ms. Beasley first told the police while watching the officer and shooter talk, she "heard about four gun shots" followed by "two more shots" after Officer Verna was on the ground. (Ex. 12 at 158.) Petitioner affirmatively alleges Ms. Beasley testified before the grand jury she looked outside after hearing four shots and seeing the shooter firing at "someone laying on the ground, and I assumed it to be the police officer." (1 Supp. CT

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the lineup." (Retrial 19 RT 2044.) Mr. Morrison failed to ask Ms. Beasley why her identifications became more certain after experiencing the community pressure.

198-99.) Ms. Beasley testified at the preliminary *before* looking out her window at the shooting, she heard either one shot (2 CT 551, 573-74), two shots (*id.* at 520-21), or four shots (*id.* at 559.) By the time Ms. Beasley testified at petitioner's penalty phase retrial – the version of events respondent credits as being Ms. Beasley's actual faithful reproduction of the facts (*see* Return at 126 ¶ 299) – she testified she witnessed the entire shooting (Retrial 19 RT 2029-30) and heard "approximately three or four shots" (*id.* at 2033).

193. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn unreasonably failed to cross-examine Ms. Beasley on these glaring inconsistencies. (Return at 127, ¶ 302.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Beasley's inconsistent statements and testimony in paragraphs VI.191-192., *ante*. Petitioner affirmatively alleges Shinn failed to conduct an adequate investigation upon which he could have made "a rational and informed decision" whether or not to question Ms. Beasley on her conflicting reports on whether or not she saw the shooter exit the car prior to the shooting. *In re Gay*, 19 Cal. 4th at 790. Petitioner affirmatively alleges respondent has uncovered as utter pretext Ms. Beasley's concern about community pressure affecting her ability to tell a single consistent version of events. Petitioner affirmatively alleges respondent alleged that a thorough and competent cross-examination by Shinn may have allowed Ms. Beasley to "overcome her fears of community pressure." (Return at 127, ¶ 302.) Petitioner affirmatively alleges respondent's allegation revealed the fiction that is Ms. Beasley's *post hoc* excuse for her inconsistent statements regarding nearly every aspect of the shooting. Petitioner affirmatively

alleges the threats and community pressure Ms. Beasley experienced had nothing to do with petitioner – as evidenced by her willingness to come increasingly close to positively identifying petitioner – these threats came, as Ms. Beasley well knew, from members of the Cummings family. (Declaration of Antonio Samaniego at ¶4.)

194. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley did not know how many people she saw outside of the car. (Return at 127, ¶ 303.) . Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Beasley's inconsistently reporting how well she saw the back seat passenger, including her failure to report seeing a dark skinned man in the back seat of the car, in paragraph VI.193., *ante*. Petitioner affirmatively alleges even if Ms. Beasley's penalty phase retrial testimony did not post-date her testimony at petitioner's trial, it is still completely at odds with the fact she described the shooter as wearing clothing actually worn by the back seat passenger, not petitioner. Furthermore, Ms. Beasley's subsequent belief that the back seat passenger remained in the car was not made more credible by her reasoning as to why she initially thought she saw the third person outside of the car:

> [By Mr. Watson]: Did you ever see the third man, the man in the back seat of the car, did you ever see him out of the car?
>
> [By Ms. Beasley]: I thought I did but –no, I didn't.
>
> Q: At one time you thought you did but now you don't think so?
>
> A: Right.
>
> Q: What is it that has changed your mind about that?

> A: Because now it seems as though it was the girl who I thought was the passenger. It seems like the girl in the back of the car had moved towards like a passenger side and was blocking that view. I just thought that was him out of the car then because the hair looked different. It just didn't look the same as the pictures you showed me.

(2 CT 539.) Petitioner affirmatively alleges aside from the serious reliability and credibility issues inherent in confusing Pam Cummings a 5'5" White female with Raynard Cummings a 6'5" Black male, Ms. Beasley's admission that she was subjected to outside influences – the photographs Watson showed her at some unknown time – yielded rich impeachment material for a competent, prepared attorney. Petitioner affirmatively alleges that despite her later testimony that she only saw two people outside of the car, Ms. Beasley's detailed description of the clothing worn by the third person she did not see outside of the car calls into question her reliability as an eyewitness and her credibility. (Ex. 12 at 157 [clothing described as "gry [sic] tank top, gry gym type shorts with *white piping around the sides*" (emphasis added)].)

195. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that one of the largest inconsistencies was Ms. Beasley's initial report and detailed clothing description of a Black man she said jumped out and back into the car. (Return at 128, ¶ 304.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Beasley's questionable explanation for having initially reported seeing a third person outside of the car in paragraph VI.194., *ante*.

196. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to

indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley was only able to recall seeing two people outside of the car when she testified before the grand jury. (Return at 128, ¶ 305.) Petitioner affirmatively alleges Officer Verna was the victim and not a suspect. Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Beasley's questionable explanation for having initially reported seeing a third person outside of the car in paragraph VI.194., *ante*.

197. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley's memory "faded." (Return at 128-29, ¶ 306.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Beasley's failure of memory regarding the number of people she saw outside of the car and her "fears" of community pressure not to be a "snitch," in paragraphs VI.190.–194., *ante*.

198. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation there was no tactical reason for Shinn to bring out Ms. Beasley's change in memory regarding the third person being outside the car and how that change was beneficial to Raynard Cummings. (Return at 129, ¶ 307.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Cummings and Ms. Como's friendship, Ms. Beasley's impeachable inconsistent testimony, and Shinn's lack of a tactical reasons for his failure to adequately cross-examine Ms. Beasley in paragraphs VI.39., 192.–194., *ante*.

199. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley did not know whether or not she saw the car drive away. (Return at 129, ¶ 308.) Petitioner affirmatively alleges the day of the shooting when she was first interviewed by Officer Prado at 6:30 pm, Ms. Beasley reported all three suspects "got into the car and *I don't know who drove off. I don't know which direction they went.* I didn't see more." (Ex. 12 at 156 [emphasis added].) Petitioner affirmatively alleges approximately ninety minutes later, at 8:00 pm, Ms. Beasley reported to Officer Vojtecky "While I was still on the phone, *I observed the car drive away east bound on Hoyt.*" (Id. at 158 [emphasis added].)[27] Petitioner affirmatively alleges at the grand jury hearing, Ms. Beasley changed her story yet again, and testified she did not see the car leave. (1 Supp. CT 206.) Petitioner affirmatively alleges Ms. Beasley either did not know whether or not she saw the suspects' car leave. Petitioner affirmatively alleges Ms. Beasley lied to the police or she lied under oath – whichever may have been true, her changeable stories were highly susceptible to impeachment.

200. Petitioner excepts to the sufficiency of respondent's allegation that hours after the shooting Ms. Beasley reported she did not know what direction the car went because it fails to indicate the existence of genuine issues of fact. (Return at 129-130, ¶ 309.) Petitioner affirmatively alleges respondent's allegation fully supports petitioner's claim that Ms. Beasley

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[27] Petitioner acknowledges that although Ms. Beasley reported her observation to the police, Officer Vojtecky's interview report may not have used her exact language.

did not know whether or not she saw the car drive away. (*See* Petition at 112, ¶¶ 4.a.(3)(c)(i)-(iii); paragraph VI.199., *ante*.)

201. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley's failure to continue remember seeing the car leave was a convenient way for the prosecution to avoid significant impeachment of a key witness, since Ms. Beasley failed to ever report seeing one of the suspects pick up something by the fallen victim, as did other eyewitnesses (Return at 130, P 311.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Beasley's *internal* inconsistency as to whether or not she saw the car drive away and a third person outside of the car in paragraphs VI.196., 198., and 199., *ante*.

202. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that had petitioner's jury been made aware of Ms. Beasley's discrediting, false memory lapses they would have given little weight to her testimony, including her purported identification of petitioner as the shooter. (Return at 130, ¶ 312.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.196.–199., *ante*, regarding the exculpatory impeachment evidence Shinn failed to elicit and the lack of credibility for the excuses for Ms. Beasley's inconsistent statements. Petitioner affirmatively alleges Shinn's failure to cross-examine Ms. Beasley on testifying she only saw "the head" of the back seat passenger (1 Supp. CT 205), yet describing petitioner wearing clothing that Cummings had worn that day (2 CT 524-25; Ex. 12 at 157)

was objectively unreasonable and grossly prejudicial.

203. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation Marsha Holt's ever-changing observations were wholly unreliable. (Return at 131, ¶ 313.) Petitioner affirmatively alleges that when Ms. Holt testified "everybody pressuring me, you know, I might say this and I might get something later" (68 RT 7562), she explained the reason for her constantly changing stories: Ms. Holt simply did not know which version "might get [her] something later" because it most helped the prosecution's case against petitioner.

204. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that "there was no reliable indication Ms. Holt ever saw the shooter approach the victim before shots were fired" (Petition at 113, ¶ 4.a.(4)(a); Return at 131, ¶ 314.) Petitioner affirmatively alleges Marsha Holt did not hear any shots or know someone had just been shot (2 CT 548 [Marsha Holt was "sitting on the bed next to her mother"]; *see also* 1 Supp CT 281 [Celeste Holt did not "really hear the shots," Gail Beasley informed her what was happening]); Ms. Holt told Don Anderson she did not see the shooting (Ex. 20 at 223); and, Gail Beasley testified Ms. Holt was watching television during the shooting and did not know anything had happened until Ms. Beasley informed her of the shooting (2 CT 549). Petitioner affirmatively alleges Ms. Holt's inconsistent testimony regarding what she allegedly saw strongly tends to prove she did not witness the shooting. (*See* Petition at 113-114 [discusses inconsistencies in Holt's statements and testimony] *cf Cummings v. Calderon*, United States District

Court Central District of California, Case No. CV-95-7118 "Amended Petition for Writ for Habeas Corpus," Exhibit 197, Declaration of Marsha Holt (hereinafter "Federal Declaration of Marsha Holt) at 1-2 ¶¶ 4-5 [In 1997 Holt recalled she saw victim by driver's window, heard shot, saw victim fall, then saw shooter emerge from the car].) Petitioner affirmatively alleges Ms. Holt's inability to testify consistently and coherently, within a single proceeding on direct examination was another reliable indication that she did not witness the shooting: "Well I was like I seen the car door open up, but he was standing outside the car and he told the girl, 'Hurry up.' You know 'Hurry up. Come on.' Because he had already shot the police officer[.]" (68 RT 7530-31.) Petitioner affirmatively alleges in response to former Deputy District Attorney Watson's question whether she saw where the shooter went, Ms. Holt replied "I couldn't tell you really, because I was like in and out, you know the window." (*Id.* at 7531-32.) A page later when asked if she saw the gun, Ms. Holt responded "You know, Okay. You know, the girl - anyway - he got out of the car, went around." (*Id.* at 7533.)

205. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Holt failed to consistently testify whether or not she saw the shooter approach the victim before shots were fired. (Return at 132, ¶ 315.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraph VI.204., *ante*. Petitioner affirmatively alleges Ms. Holt's inability to answer the prosecution's question "did you actually see Mr. Gay get out of the car?" (68 RT 7530-31) was a strong indication that she not only did not see petitioner exit the car, she did not see any part of the actual shooting.

206. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Holt's recall was so unreliable she was unable to consistently testify to a single version of events at petitioner's trial. (Return at 132, ¶ 316.) Petitioner affirmatively alleges, when asked by the prosecution, Ms. Holt testified she did not see petitioner approach Officer Verna. (68 RT 7530-31 [did not see petitioner get out of the car, only saw him standing by the open car door after the shooting]; *id.* at 7831-32 [does not know whether petitioner walked in front or in back of the car towards the victim because she "was like in and out, out know, the window"].) Petitioner affirmatively alleges Ms. Holt's lack of recall did not stop former Deputy District Attorney Watson from ignoring her answer and questioning her as if she did see the shooter approach the victim. (*Id.* at 7532 ["When Mr. Gay was coming around, coming closer to the policeman, where were his arms and his hands?"]). Petitioner affirmatively alleges as a result of former deputy district attorney Watson's dishonest leading questions, by cross-examination, Ms. Holt testified that she saw petitioner "get out of the car, walk around and start talking to the police officer." (*Id.* at 7580.) Petitioner again affirmatively alleges Ms. Holt's inability to answer the prosecution's question "did you actually see Mr. Gay get out of the car?" was a strong indication that she not only did not see petitioner exit the car, she did not see any part of the actual shooting. (*Id.* at 7530-31.)

207. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that because Shinn failed to impeach Ms. Holt with her inconsistent and contradictory testimony, petitioner's jury was unaware

that her recall was at best erratic and wholly untrustworthy. (Return at 132-33, ¶ 317.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Holt's highly inconsistent testimony in paragraphs VI.204.–206., *ante*.

208. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that even though Ms. Holt claimed to have heard and seen the entire shooting, she could not consistently state how many shots she heard. (Return at 133, ¶ 318.) Petitioner affirmatively alleges even measured against respondent's elastic definition of "consistent," Ms. Holt's statements and testimony were anything but consistent. Petitioner affirmatively alleges Ms. Holt variously reported seeing as many as five of six shots (Ex. 42 at 1622) and as few as two of three shots (1 Supp. CT 217-18). (*See generally* Petition at 114, ¶¶ 4.a.(4)(b)(i)-(iii) [varying and inconsistent number of shots Ms. Holt reportedly heard].)

209. Petitioner excepts to the sufficiency of respondent's allegation that Ms. Holt "did not say she saw five more shots" merely that she "reported" five additional shots were fired because it fails to indicate the existence of genuine issues of fact. (Return at 133, ¶ 319.) Petitioner affirmatively alleges respondent admits Ms. Holt failed to *witness* any of the shooting and her reports of having done so were false. (*Id.*)

210. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Holt's story changed several hours later to hearing the first shot, possibly seeing the next two shots, and seeing the last two shots. (Return at 133, ¶320.) Petitioner incorporates by reference

herein, as if fully set forth, the relevant allegations regarding Ms. Holt's inconsistent reports of the number of shots she saw and heard in paragraphs VI.208.–209., *ante*.

211. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Holt recalled seeing and hearing a total of two to three shots by the time she testified before the grand jury. (Return at 133-34, ¶ 321.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Holt's inconsistent reports of the number of shots she saw and heard in paragraphs VI.208.–209., *ante*. Petitioner affirmatively alleges even fifteen years later Ms. Holt's testimony remained consistent only in its inconsistency: Ms. Holt first testified at petitioner's penalty phase retrial she heard two shots before looking out the window (Retrial 19 RT 1937); she later testified to a more prosecution friendly version that she heard one shot, looked out the window and saw two shots (*id.* at 1952, 1954; *see id.* at 1954 [Deputy District Attorney Morrison asks Holt to explain inconsistent testimony]).

212. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn had no tactical reason to fail to impeach Ms. Holt on her faulty and unreliable memory." (Return at 134-35, ¶ 322.) Petitioner affirmatively alleges Shinn's failure to meaningfully cross-examine Ms. Holt on her inconsistent police statements and testimony regarding events specific to the shooting she claimed to have witnessed was below the standard of care and prejudicial. Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms.

Holt's inconsistent reports of the number of shots she saw and heard in paragraphs VI.204., 208.–209., *ante*. Petitioner affirmatively alleges one simple gauge of how Shinn's incompetence affected the verdict is the trial court's explicit finding, in the absence of available impeachment evidence, that the prosecution witnesses – including Ms. Holt – "were credible and believable." (107 RT 11999.)

213. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn unreasonably failed to investigate and litigate the tainted and manufactured eyewitness identifications of petitioner that corroborated the false and coerced testimony of codefendant and then-wife of Raynard Cummings, Pamela Cummings. (Return at 135, ¶ 323.)

214. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that the unconstitutionally suggestive line-up tainted all future eyewitness identifications of petitioner. (Return at 135, ¶ 324.)

215. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial that the line-up was tainted as soon as the eyewitnesses gathered to wait for the police bus and that the taint "thickened" after they viewed petitioner in line-up number seven. (Return at 135-36, ¶ 325.) Petitioner affirmatively alleges it was inherently prejudicial, in an eyewitness case such as this one, for the eyewitnesses to discuss "what each of us had seen" prior to viewing the line-up. (Return at 136, ¶ 326 [respondent admits eyewitnesses "compared what each had seen and who they saw do it"]; Ex.

75 at 2072; *see also* Exhibit 76, Declaration of Shequita Chamberlain at 2075 [eyewitnesses talked to each other at the police station prior to the line-up].) Petitioner affirmatively alleges the fact that fifteen to twenty years later, nearly every eyewitness recalled the "beaten up" person in the line-up is a strong indication of how tainted the line-up was. (Ex. 75 at 2072; Ex. 76 at 2075; Ex. 81 at 2091; Ex. 85 at 2100 [Robert Thompson's wife specifically recalled that he had been "visibly upset and disgusted that one of the light-skinned men in the line-up had been badly beaten, and had bruises all over his face"]; Federal Declaration of Marsha Holt at 3 ["I remember one of the people I picked had been beaten up."].) Petitioner affirmatively alleges that the prosecution's eyewitnesses eventually, if not immediately, identified petitioner as the shooter, and they did so under highly suggestive circumstances. Petitioner affirmatively alleges Marsha Holt and Gail Beasley – who when given the opportunity to identify petitioner as the shooter at the live line-up failed to do so – did not purport to positively identify petitioner as the shooter until they were interviewed by law enforcement officers after the line-up. (Return Ex. 17 at 117, 118 [post line-up interviews; *id.* at 115, 129, 134 [line-up photograph and witness cards for Beasley and Holt].) Petitioner affirmatively alleges Robert Thompson did not identify petitioner as the shooter until after law enforcement went "to [his] home several times, and stayed for several hours each time talking to Robert about the events. They went over and over what Robert had seen like they were helping him memorize it," (Ex. 85 at 2100), and Detective Holder subjected him to a suggestive and undocumented "walk through" of the shooting (*see, e.g., id.*). Petitioner affirmatively alleges Shannon Roberts, the youngest prosecution witness, could not identify petitioner without even further assistance from the prosecution including, but not limited to helping him to remember events he could not

recall by "tell[ing] me what other people had said" (Ex. 83 at 2095) to blatantly pointing out petitioner as the person he was supposed to identify as the shooter, just prior to Mr. Roberts' trial testimony (*id.* at 2096).

216. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that the State's conduct effectively ensured the eyewitnesses would come to an agreement that petitioner was the shooter, by forcing them to wait together for a bus to take them to the police station to view line-ups. (Return at 136, ¶ 326.) Petitioner affirmatively alleges that an unduly suggestive line-up is not rendered any less prejudicial or unconstitutional because the state did not intend to violate petitioner's state and federal constitutional rights. *Foster v. California*, 394 U.S. 440, 443 (1969) (due process is violated when "suggestive elements in [the] identification procedure" render an identification "all but inevitable," regardless of the State's intent to fashion an unconstitutionally suggestive line-up); *People v. Cook*, 40 Cal. 4th 1334, 1355 (2007) (same).

217. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that the police indicated who they believed was involved in the shooting by allowing petitioner to appear as the only person in the line-up who appeared to have obvious and recent bruises and cuts on his face. (Return at 136-37, ¶ 327.) Petitioner affirmatively alleges that irrespective whether petitioner's appearance was described as "badly beaten, and had bruises all over his face" (Ex. 85 at 2100); "like he had just been beaten up, his face was cut and his cheek was smeared with what looked to be dried blood" (Ex. 75 at 2072); or, a large "bruise or scrape" on

the side of his face (Return at 136, ¶ 327), the relevant fact remains that petitioner was the only person in any of the line-ups who fit any of those descriptions. Petitioner affirmatively alleges regardless of the State's intention, eyewitnesses inferred from petitioner's distinctive appearance that he was the one the police wanted them to identify as the shooter. (Ex. 75 at 2072; Ex. 76 at 2075; Ex. 81 at 2091; Ex. 85 at 2100.)

218. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that petitioner was the only person in the line-up who looked like he had just been beaten which suggested to the eyewitness that he was the person the police wanted them to identify. (Return at 137-38, ¶¶ 328-30.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding eyewitness descriptions of petitioner's appearance in paragraphs VI.215.–217., *ante*.

219. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that during the line-up another witness openly discussed her opinion that petitioner was the suspect. (Return at 137, ¶331.) Petitioner affirmatively alleges that the trial testimony of Sheriff's Deputy William Bluthenthal and former Judge John Watson's self-serving declaration statement that he did not hear any discussions during the line-ups are not sufficient to rebut petitioner's allegations. Petitioner affirmatively alleges Deputy Bluthenthal also testified that potential witnesses "are seated separately from *other individuals* in the room" and prosecutors "generally stand at the back of the room or along the sides" when there is no room to sit. (83 RT 9546 [emphasis added].) Petitioner

affirmatively alleges Deputy Bluthenthal's testimony makes clear that potential witnesses in fact sit together (within close conversational proximity) and there is no particular area for prosecutors to view the line-up. Petitioner affirmatively alleges former Judge Watson merely declares that he was present at the line-up and he "did not hear any witness openly discuss within earshot of *all those present* her opinion that Gay was probably the suspect." (Return Ex. at 33 [emphasis added].) In light of Mr. Gomez's statement that he heard someone implicate petitioner during the line-up, former Judge Watson's statement that he did not hear anything – especially in light of the failure to address where then Deputy District Attorney Watson was situated during the line-up – is insufficient documentary evidence to indicate the existence of genuine issues of fact. *In re Gay*, 19 Cal. 4th at 783, n.9 (Court noted with disapproval declaration failed to contain evidence to rebut allegation Attorney General had generally denied).

220. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that no eyewitness identified petitioner as the shooter at the line-up. (Return at 138, ¶ 332.) Petitioner admits several eyewitnesses did see him at the time of the shooting. Petitioner affirmatively alleges he was standing on the sidewalk, next to the passenger side door, at the time of the shooting; therefore, he could not have been seen firing any of the shots at Officer Verna. (Petition at 109; Ex. 17 at 177, 179.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations that discuss why the excuses given for failing to identify petitioner in the live line-up are simply *post hoc* justifications in paragraphs VI.176., 193., and 215., *ante*.

221. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Holt was able to identify petitioner only after she saw additional photographs of him in an unrecorded police interview immediately after the line-up. (Return at 139, ¶ 334.) Petitioner affirmatively alleges Ms. Holt was unable to identify petitioner – or anyone else – as the shooter, because she did not see the shooting. (Ex. 20 at 223 [Holt told Anderson she did not see the shooting]; 2 CT 1836-38 [Holt watching TV when Beasley informed her of the shooting]; Retrial 19 RT 2084 [same].) Petitioner affirmatively alleges the manner in which Ms. Holt was suddenly able to identify petitioner was at best, highly suggestive and questionable. Petitioner affirmatively alleges Ms. Holt stated on her official witness identification card she was unable to identify anyone (Ex. 42 at 1626-27; Return Ex. 17 at 129); however, after the line-up, behind closed doors, the police suggestively displayed some unknown photograph(s) of petitioner to her. (68 RT 7568.) The documentation of the post line-up interview with Ms. Holt failed to mention that she was shown "some better pictures" (*id.*) of petitioner, or how many and what "better pictures" were shown; its purpose appears solely to be to document Ms. Holt's new-found ability to identify petitioner because "something told her he was the same person she saw the night the officer was shot." (Return Ex. 17 at 117). Petitioner affirmatively alleges under these suspicious and inherently suggestive conditions, Ms. Holt – a witness who failed to initially identify petitioner at the line-up because she was "tired of officers at my door and I don't have time to be going through this back and forth to court," (2 CT 455), was said not to have seen the shooting by another prosecution witness who saw her watching television and told her about the

shooting (2 CT 1836-38), and later told her husband at the time she did not witness the shooting (Ex. 20 at 223) – alleged she saw petitioner murder Officer Verna. Petitioner affirmatively alleges that Ms. Holt's almost immediate subsequent identification of petitioner calls into question her excuse for "refusing" to initially identify him at the line-up. Petitioner affirmatively alleges like Ms. Beasley's "fear of community pressure," (Retrial 19 RT 2044-46), Ms. Holt's being "tired of officers at my door and I don't have time to be going through this back and forth to court," (2 CT 455), was only aggravated by her positive identification of petitioner. Petitioner affirmatively alleges the line-up took place on June 6, 1983, three days after the crime. (*See generally* Return Ex. 17.) Petitioner affirmatively alleges that if the police were at Ms. Holt's "door" that frequently, the reports of those contacts were not disclosed to petitioner nor reported in the "murder book's" chronological record. (Los Angeles Police Department Chronological Records at 2434-45.) Petitioner affirmatively alleges if, in fact, the only contact Ms. Holt had with the police were those documented in the chronological record, no police officers were ever at her "door" between the day after the crime and the day of the line-up, thus revealing Ms. Holt's excuse as false as well as either her willingness to lie under oath or her tenuous grasp of historical fact, either of which speaks to her lack of credibility.

222. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Ms. Beasley was unable to make a positive identification of petitioner at either the grand jury proceedings or the preliminary hearing. (Return at 139-40, ¶ 335.) Petitioner affirmatively alleges Ms. Beasley's reported observations make it clear she was not

"focusing [her] attention to any one person." (2 CT 553.) Petitioner affirmatively alleges Ms. Beasley has consistently reported - and testified to – the description of the clothing worn by the back seat passenger, Raynard Cummings. Petitioner affirmatively alleges from her initial statement to the police, through her testimony at petitioner's penalty phase retrial, Ms. Beasley described petitioner's clothing on June 2, 1983 as a burgundy to red colored top and dark pants. (Ex. 12 at 156 [burgundy short sleeve shirt and Levis], 157 [burgundy tank top and blue jeans]; 1 Supp. CT 208 [red shirt, dark jeans]; 2 CT 525 [red shirt (trial court calls it "rust orange to a brown") and dark colored pants].) Petitioner affirmatively alleges that it has been undisputed that on June 2, 1983 Raynard Cummings wore a burgundy colored shirt and dark pants (4 Supp. CT 755-56 [Eula Heights testified Cummings wore a burgundy tank top, burgundy sweatshirt, and jeans]; 74 RT 8378-80 [same]; 73 RT 8174-75 [Pam Cummings testifies Raynard Cummings wore burgundy pants and a "black or burgundy" pull-over shirt]) and petitioner wore a light colored long sleeve shirt. (4 Supp. CT. 755 [Eula Heights testified petitioner wore jeans and "grayish white" shirt]; 74 RT 8380 [Ms. Heights testified petitioner wore jeans and white and gray checkered button down shirt]; 73 RT 8174 [Pam Cummings testified petitioner wore "light gray" almost white long sleeve shirt and gray pants]). *See People v. Gay*, 42 Cal. 4th 1195 at 1227, n.8 ("Raynard Cummings was wearing a burgundy short-sleeved pullover shirt. Defendant was wearing a long-sleeved, light-gray dress shirt"). Petitioner affirmatively alleges respondent has failed to provide a better explanation for Ms. Beasley's placing petitioner's clothing on the backseat passenger, whom she said she did not see leave the car, than did Ms. Beasley:

> Reflecting on the incident, the Witness is not sure of the time frame in which she observed the Defendant to be standing over the

policeman. Following the time when she heard the first shot, subsequently followed by the policeman steping [sic] back, she represented that in a moment of disbelief, she may have left the front kitchen location, to advise her mother and Celeste of her observations.

(Exhibit 96, Los Angeles County Public Defender Investigation Report of Gail Blunt.) Petitioner affirmatively alleges in light of Ms. Beasley's acknowledged "foggy" memory immediately after the shooting (Ex. 75 at 2071), it is understandable why when "requested to provide an estimate of the certainty of her identifications she indicated a 9 1/2 out of 10, when in actuality she should have indicated a 5 out of 10." (Ex. 96.) Ms. Beasley recalled at that time she "simply agreed with officials, when they read to her various statements" (*id.*) or exposed her to overly suggestive line-ups and photo arrays.

223. Petitioner excepts to the sufficiency of the Return because the allegation that Ms. Beasley's fear for family's safety was responsible for her inability to positively identify anyone at the line-up, but allowed her to make a qualified identification after the line-up fails to plead or set forth documentary evidence to indicate the existence of genuine issues of fact. Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Ms. Beasley's curious fear of community pressure against being a snitch that caused her to go from failing to identify petitioner to almost identifying him in paragraphs VI.191., and 193., *ante*.

224. Petitioner affirmatively alleges that respondent's admission that when the police first interviewed Mr. Thompson, he "described the shooter as a darker skinned black man who sat in the back seat of the car," (Return at 141, ¶ 337) conclusively demonstrates the prejudice of Shinn's failure wholly or adequately to investigate and present impeachment evidence. Petitioner excepts to the sufficiency of the Return because it fails

to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Mr. Thompson further described the shooter as "dark skinned," and that he told the sketch artist he only saw and could describe the front passenger's left profile. (*Id.*) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Mr. Thompson's composite sketch of the front seat passenger, how law enforcement (including representatives of the District Attorney's Office) influenced his testimony to comport with the prosecution's theory of the crime, and respondent's rationalizations for Mr. Thompson's initial inability to identify petitioner in paragraphs VI.72.–77. and 110.–111., *ante*. Petitioner affirmatively alleges Mr. Thompson testified that he did not meet with police officers between the grand jury and preliminary hearing; but he had met with a representative of the District Attorney's Office at the time of the preliminary hearing. (69 RT 7719.) Petitioner affirmatively alleges Mr. Thompson was never asked if he met with anyone from the District Attorney's Office between the grand jury and preliminary hearing proceedings. (*Id.*) Petitioner affirmatively alleges the declaration of former Judge Watson states only that he did not tell Mr. Thompson to testify "the shooter was 'supposed to be Gay or Cummings'" (Return Ex. 7 at 32); however, the declaration is silent as to meetings with Mr. Thompson between his grand jury and preliminary hearing testimony. *See In re Gay*, 19 Cal. 4th at 783, n.9 (Court noted with disapproval declaration failed to contain evidence to rebut allegation respondent had generally denied). Petitioner affirmatively alleges respondent is naively mistaken in believing the only way for a State official to influence the testimony of a fragile witness is to expressly tell them what to say on the stand – how a witness is questioned and the witness's state of mind when questioned all play a large

part in whether or not, and to what degree, a witness can be made to believe he saw almost the exact opposite of what he initially reported. (*See generally* Ex. 7.)

225. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shannon Roberts was only able to identify petitioner as the shooter was because a law enforcement official pointed out petitioner to Mr. Roberts prior to his testimony. (Return at at 142-43, ¶ 338.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding Mr. Roberts' admitted inability to recognize petitioner without the assistance of the prosecution in paragraphs VI.87.–89., *ante*. Petitioner affirmatively alleges respondent's citation to former Judge Watson's declaration fails to support any of its allegations or to even indicate a factual dispute. Petitioner affirmatively alleges paragraph six of former Judge Watson's declaration merely states he "never coached witnesses into making any particular statements at trial or into identifying anyone at trial"; however, it failed to address whether or not he implicitly assisted young Shannon Roberts by suggestively indicating which person in the courtroom was, in fact, petitioner, after Mr. Roberts admittedly did not know what petitioner looked like. (Ex. 83 at 2096.) *See In re Gay*, 19 Cal. 4th at 783, n.9 (Court noted with disapproval declaration failed to contain evidence to rebut allegation AG had generally denied).

226. Petitioner affirmatively alleges that, based on respondent's admission that all of the eyewitnesses "'were given many opportunities to see petitioner, his photograph, or a likeness of him prior to testifying at trial'" (Return at 143 (citing Petition at 118-19, ¶ 5.(3))); that "'television and newspaper media were saturated with petitioner's likeness or

photograph'" (*id.*); and, "that Gail Beasley agreed, at the preliminary hearing, that the media coverage had helped her identify petitioner," (*id.* at 144) the return fails to plead any countervailing factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that the intense media saturation influenced several eyewitnesses' identification of petitioner. (*Id.* at 143-44, ¶ 339.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations regarding the outside influences on the erroneous identifications of Mr. Thompson's, Ms. Beasley's, Ms. Holt's, and Mr. Roberts' as petitioner as the shooter and respondent's rationalizations for their inability to consistently identify petitioner in paragraphs VI.110., 113., 169., and 191., *ante*.

227. Petitioner affirmatively alleges respondent's failure to deny constitutes an admission that "Trial counsel failed to argue that the evidence presented by the prosecution and co-defendant supported petitioner's innocence. Rudimentary marshalling of the evidence admitted at trial would have provided a strong and persuasive argument that the prosecution failed to prove petitioner's guilt beyond a reasonable doubt." (Petition at 119-125, ¶¶ 6- 6.c; *see* Return at 144-149 [failing to deny petitioner's allegations].)

228. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that Shinn failed to defend petitioner from capital murder charges. (Return at 144-45, ¶ 340.)

229. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general

denial of the allegation that Shinn failed to investigate, interview and present known exculpatory witnesses whose testimony would have strongly supported petitioner's innocence. (Return at 145, ¶ 341.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.1.–104., and 167.–212., *ante*.

230. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that despite the need, Shinn consulted no experts and presented no expert testimony. (Return at 145, ¶ 342.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs VI.105–168, *ante*.

231. Petitioner excepts to the sufficiency of the Return because it fails to plead any factual allegations or set forth documentary evidence to indicate the existence of genuine issues of fact and offers only a general denial of the allegation that "Counsels 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 counsels unprofessional failings the result of the guilt phase would have been different." (Petition at 129-30, ¶ 10; Return at 145, ¶ 343.) Petitioner incorporates by reference herein, as if fully set forth, the relevant allegations in paragraphs III.1. to VI.230., *ante*. Petitioner affirmatively alleges Shinn's representation of petitioner fell well below the standard of care for expected in the trial of a misdemeanor offense. Petitioner affirmatively alleges, but for Shinn's incompetent and conflict burdened representation of petitioner, there is more than a reasonable probability petitioner would not have been wrongfully convicted of Officer Verna's murder.

WHEREFORE, petitioner respectfully requests that the Court:

1. Hold oral argument and grant petitioner relief on these pleadings;

2. Reverse petitioner's conviction and order petitioner immune from further criminal charges and proceedings in this case;

3. Grant petitioner an evidentiary hearing in the event the Court determines that relief will not be granted in petitioner's favor on these pleadings;

4. Grant petitioner discovery so that additional facts may be discovered and proffered in support of all claims raised by petitioner;

5. Grant petitioner the right to avail himself of the formal subpoena power of this Court for witnesses and documents not otherwise obtainable;

6. Reconsider whether to issue an order to show cause on the numerous other issues raised by petitioner in the petition for writ of habeas corpus, and issue an order to show cause on those forthwith;

7. Reconsider the numerous issues raised on the direct appeal in light of the facts and evidence submitted in support of the Petition for Writ of Habeas Corpus;

8. After full consideration of the issues raised, vacate the judgment and sentence imposed in Los Angeles County Superior Court Case No. A392702;

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9. Grant petitioner such further relief as is appropriate and just in the interests of justice.

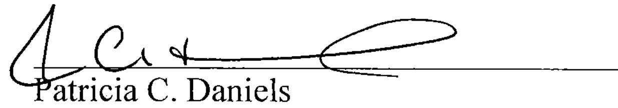
10.

Dated: October 19, 2010

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: GARY D. Sowards By: Patricia Daniels
Gary D. Sowards



Patricia C. Daniels

Attorneys for Petitioner:
Kenneth Earl Gay

VERIFICATION

I am an attorney admitted to practice law in the State of California. I represent petitioner herein, who is confined and restrained of his liberty at San Quentin Prison, Tamal, CA.

I am authorized to file the Petitioner's Amended Traverse on petitioner's behalf. I make this verification because petitioner is incarcerated in a county different from that of my law office. In addition, many of the facts alleged are within my knowledge as much as or more than petitioner's.

I have read the Traverse and know the contents of the Traverse to be true.

Executed under penalty of perjury on this 19th day of October, 2010, at San Francisco, California.

Patricia C. Daniels

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This is one of the infrequent habeas corpus proceedings in which the Court may conclude, "on the basis of the return and the traverse, that there were no disputed factual issues requiring an evidentiary hearing," and that petitioner is entitled to habeas corpus relief "with respect to the ineffective-assistance-of-counsel" and conflict-of-interest claims. *In re Wilson*, 3 Cal. 4th 945, 949, 958. In *Wilson*, the Court concluded that the Attorney General's Return established that counsel's failure to object to admission of incriminating evidence omission resulted from "ignorance or erroneous interpretation" of controlling authority. *Id.* at 955. In light of the admission of deficient performance, the Court was then able to assess prejudice based on the evidentiary record. *Id.* at 956-57.

Similarly, in this case, the Return expressly admits all of the factual predicates necessary to establish trial counsel's disabling conflicts of interest (Claim Two). The Return also admits or fails to raise any dispute of the material facts establishing counsel's prejudicially deficient performance in failing to investigate and present exculpatory evidence (Claim Three). As in *Wilson*, the Attorney General's candid concession of these dispositive facts obviates the necessity for the Court to address any purported disputes regarding marginal or immaterial factual issues. *Id*, at 949.[28]

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[28] Likewise, as in *In re Hardy*, 41 Cal. 4th 977, 991 (2007), petitioner's current contentions rest in large part on allegations and witness statements that already have been the subject of a contested evidentiary hearing and findings of fact.

STANDARD OF REVIEW

The assistance of counsel guaranteed to criminal defendants by the Sixth Amendment is essential to vindicating the due process right "to receive a fair trial." *United States v. Cronic*, 466 U.S. 468, 658 (1984). As a corollary, when trial counsel's performance fails to effectively ensure such fairness, the deficient representation constitutes a violation of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). Courts therefore generally assess the prejudice of a trial attorney's deficient performance by determining whether the record demonstrates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In contrast to the instances of deficient performance governed by *Strickland*, stricter standards of prejudice are necessary to safeguard fair trial rights whenever "the defendant's counsel actively represented conflicting interests." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002); *People v. Doolin*, 45 Cal.4th 390, 418 (2009). In such situations, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary," and the *Strickland* showing of probable effect on the outcome is not required. *Id.* at 166, 174. Instead, where the trial court fails to conduct appropriate inquiry in response to timely objection by the defendant and his counsel, it is presumed that the conflict undermined the adversarial process, and reversal is automatic. *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978).

Where there was no objection, or other circumstances reasonably alerting the trial court to the existence of the conflict, reversal is required if the "conflict of interest actually affected the adequacy of [counsel's] representation." *Cuyler v. Sullivan*, 446 U.S. 335, 348-349 (1980). The standard for presuming prejudice under *Sullivan* is one requiring "a

showing of defective performance, but *not* requiring in addition (as *Strickland* does in other ineffectiveness-of-counsel cases), a showing of probable effect upon the outcome of trial." *Mickens v. Taylor*, 535 U.S. at 174 (emphasis in the original).

The factual allegations that respondent explicitly admits in the Return conclusively establish all three species of Sixth Amendment violations and, in light of the record, the requisite prejudice: (1) counsel was burdened by a conflict of interest that the trial court failed to explore in response to timely objection by petitioner and his attorney, resulting in a conclusive presumption of prejudice under *Holloway*; (2) independent of the trial court's error, counsel's conflicts significantly affected his performance, and requires reversal under *Sullivan*; and, (3) counsel's performance was also prejudicially deficient under the standard *Strickland* analysis, which generally governs ineffective-assistance claims.

ARGUMENT

I. UNDISPUTED FACTS ENTITLE PETITIONER TO RELIEF BASED ON COUNSEL'S CONFLICTS OF INTERESTS

A. Admitted Conflicts of Interest and the Trial Court's Failure to Investigate In Response to Adequate Notice.

Respondent admits the factual allegations necessary to establish that trial counsel labored under at least four conflicts of interest, which the trial court failed to explore despite timely notice from petitioner and his attorney.

1. Unlawful Capping Operation and Fraud on the Court.

The Return admits that at the outset of this case, trial counsel, Daye Shinn, committed fraud on the trial court and intentionally used other

improper means to engineer his appointment as petitioner's counsel.[29] The fraudulent activity was part of a capping operation in which counsel used the services of Marcus McBroom to obtain clients, in exchange for which Shinn "funneled public monies" to McBroom and Dr. Fred Weaver for their purported expert assistance. (Return at 6, ¶ 14.)[30] Trial counsel knew that Dr. Weaver "'was not willing to commit the time or to undertake the work necessary to perform an adequate assessment necessary to assist counsel in preparing a defense in a complicated case such as petitioner's.'" (*Id.* at ¶ 15.) The capping arrangement was the only factor that motivated trial counsel to retain Dr. Weaver in petitioner's case. (*Id.*) The Return further admits that trial counsel's fraudulent conduct created a conflict between trial counsel and petitioner and that trial counsel knew "that he was acting unethically, unprofessionally, and contrary to petitioner's interests." (*Id.* at 29, ¶ 78.) *See* California Rules of Professional Conduct, Rule 3-310 (Avoiding the Representation of Adverse Interests).[31]

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[29] E.g., "'[t]rial counsel, Daye Shinn, knowingly used fraudulent means to secure his appointment as petitioner's attorney prior to the guilt phase of his capital trial'" (Return at 2, ¶ 1); "'[t]he fraudulent means included, but were not limited to, employing and exploiting the services of Marcus McBroom,'" with whom counsel operated "'an illegal capping relationship.'" (*Id.* at ¶ 2; and 5, ¶ 11, respectively.)

[30] "'Pursuant to the capping arrangement, Shinn retained Weaver in any cases in which McBroom had arranged for Shinn to be counsel.'" (Return at 5, ¶ 12.)

[31] Rule 3-310(B) provides that "[a] member shall not accept or continue representation of a client without providing written disclosure to the client where: * * * (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation."

2. Criminal Investigation of Counsel for Embezzlement and Murder.

Respondent admits that shortly after counsel fraudulently secured his appointment in petitioner's case, he became aware that the Los Angeles County District Attorney's office was investigating him for embezzling client funds.[32] As the result of a related investigation, trial counsel also suspected he was being investigated for the murder of Lewis Jones, a fellow lawyer.[33]

In November 1983, one of trial counsel's other clients, Oscar Dane, reported to the authorities that Shinn had embezzled approximately $200,000 from him. (Return at 10, ¶ 26.) Shinn's fraudulent behavior was motivated by his need to cover up still other unlawful conduct, including "'his misappropriation of approximately $90,000 from Rebecca and Alexander Korchin.'" (*Id.* at 11-12, ¶ 29.) Preliminary investigation revealed that Shinn concealed his embezzlements by "'shift[ing] the monies through a labyrinth of accounts,'" and "skimmed off the interest as it accrued in each account.'" (*Id.* at 16, ¶ 45.) During the ensuing investigation, Shinn falsely claimed that a fire in the office of the murder

[32] "'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.'" (Return at 10, ¶ 25.)

[33] "Respondent admits that Shinn thought the district attorney's office and sheriff may have been investigating him in connection with the murder of Mr. Jones." (Return at 18, ¶ ¶ 51, 53.)

victim, Lewis Jones, destroyed records Shinn needed to prove he had properly handled the client funds.[34]

Trial counsel knew that rudimentary police investigation of his fraudulent activities could result in his imprisonment and disbarment.[35] Counsel's fear of such consequences motivated his "attempts to appear cooperative with the District Attorney's Office and other investigating agencies." (Return at 12, ¶ 30.)

Respondent admits that Shinn's efforts to placate the District Attorney's Office, and other law enforcement, continued throughout petitioner's capital trial proceedings.[36] Respondent also explicitly concedes that, despite the ready availability of "'conclusive evidence'" against Shinn, he "was never criminally prosecuted or imprisoned for any fraudulent or criminal behavior toward his clients." (*Id.*)

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[34] "'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.'" (Return at 23, ¶ 62.) "'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.'" (*Id.* at ¶ 63.)

[35] Counsel was aware 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.'" (Return at 12, ¶ 30.)

[36] *See, e.g.*, Return at 17-18, ¶ 50: "Respondent admits that 'In the midst of petitioner's trial proceedings, Shinn responded to the intensifying investigation, and to 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.'"

3. Disbarment Proceedings

Respondent admits that throughout petitioner's capital trial proceedings, trial counsel also faced "'State Bar disciplinary matters and/or lawsuits by former clients.'" (Return at 24, ¶ 66.) Rebecca and Alexander Korchin, the embezzlement victims discussed above, filed a formal complaint against Shinn with the State Bar. In July 1983, the Korchins also filed a lawsuit against Shinn. In September 1983, shortly after the preliminary hearing in petitioner's capital case, the State Bar found probable cause to issue formal charges against Shinn in the Korchins' matter. (*Id.* at 26, ¶¶ 69-70.)

During this period, Shinn was also sued for malpractice by John Kim. (*Id.* at ¶ 71.) In a scheme similar to the one Shinn used to finagle his appointment in petitioner's case, Shinn fraudulently induced Kim to discharge his attorney by falsely claiming that a group of Korean businessmen had retained Shinn to represent Kim. (*Id.* at 27, ¶ 74.)[37] After Kim discovered the truth about Shinn's fraudulent behavior, he discharged trial counsel and represented himself; and was subsequently convicted and sentenced to prison. (*Id.* at ¶ 75.)

Respondent admits that, in the final analysis, Shinn, the attorney who fraudulently secured an appointment to represent petitioner in a trial for his life, was indisputably "'an unethical, unsavory blowhard who would promise his clients anything just to make a dollar,'" but who did "'not understand[] the rudimentary elements of the law.'" (Return at 28, ¶ 76.)

4. Trial Counsel's Inducement of Petitioner to Confess to Robberies

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[37] In petitioner's case, Shinn falsely informed petitioner that a group of African-American benefactors had hired Shinn on petitioner's behalf. (Return at 2, ¶ 4.)

Respondent admits that, as discussed in more detail below, shortly after the police interviewed trial counsel as part of the "'intensifying criminal embezzlement investigation,'" Shinn induced petitioner to meet with the prosecutor handling petitioner's capital murder case and to confess to several charged and uncharged robberies. (Return at 32, ¶ 81.)[38]

Respondent admits Shinn misled petitioner into making the confessions by falsely assuring him that the prosecution had agreed the tape-recorded confessions could not be used against him at trial. (*Id.* at 33-34, ¶¶ 82-83.)[39] It is indisputable that Shinn's actions constituted "incompetence." *In re Gay*, 19 Cal. 4th at 793. In turn, respondent admits that trial counsel'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.'" (Return at 36, ¶ 87; respondent's emphasis.)

5. Trial Court's Failure to Conduct Any Inquiry

Petitioner remained unaware of Shinn's false and misleading assurances about the inadmissibility of the confessions until the prosecution proffered the incriminating evidence at trial.[40] In a hastily arranged

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[38] Counsel's conduct in inducing petitioner to make these devastating confessions is discussed, *post*, in evaluating the actual, adverse "effect" on counsel's performance for purposes of retrospectively assessing the impact of an undisclosed conflict pursuant to the *Cuyler v. Sullivan* analysis. The circumstances, however, also gave rise to a separate conflict of interest that the trial court failed to investigate.

[39] "However, there was no such agreement." (Return at 33, ¶ 82.) *See also In re Gay*, 19 Cal. 4th at 781, 793 ("Shinn had advised petitioner to make the statement . . . falsely assuring petitioner that the statement would not be admissible at trial," "Shinn misled petitioner into making" the statement).

[40] *See* 58 RT 6282; *People v. Cummings & Gay*, 4 Cal. 4th 1233, 1319-20 (1993) ("revelations regarding the circumstances of Shinn's advice to admit

hearing to determine the admissibility of the confession, petitioner testified that Shinn had instructed him to lie by falsely admitting he had committed the robberies. Otherwise, Shinn warned petitioner, the prosecutor would not give him an opportunity to prove his innocence of the murder charge by taking a polygraph examination. (58 RT 6278-79.) Shinn then testified at the hearing, in response to the prosecutor's question, that he did not recall petitioner's testimony (which had occurred approximately "30 seconds" earlier), but that Shinn "never told anyone to lie." (58 RT 6282.)

Shinn then acknowledged to the court that his conduct had created a conflict of interest between him and petitioner. (*See* 58 RT 6278-79, 6282) The trial court, however, declined to inquire whether Shinn had a disabling conflict of interest, and refused to make any finding about whether Shinn had instructed petitioner to lie in purportedly confessing to the robberies. (59 RT 6336.) Instead, the trial court treated the issue only as a motion by petitioner to be permitted to represent himself. As a result, at this critical juncture in the proceedings, petitioner did not have the assistance of *conflict-free* counsel, meaning he essentially had *no* assistance of counsel. *See Mickens*, 535 U.S. at 167. Petitioner was left to fend for himself, or to rely on his conflicted counsel to persuade the trial court to remedy his predicament.

In the ensuing hearing on petitioner's "pro per" motion, petitioner repeatedly informed the court that he could "see no way possible to protect [himself] from past, present or future deceptions except" to have counsel relieved. (Sealed Transcript, Feb. 27, 1985 at 8.) While petitioner, as a layperson, erroneously concluded the only avenue open to him was to

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the robbery-related charges" made petitioner "aware of Shinn's 'deception'").

request *self*-representation, the trial court should have known he was entitled to the guiding hand of *conflict-free* counsel, including during the hearing on the question of Shinn's conflict. *See United States v. Gelders*, 425 U.S. 80, 89-90 (1976); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *People v. Mroczko*, 35 Cal. 3d 86, 110-11 and 114-15 (1983), *overruled on other grounds, People v. Doolin*, 45 Cal.4th at 421 & n.22. Petitioner's further representations to the court that Shinn had "deceived" and "misled" him raised a number of red flags pointing to the existence of a pervasive conflict. (Sealed Transcript, Feb. 27, 1985 at 9.) Rather than inquire into the specifics of the deceptions, or permit petitioner to consult with independent counsel who could assist him to conduct such an inquiry, the court summarily ruled that no conflict arose from "what occurred," which would prevent "the parties [sic]" from "continu[ing] in a meaningful manner." (59 RT 6341.)

As a consequence of the trial court's peremptory response, and as Respondent admits, no inquiry was conducted leading to disclosure of trial counsel's other fraudulent behavior, including the capping scheme and the embezzlements, and that counsel was "'actually aware that he was acting unethically, unprofessionally, and contrary to petitioner's interests.'" (Return at 29, ¶ 78.)

6. <u>The Conflicts Establish a Conclusive Presumption of Prejudice</u>

This case illustrates the factors leading the United States Supreme Court to presume prejudice where trial counsel is simultaneously representing conflicting interests: such representation "is inherently suspect," and counsel's divided loyalties "'effectively sea[l] his lips on crucial matters' and make it difficult to measure the precise harm from counsel's errors." *Mickens v. Taylor*, 535 U.S. at 168 (quoting *Holloway v.*

Arkansas, 435 U.S. at 489-90). The necessity to presume prejudice arises precisely because a trial court's failure to investigate a declared conflict leaves a reviewing court to speculate as to the nature and extent of the conflicting interests, as well as the manner in which they affected counsel's performance.

In such situations, conflicted counsel's enforced silence usually prevents disclosure of confidential information that may benefit one client at the expense of another, simultaneously-represented client. *See, e.g. Holloway*, 435 U.S. at 489-90. Here, the conflict created by counsel's active self-representation of his own legal and financial interests fatally compromised his representation of petitioner *ab initio*. Counsel's personal interests in concealing the fraudulent manner in which he secured his appointment, his siphoning of public monies from petitioner's defense and the reasons for which he needed to curry favor with the prosecution to protect his own liberty created enormous pressures to "seal his lips" on these very matters.

As a result of the trial court's error, it is impossible at this juncture to know to what extent Shinn would have willingly disclosed the basis for his conflicts to the trial court in response to appropriate inquiry.[41] What is clear is that his statement that a conflict existed should have been treated by the trial court as having been "'virtually made under oath,'" warranting

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[41] For example, counsel may have intended merely to make an apparently candid acknowledgment of error in persuading petitioner to confess to the robberies, and then seek withdrawal from the case. Having "acted as a second prosecutor by creating the evidence that led to petitioner's conviction of the robberies," (*In re Gay*, 19 Cal. 4th at 793) and established the prosecution's theory of motive for the murder, Shinn already had gone a long way toward currying favor on his own behalf.

further inquiry. *Mickens v. Taylor*, 535 U.S. at 167-68 (quoting *Holloway v. Arkansas*, 435 U.S. at 485-86).

Even if trial counsel continued to conceal "crucial matters," timely inquiry by the trial court, informed by conflict-free assistance to petitioner, likely would have led to the disclosure of significant information from petitioner, who also had objected to the conflict. (*See* Sealed Transcript, Feb. 27, 1985, at 7-11.) Although Shinn had concealed his criminal liability and pending disciplinary matters from petitioner (Return at 29, ¶ 78), petitioner had first-hand knowledge of the sordid dealings leading to Shinn's fraudulent appointment in this case.

In light of respondent's admissions, it is undisputable that the trial court could have learned that Shinn not only fraudulently induced petitioner to accept Shinn's representation, he then instructed "'petitioner to misinform and mislead the trial court to believe that petitioner's parents had paid Shinn's retainer.'" (Return at 3-4, ¶ 8.) This was part of an overall scheme "'to defraud the court.'" (*Id.*) Shinn's next step was to have petitioner make further "'false and misleading'" statements to the court "'to the effect that petitioner's parents were unable to continue paying for Shinn's services and to request the court to appoint Shinn.'" (Return at 4, ¶ 9.) Shinn then provided petitioner with a sample motion, seeking leave to proceed in propria persona, and instructed petitioner "'to copy it verbatim in his own handwriting for submission to the court.'" (*Id.*) The purported motion, which Shinn instructed petitioner to copy, "'included the false representation that petitioner was seeking to represent himself because he could not afford to pay Shinn's legal fees.'" (*Id.*) As Shinn expected, the trial court responded to petitioner's apparent predicament by appointing Shinn to represent petitioner. (*Id.* at ¶ 10.)

Although a "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel," *Nix v. Whiteside*, 475 U.S. 157, 165 (1986), any trial court that had been made aware of Shinn's chicanery in this case would have grasped the obvious conflict of interests. As relevant to resolving any credibility dispute between Shinn and petitioner, the fact that Shinn had instructed petitioner to lie *to the court* on an earlier occasion was highly supportive of the petitioner's testimony that Shinn had told him to lie about his involvement in the robberies.

Moreover, by the point in the proceedings at which Shinn and petitioner raised the conflict issue, Shinn already had "incompetently elicited from petitioner," the incriminating statement that "made the prosecutor's case" on the robberies. *In re Gay*, 19 Cal. 4th at 793. Disclosure of Shinn's self-dealing in obtaining the appointment would have demonstrated that the apparent blunder in misleading petitioner to confess resulted from the fact that Shinn sought only to satisfy his own needs, rather than to "represent [petitioner] as well as possible." *Id.* at 832 (Werdegar, J., concurring); (Return at 28, ¶ 76).

Because the trial court failed adequately to inquire into such circumstances, "the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary," and automatic reversal is required. *Mickens v. Taylor*, 535 U.S. at 166.

B. The Admitted Conflicts of Interest Had an Actual, Adverse Affect on Trial Counsel's Performance.

Even where the circumstances do not alert a trial court to the need for inquiry, a defendant "need not demonstrate prejudice in order to obtain relief" if defense counsel "actively represented conflicting interests," and the conflict "actually affected the adequacy of his representation." *Cuyler*

v. Sullivan, 446 U.S. at 349-50; *see also Mickens v. Taylor*, 535 U.S. at 171. As demonstrated by the facts, which respondent expressly admits or does not dispute, the conflicts described above significantly affected Shinn's representation of petitioner.

1. Shinn's Fundamental Unfitness.

As respondent has admitted, Shinn did "'not understand[] the rudimentary elements of the law.'" (Return at 28, ¶ 76.) He therefore had no legitimate business undertaking representation in a matter as serious as a capital case, and his professional unfitness pervaded all aspects of his purported representation. Motivated solely by the need to cover up and avoid prosecution for embezzlement of his clients' funds, Shinn ignored his ethical and professional obligation to refrain from accepting employment in a matter for which he was not qualified, and could not become qualified. *See* California Rules of Professional Conduct, Rule 3-110 (Failing to Act Competently).[42] Shinn defrauded the trial court to secure his appointment in petitioner's case – and thereby prevented the court from appointing competent counsel – in order to serve his own interrelated monetary and legal needs, rather than to "represent [petitioner] as well as possible." *Id.* at 832 (Werdegar, J., concurring); (Return at 28, ¶ 76). Shinn's pursuit of his own interests, as well as the interest of the other participants in his capping scheme, resulted in burdening petitioner with a lawyer who was ignorant of legal fundamentals. By definition, this constituted a direct, pervasive,

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

significant and adverse effect on the quality of representation petitioner received at trial.

Shinn's fundamental ignorance of the law and its further adverse effect on his representation of petitioner is illustrated by, *inter alia*, his uninformed failure to present testimony from Don Anderson. Mr. Anderson was the husband of a key prosecution eyewitness, Marsha Holt. Prior to trial, the defense learned that Ms. Holt had confided to her husband that she did not witness the shooting, and had lied under oath at the grand jury and preliminary hearing proceedings when she identified petitioner as the perpetrator.[43] Shinn did not call Mr. Anderson to impeach Ms. Holt's similarly false testimony at trial because Shinn mistakenly believed Mr. Anderson's testimony was inadmissible hearsay. (EH 5 RT 860-862.) Although technically hearsay, Ms. Holt's impeaching admissions to her husband were clearly admissible as prior inconsistent statements, CAL. EVID. CODE §§ 770, 1235, or, if Ms. Holt invoked her constitutional privilege against self-incrimination, the evidence also could be offered as a declaration against interests. *See id.* at § 1230.

Indeed, each and every instance of Shinn's deficient performance, including the failures to introduce exculpatory evidence discussed in Argument II, below, and incorporated here by this reference, demonstrates the adverse impact of his conflict of interest that resulted from fraudulently burdening petitioner with an unqualified attorney. Under the analysis in *Cuyler v. Sullivan*, each instance is sufficient to require reversal of

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[43] The truthfulness of Ms. Holt's admission to her husband would have been corroborated by another prosecution witness, Gail Beasley, who testified that Ms. Holt had been in a rear bedroom of her mother's house watching television, and knew nothing about the shooting until Ms. Beasley reported it to her. (2 CT 548-552.)

petitioner's conviction without the need to further demonstrate the probability of a different result, which otherwise would be required by *Strickland*. *See Mickens v. Taylor*, 535 U.S. at 174.

2. <u>Significant Effect of the Capping Scheme</u>

Respondent admits that "'Shinn retained [Dr. Fred] Weaver in any cases in which [Marcus] McBroom had arranged for Shinn to be counsel.'" (Return at 5, ¶ 12.). Shinn knew that Weaver was not willing to expend the effort "'necessary to perform an adequate assessment necessary to assist counsel.'" (*Id.* at 6, ¶ 15.) Trial counsel's "'sole motivating factor for . . . retaining Weaver,'" was "'Shinn's and Weaver's pre-existing, mutually beneficial capping arrangement.'" (*Id.* at ¶ 14.) Trial counsel's only purpose in retaining Weaver was to "funnel[] public monies" to him and McBroom pursuant to the capping scheme.

Respondent admits that "'pursuant to the illegal capping arrangement,'" Shinn was aware and expected that "'hiring Weaver to perform a pro forma evaluation'" of petitioner "'would result in McBroom also receiving a share of case-generated funds.'" (*Id.* at 8, ¶ 22.) Respondent also admits that both Shinn and Weaver understood from the outset that Weaver's "pro forma services" would require him to "'do no more than "go through the motions," rather than provide petitioner the benefit of his best clinical and forensic skills.'" (*Id.* at 7, ¶ 19.) The limited purpose for which Shinn purportedly retained Weaver unquestionably "constitute[d] constitutionally inadequate representation." *In re Gay*, 19 Cal. 4th at 798.

Thus, by definition, the capping-scheme conflict of interest, which singularly motivated Shinn to employ Weaver and McBroom, "actually affected the adequacy of [counsel's] representation." *Cuyler v. Sullivan*,

446 U.S. at 348-349. Accordingly, no further showing of prejudice is required to entitle petitioner to relief. *Id.*

Neither is the presumptive prejudice of trial counsel's conflict limited to the penalty phase, to the exclusion of guilt phase relief. First, as discussed above, the purpose of the *Sullivan* standard is to apply a modified version of the otherwise *per se* prejudice standard of *Holloway* in situations where the trial court did not have the opportunity to investigate a potential conflict or otherwise consider the existence and nature of counsel's competing interests. In such situations, a retrospective determination that a conflict in fact existed, which *actually* affected counsel's performance, is sufficient to show that "the likelihood that the verdict is unreliable is so high," the outcome analysis of *Strickland* "is unnecessary." *Mickens v. Taylor*, 535 U.S. at 166.

Such is the case here. Counsel's demonstrably incompetent performance in retaining Weaver raises a very high likelihood that counsel's overall decision-making – which was motivated by personal gain rather than doing the best for his client – produced unreliable verdicts at both phases of the trial.

Second, counsel's deficient performance in retaining Weaver also had discernable guilt-phase-specific impacts. As discussed below, the testimony of a competent and well-prepared eyewitness identification expert could have been sufficient to establish a strong reasonable doubt of petitioner's guilt. For example, an eyewitness expert could have explained the contaminating effects of the police "walk-through" that apparently caused key witness Robert Thompson to change his original statement to the police. Respondent admits that in Mr. Thompson's initial statement, which he gave on the day of the offense, he "'stated the back seat passenger, and only the back seat passenger, emerged from the car to shoot

the decedent'" (Return at 115, ¶ 283); his account of the crime then "varied over time" (*id.* at 111, ¶ 277); including after a "walk through with Detective Holder," leading him to identify petitioner as the person who shot Officer Verna. (Return at 113-14, ¶ 281.)

Trial counsel explicitly acknowledged that "eye witness testimony is going to be essential." (Sealed Transcript, March 7, 1985 at 9.) Shinn also clearly acknowledged that competent representation of petitioner under the circumstances of this case reasonably required the preparation and presentation of expert testimony on eyewitness identification. Rather than engage in the requisite consultation, however, Shinn falsely informed the trial court at the beginning of the trial that he was "going to put a psychologist – two or three psychologists – regarding eye witness testimony" on the stand to testify on behalf of petitioner. (Sealed Transcript, March 7, 1985 at 9.) Because Shinn had diverted to Weaver and McBroom the funds that might otherwise have been used to retain such "psychologists," he could not – as he knew – make good on his promise to the court. Thus, Shinn's conflict once again had an actual and adverse impact on his representation. *See, e.g., People v. McDonald*, 37 Cal. 3d 351, 375 (1984) ("no other evidence connected [petitioner] with the crime, the crucial factor in the case was the accuracy of the eyewitness identifications. Yet on that issue the evidence was far from clear." *See also People v. Cummings & Gay*, 4 Cal. 4th at 1259 [eyewitnesses' "versions of the events and identification of the shooter or shooters varied greatly"].)

3. <u>Significant Effect of Capping and/or Shinn's Ongoing Criminal Investigation.</u>

As discussed above, respondent admits that during Shinn's representation of petitioner, Shinn was the target of an intensifying criminal investigation that easily could have led to his successful prosecution,

imprisonment and disbarment. (Return at 12, ¶ 30.) Three weeks after being interviewed by the police in Shinn's own investigation, and while he was under increasing pressure to appear cooperative, Shinn induced petitioner to confess to the commission of the robberies alleged in this case. (*Id.* at 16-17, ¶¶ 47-48; 32, ¶ 81.) There is no question that Shinn's action constituted "incompetence." *In re Gay*, 19 Cal. 4th at 488. Nor is there any question that "but for Shinn's incompetence," it is possible that petitioner "would not have been convicted of several of the robberies." *Id.*

These admitted and indisputable facts demonstrate that Shinn's conflicted performance was prejudicial under even a *Strickland* analysis and, therefore, was reversible *a fortiori* under *Sullivan.* As the result of the conflicting interest that motivated Shinn to secure appointment in a case for which he was not professionally qualified, and/or his need to curry favor with the prosecution, Shinn *joined* the prosecution against petitioner. He effectively "acted as a second prosecutor by creating the evidence that led to petitioner's conviction of the robberies," and thereby "permitted the prosecutor to portray petitioner as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies." *In re Gay*, 19 Cal. 4th at 488.

The prosecution exploited petitioner's purported guilt of the robberies to establish the motive for committing the capital murder. *See People v. Gay*, 42 Cal. 4th 1195, 1199 (2008); *In re Gay*, 19 Cal. 4th at 827. Absent Shinn's stunning act of incompetence in actually creating evidence of petitioner's guilt of the robberies, the prosecutor's "motivation argument would not have been as strong as applied to petitioner." *In re Gay*, 19 Cal. 4th at 827. The readily available evidence clearly provided the bases to establish a reasonable doubt as to petitioner's guilt of the robberies; and such evidence may even have warranted granting a motion for acquittal. *Id.*

at 793. Whatever the conflicted source of Shinn's failure to present such evidence may have been, his failure to do so as well as his incompetence in *creating* evidence of guilt clearly had an actual and adverse effect on his representation of petitioner. *See Rubin v. Gee*, 292 F3d 396 (4th Cir.) (adverse affect found where, *inter alia*, attorneys' caused delay of defendant's surrender to ensure retainer fee thus jeopardizing self-defense defense at murder prosecution).

Yet, Shinn's active assistance to the State as a "second prosecutor" did not end there. After petitioner's tape-recorded confession had been ruled admissible, Shinn elicited testimony from the prosecutor's investigator that, in his opinion, "'petitioner had been truthful in *confessing to the robberies*, but had *lied* about *denying his commission of the murder* of the decedent.'" (Return at 42-43, ¶ 96 [emphasis added] [admitting allegations in the Petition at 58, ¶ 5.i.(1)(b)(vii)]; *see* 58 RT 6254-56.) Eliciting such devastating opinion testimony from a law enforcement witness clearly had no purpose other than to ingratiate Shinn to the authorities who were investigating his own criminal behavior, and unquestionably had an adverse effect on the quality of counsel's representation in petitioner's trial. *But cf. People v. Sanchez*, 12 Cal. 4th 1 (1995) overruled on other grounds, *People v. Doolin*, 45 Cal. 4th at 421 & n.22. (no conflict found where counsel undergoing disbarment proceedings, but investigation only by state bar and defendant informed of and waived conflict).

4. The Pervasive, Significant Effect of Shinn's Conflicts.

The foregoing discussion of the undisputed evidence demonstrates that Shinn wholly abdicated his professional obligation to provide petitioner with constitutionally effective representation. The undisputed evidence also makes it clear that Shinn's abdication resulted from the conflicts between

his financial and legal interests, on the one hand, and petitioner's interests on the other. Shinn decided to protect his own financial and legal interests at the expense of petitioner's legal defense. Indeed, Shinn intentionally sacrificed petitioner's defense in exchange for avoiding prosecution for counsel's own unlawful behavior.

The undisputed facts clearly establish the existence of Shinn's debilitating conflicts of interests. Yet even if Shinn's failings were not the result of his discrete conflicts of interests (which they were), the following section demonstrates that there is no material dispute that these and other instances of Shinn's substandard performance were prejudicially deficient under the *Strickland* standard of unconstitutionally ineffective assistance.

II. The Undisputed Facts Entitle Petitioner to Relief Based on Counsel's Failure Wholly or Adequately to Investigate and Present Evidence Showing That Petitioner Did Not Participate in the Charged Capital Murder.

Shinn prejudicially failed to investigate and present readily available evidence that would have overwhelming refuted the prosecution's theory that petitioner participated in the co-defendant Raynard Cummings' homicidal acts. The presentation of evidence available through minimal investigation would have shown that the co-defendant Cummings in fact fired all of the gunshots at the crime scene. Trial counsel, however, unreasonably failed to conduct such an investigation or present the available evidence.

First, Shinn unreasonably failed to develop and present exculpatory evidence disclosed to him in the discovery. *See, e.g., Kimmelman v.*

Morrison, 477 U.S. 365, 385 (1977) (ineffective assistance where counsel's ignorance of pretrial discovery resulted in failure to file meritorious suppression motion); *Riley v. Payne*, 352 F.3d 1313 (9th Cir. 2003) (failure to investigate and present testimony of known key witness to corroborate defense); *Luna v. Cambra*, 306 F.3d 954, amended by 311 F.3d 928 (9th Cir. 2002) (counsel ineffective for failure to interview and present known exculpatory witnesses). The discovery readily disclosed the existence of three categories of credible exculpatory evidence, which counsel unreasonably failed to develop: (1) co-defendant Cummings' many confessions that he alone was responsible for shooting the victim[44]; (2) numerous eyewitness statements that described the sole shooter as being a man who matched Cummings' physical appearance, rather than petitioner's; and, (3) the police reports of statements by prosecution eyewitnesses, which seriously contradicted and undermined the credibility of the witnesses' testimony. *See Sanders v. Ratelle*, 21 F.3d 1446 (9th Cir. 1994) (counsel ineffective for failing to investigate repeated and consistent confessions made by defendant's brother; *see also White v. Roper* 416 F.3d 728 (8th Cir. 2005) (counsel's representation deficient for failing to investigate and present known percipient witness who said petitioner was not killer); *Matthews v. Abramajitys*, 319 F.3d 780 (6th Cir. 2003) (failure to challenge flaws in the state's case rendered representation deficient).

Second, Shinn unreasonably failed to conduct a minimal investigation, which would have yielded lay and expert testimony that affirmatively refuted the prosecution's case and exculpated petitioner. The readily available, exculpatory evidence included the testimony of Don Anderson, who would have conclusively impeached the perjured testimony

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[44] Section II.B., *post*, contains an in-depth discussion of these witnesses.

of Marsha Holt, a key prosecution eyewitness;[45] and expert testimony, which would have established that the timing and sequence of gunshots made it physically impossible for petitioner to have participated in the shooting. *See Duncan v. Ornoski*, 528 F.3d 1222, 1235 (9th Cir. 2008) (colorable claim of ineffectiveness where counsel fails to consult experts to refute prosecution's expert testimony); *Schell v. Witek*, 218 F.3d 1017 (9th Cir. 2000) (remanding for evidentiary hearing on counsel's failure to consult and call necessary experts).

Trial counsel's wholesale failure to expend adequate time on petitioner's capital murder case is illustrated by Shinn's own description of the contents of his "trial file":

> [Shinn]: There was just little bit of notes and so forth, which I took down at the trial.
>
> The Court: So your little, your notebooks that you had?
>
> [Shinn]: Scraps of papers, just yellow sheets.
>
> The Court: How much stuff are we talking about? An inch thick? Half an inch?
>
> [Shinn]: No.
>
> The Court: About how much?

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[45] At the beginning of trial, on February 26, 1985, Shinn was made aware of the highly exculpatory evidence Mr. Anderson (EH 5 RT 808). Although he was never called to testify, Shinn only considered presenting Don Anderson's testimony in the penalty phase. (Exhibit 97, Deposition of Douglas Payne at 2221-22.) Mr. Anderson was not called as a witness because of Shinn's ignorance of the law – Shinn did not believe his "hearsay" testimony would be admissible. (EH 5 RT 862.) As with his failure to investigate, Shinn failed to research the issue in an attempt to admit this highly exculpatory evidence or he would have discovered his error.

[Shinn]: (No audible response.)

The Court: Five, ten pieces of paper.

[Shinn]: I can't tell you exactly. It was a lot of scrap of papers. I just put it in the folder, and I keep it.

(EH 1 RT 144.)[46] The scant contents of Shinn's "file" are consistent with his uniform failure to interview numerous exculpatory witnesses, to make use of readily available discovery to impeach prosecution witnesses, and to consult with appropriate experts, including those he *expressly acknowledged* he should call to testify.[47] *See in re Neely*, 6 Cal. 4th 901 (1993) (counsel ineffective for *inter alia*, failing to investigate known leads regarding *Massiah* violation).

Indeed, respondent essentially concedes that Shinn's notion of "investigating" adverse witnesses consisted largely of sitting in court while the witnesses testified in pretrial proceedings, and otherwise relying on the prosecution to call witnesses helpful to the defense. (*See* Return at 62, ¶ 152; 69-70, ¶¶ 167, 169.) Prevailing standards of constitutionally adequate representation, however, required trial counsel to do more than rely on the prosecution to provide him with the evidence necessary to build a defense. *See Kimmelman v. Morrison*, 477 U.S. at 385 (counsel deficient in expecting police would bring all exculpatory evidence to his attention); *In re Hall*, 30 Cal. 3d 408, 425 (1981) (same).

Regrettably, trial counsel made his priorities painfully clear on this

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[46] Mr. Payne orally reported the results of his investigation to trial counsel. If any witness of import had been interviewed, no report existed for trial counsel's future reference or use in witness impeachment. (Ex. 97 at 2324.)

[47] *See* Sealed Transcript, March 7, 1985, at 9 (Shinn explained he needed to argue the robbery and murder counts together because he planned to present "two or three psychologists -- regarding eye witness testimony").

issue: weighed against counsel's own interests – finances, livelihood, and freedom from incarceration – petitioner's interest in receiving a fair trial merited only "a lot of scrap of papers," contained within a single folder. (EH 1 RT 144.)

A. Shinn Unreasonably Failed to Develop Exculpatory Evidence, Including the Co-Defendant's Confessions, Exculpatory Eyewitness Testimony, Impeachment of Prosecution Witnesses and Exculpatory Expert Testimony.

1. Failure to Introduce Credible Evidence of Cummings' Confessions.

Trial counsel appeared to acknowledge the incredibility of the prosecution's theory that after Cummings fired the first shot, he then "passed the gun" to petitioner, who continued shooting the victim. As trial counsel recognized, and explained to the jury in his opening statement, petitioner's meritorious defense rested on the fact that the "truth of the matter was the gun was never passed." (58 RT 6299.) Counsel, however, continually ignored opportunities to establish that truth or support the available defense. *See In re Hardy*, 41 Cal. 4th 977, 1020 (2007) (counsel was deficient for failing to investigate and present evidence supporting chosen defense theory).

As respondent repeatedly admits, foremost among counsel's failures were the failures to interview and call witnesses who would have testified that Cummings confessed that he alone shot the victim. Respondent expressly admits that "'Shinn made no effort to interview or present the readily available'" testimony of Deputy Sheriff William McGinnis, who could have testified "'that Cummings made admissions and/or confessions to being the *sole shooter* who killed the decedent.'" (Return at 41, ¶ 94; emphasis added.) Respondent further admits that Deputy McGinnis would

have "'testified truthfully'" to such facts, that Deputy McGinnis' testimony would have been "'reliable, credible and *persuasive*,'" and that the testimony would have "'*affirmatively exculpated* petitioner, and inculpated co-defendant Cummings.'" (*Id.* [emphasis added].)

Petitioner submits that respondent's admission regarding the failure to present Deputy McGinnis' testimony conclusively establishes petitioner's entitlement to relief under *Strickland*. Independent of the conflicts that motivated counsel to pull his punches and curry favor with the prosecution, it was – by definition – prejudicially deficient for counsel to fail to present "credible and persuasive" testimony from a law enforcement officer, which would have "affirmatively exculpated" petitioner. Any impartial juror hearing credible and persuasive evidence of petitioner's innocence necessarily would have voted to acquit. Similarly, no court can have confidence in a guilty verdict that was rendered in the absence of such evidence. *Strickland*, at 686; *Sanders v. Ratelle*, 21 F.3d 1446. (9th Cir. 1994)

Shinn knew, as the result of a hearing conducted outside the jury's presence, that Deputy McGinnis would be permitted to testify that Cummings had confessed to him. (Ex. 29 at 501; *see* 7 CT 1887.) Shinn also knew that Deputy McGinnis would have testified that, in his expert opinion, Cummings' confession to being the sole perpetrator of Officer Verna's murder was truthful. (Ex. 29 at 501, ¶ 5.) Nevertheless, as respondent expressly concedes, Shinn made no effort to interview or call Deputy McGinnis as a witness on petitioner's behalf. (Return at 41, ¶ 94; 69, ¶ 167.) *Jones v. Wood*, 207 F.3d 557 (9th Cir. 2000) (counsel ineffective for failing o investigate an present evidence of known third party culprit).

Thus, after presenting the prejudicial opinion of the prosecution's investigator, Detective Holder, to the effect that petitioner *falsely denied* committing the murder, Shinn compounded his prejudicial error by inexplicably failing to call Deputy McGinnis to testify that Cummings *truthfully admitted* being the only one to commit the murder. The only consistent strategic goal reflected in such acts and omissions was to ensure that petitioner was convicted of capital murder.

Respondent admits that Shinn also failed even to interview, let alone call as witnesses, at least three other inmates in the Los Angeles County Jail who could have testified to Cummings' repeated confessions that he was the *only person* to shoot Officer Verna. These inmates were Jack John Flores, James Edward Jennings and Gilbert Anthony Gutierrez. (Return at 64, ¶ 156; 67-68, ¶¶ 163-64; 68-69, ¶ 165.)

Although Shinn's prejudicially deficient performance is conclusively established solely by his failure to call Deputy McGinnis, the availability of inmates' testimony further demonstrates counsel's ineffectiveness. Deputy McGinnis' credible and persuasive testimony would have served to corroborate the accounts of Cummings' confession provided by the inmates. Cummings' consistent and uninhibited claims of sole responsibility for the murder would have foreclosed any possibility that an individual witness was misquoting Cummings' self-incriminating statements. Moreover, to the extent there may have been arguable ambiguity in still *more* confessions Cummings made to witnesses such as inmates Elliot, Pernell and Gaxiola, Cummings' repeated and unequivocal confession of sole responsibility would have provided a clarifying context for these additional confessions[48].

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[48] Respondent also admits that Cummings made additional confessions to these three inmates (David Elliott, Norman Pernell and Michael David Gaxiola, but disputes whether the record makes it clear that Cummings

The complete lack of any rational explanation for trial counsel's failings in this regard is illustrated by respondent's unconvincing attempt to suggest the *possible* existence of a tactical judgment. Pointing to the fact that the *prosecutor* "also did not call Deputy McGinnis," or the inmates discussed above, respondent feebly suggests that this indicates there may have been "some problem" with their testimony that also justified Shinn in not calling them. (Return at 62-63, ¶ 154; 71, ¶ 71.) The "problem" for the prosecutor, of course, was that the testimony from *all* of these witnesses would have tended to establish petitioner's innocence; i.e., he did not participate in the murder.

Indeed, the fact that the prosecutor declined to call witnesses – including a law enforcement officer – who otherwise would have convicted *Cummings* with *his* confession, constituted a clear indication that such testimony was *unhelpful* to the prosecution's efforts to convict *petitioner*. The prosecutor knew that under the circumstances here, the undeniable tendency of Cummings' confessions to incriminate him exerted with equal force a tendency to exonerate petitioner. *See Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("the defendants own confession is probably the most probative and damaging evidence that can be admitted against him." (inner citation omitted).

Thus, respondent's inability even to suggest a plausible explanation for counsel's failing underscores the obvious: the failure to investigate and present such powerful exculpatory evidence was not the product of an

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stated he *alone* committed the homicide. (*See* Return at 63, ¶ 155; 65-66, ¶ 157.) In light of respondent's admissions, discussed above, that Shinn failed to interview and call a law enforcement officer and three inmates to testify to Cummings' *repeated* confessions that he acted alone, respondent's parsing of Cummings' other reported confessions does not raise any dispute of a material fact.

informed or professionally adequate decision. *Cf. Matthews v. Abramajitys*, 319 F.3d 780 (6th Cir. 2003) (failure to challenge flaws in the state's case rendered representation deficient).

2. Failure to Present Exculpatory Eyewitness Testimony

Trial counsel had an ethical and legal obligation to investigate known leads of potentially exculpatory eyewitnesses. *See, e.g., White v. Roper*, 416 F.3d 728 (counsel should have investigated known percipient witnesses identified in police reports who said defendant was not the killer). By contrast, Shinn simply failed to follow up such leads, including failing to interview eyewitnesses he knew, or should have known, possessed exculpatory information that would have supported petitioner's defense.

Reasonably competent trial counsel would have known that the potential exculpatory value of eyewitness evidence needed to be assessed in light of several critical facts that were consistent with both the prosecution and defense theories.[49] These facts were: (1) Petitioner, the co-defendant Raynard Cummings and Cummings' wife, Pamela, were all present at the crime scene; (2) Pamela was driving the suspect vehicle, with petitioner seated in the front passenger seat, and Raynard Cummings in the left-rear passenger seat; (3) petitioner was a six-foot tall, thin, light-complexioned Black male, who appeared to be White, and Cummings was a taller, Black male with a medium-dark complexion; (4) petitioner was wearing a long-sleeved, light gray dress shirt, and Cummings was dressed in a burgundy short-sleeved, pullover shirt and dark sweat pants; (5) after Officer Paul Verna initiated a traffic stop of the suspects' car, Cummings fired at least

[49] These facts illuminated the significance of affirmatively exculpatory witnesses, as well as the value of statements and other evidence that impeached the credibility of the prosecution's purported eyewitness testimony.

the first shot, striking the officer; and, (6) after several more shots were fired, witnesses observed the suspect vehicle drive away and then return to the scene, where petitioner alighted and retrieved certain physical evidence.

Minimal investigation of percipient witnesses, whose identities were disclosed in the police reports or grand jury and preliminary hearing testimony, would have yielded the testimony of at least four witnesses who would have testified that petitioner did not shoot the victim: - Walter Roberts, Ejinio "Choppy" Rodriguez, Martina Jimenez and Irma Esparza. All of them would have testified consistently with the fact that a medium-to-medium-dark-complexioned Black male was the *only* man in the suspect vehicle who shot the victim.

Consistent with the observations of each of these witnesses, Martina Jimenez would have testified that the lone shooter was a Black male with a "very dark complexion." (Ex. 27 at 498; *see* Ex. 43 at 1628, 1630); *see also In re Gay*, 42 Cal. 4th at 1216. Respondent admits that Ms. Jimenez had spoken to Officer Verna moments before the shooting, and watched him as he approached the suspect vehicle. (Return at 49, ¶ 109.) Respondent also admits that Ms. Jimenez then witnessed the shooting and, in a statement that was available to trial counsel Shinn (Ex. 43), Ms. Jimenez said the Black "tall," "thin" male got out of the car and shot the officer. (Return at 49, ¶¶ 109-110.)

Similarly, Walter Roberts would have testified to seeing a medium-dark-complexioned Black male get out of the car and fire two shots into the victim as he lay on the ground. (Ex. 44 at 1636, 1637); *see also In re Gay*, 42 Cal. 4th at 1216. Likewise, Ejinio Rodriguez would have testified to hearing what sounded like fireworks and then seeing a medium-dark-complexioned Black male outside the car near the downed officer. (*See* Ex. 24 at 245, ¶ 6 [Mr. Rodriguez saw "a black man who had dark skin and was

wearing a dark shirt" shoot and kill Officer Verna, while "the other man[,] was in the car and had much lighter skin"].)

Further consistent with these witnesses, Irma Esparza described a dark-complexioned African-American male on the driver's side of the car and a light-skinned African-American male in the front passenger seat (Ex. 13 at 162-63.) Ms. Exparza observed the dark-complexioned man shoot the victim in the neck and at least two more times. (Id.) After the officer had been shot, the suspect vehicle drove away and then returned, at which point the light-skinned male retrieved a gun from the ground. (Id.) Ms. Esparza described the light-skinned man as wearing a white, long-sleeved shirt, gray pants with pleats in the front and black shoes. (Id.)

Thus, in light of the distinguishing physical characteristics of petitioner and co-defendant Cummings, the testimony of these eyewitnesses clearly would have tended to establish that the co-defendant shot the decedent, and that he acted alone in doing so. In turn, this testimony would have corroborated, and been corroborated by, "the far more powerful evidence that Raynard himself, on at least four occasions, had admitted firing all of the shots." *People v. Gay*, 42 Cal. 4th at 1224. Such "powerful evidence" left no question that the independent eyewitnesses were correct in identifying the same person who made numerous, spontaneous confessions that he alone committed the murder.

Respondent admits that Shinn did not interview these significant witnesses. (Return at 46, ¶ 102; 48, ¶ 108; 40, ¶ 114.) Respondent appears to suggest that such failure might be excused by the fact that Shinn's investigator conducted a general canvass of the area (i.e. "conducted field interviews to attempt to discover potential witnesses") in which he "spoke to someone" at various addresses to determine whether the unidentified person or any resident of the household had witnessed the shooting.

(Return at 47, ¶ 102; 48-49, ¶ 108; 50, ¶ 114.) Respondent, however, does not expressly contend, or cite any authority for the proposition, that such haphazard contacts fulfilled counsel's duty to locate and interview specifically identified witnesses at their reported addresses. Nor is that the law. *See Riley v. Payne*, 352 F.3d 1313 (9th Cir. 2003) (failure to investigate and present witness who supported defense and corroborated defendant's testimony); *Avila v. Galaza*, 297 F.3d 911 (9th Cir. 2002) (failure to investigate alternate suspect); *see also In re Gay*, 19 Cal. 4th at 790 (counsel cannot make an informed strategic decision without first investigating).

Similarly, respondent does not dispute that the witnesses would have provided testimony as summarized above if Shinn had called them at trial. Respondent instead argues that such testimony would not have been reliable or credible in light of statements the same witnesses made on other occasions. (*See, e.g.,* Return at 47, ¶ 103; 49, ¶ 110.) Respondent's contentions do not refute the material, exculpatory value of the witnesses' testimony for at least three reasons.

First, respondent's criticisms are misdirected at the fact the witnesses did not positively identify either petitioner or the co-defendant Cummings based on facial recognition. (*See, e.g.* Return at 49, ¶ 110 [Ms. Jimenez "did not see the face of the shooter," and "was unable to identify either petitioner or Raynard in live lineups"].) Respondent cannot dispute, however, that the witnesses were able to distinguish between the darker complexioned African American suspect (Raynard Cummings) and the lighter complexioned, apparently White suspect (petitioner). It was this significant dissimilarity between the appearances of the only male suspects that gave exculpatory value to all the witnesses' testimony and their ability to describe which of the suspects was the *only* one to shoot the victim.

Respondent cannot dispute that, in essence, these witnesses' observations were all consistent with the facts that "the dark skinned man 'shot numerous times consecutively without stopping,'" and "'did not hand the gun to the passenger at any point.'" (Return at 50, ¶ 111.)

Second, this Court already has recognized that these witnesses "would have substantially bolstered the defense theory" that petitioner was not the shooter. *People v. Gay*, 42 Cal.4th at 464. Thus, the strength of any arguments the prosecution might have offered to challenge the exculpatory impact of such evidence was a matter for the *jury* to consider in weighing all of the evidence. *See Williams v. Taylor*, 529 U.S. 362 (2000) (IAC claims evaluated by considering all evidence in habeas as well as at trial). The fact that the prosecution may have been able to offer (ultimately unpersuasive) grounds for challenging this consistently exculpatory testimony does not in any way excuse trial counsel from failing even to offer evidence that "would have substantially bolstered" the case for petitioner's innocence.

Third, any purported reasons for challenging the credibility of the exculpatory testimony available through the witnesses Shinn failed to call pales in comparison to the vulnerability of the prosecution's alleged eyewitnesses discussed below. None of the exculpatory witnesses Shinn failed to call was vulnerable to impeachment based on the wholesale revisions of his initial description of events (as was prosecution witness Robert Thompson), her initial description of the shooter that matched Cummings rather than petitioner (as was prosecution witness Gail Beasley), or her admitted perjury and demonstrated inability to observe what she claimed to have seen (as was prosecution witness Marsha Holt).

Indeed, to the extent respondent argues that potential impeachment on collateral details of the exculpatory eyewitnesses' accounts would have

rendered their testimony completely unreliable and lacking credibility, respondent effectively concedes *a fortiori* that the prosecution's eyewitnesses were vulnerable to even more devastating impeachment. Accordingly, Shinn's further failure to capitalize on the evidence available to impeach the prosecution's witnesses also constituted prejudicially deficient performance. *See Eze v. Sankowski*, 321 F.3d 110 (2nd Cir. 2003) (counsel failed to use available evidence to impeach prosecution witnesses).

3. Failure to Impeach Prosecution Eyewitnesses.

At trial, the prosecution eyewitnesses' "versions of the event and identification of the shooter or shooters varied greatly." *People v. Cummings & Gay*, 4 Cal. 4th at 1259. At best, the prosecution had to rely on four identification witnesses to support the theory that co-defendant Cummings initially shot the victim and then "passed the gun" to petitioner, who emerged from the car and continued shooting. The witnesses who identified petitioner as being involved in the shooting were Robert Thompson, Marsha Holt, Gail Beasley and Shannon Roberts.[50] Each of these witnesses was vulnerable to significant impeachment, which was available to minimally competent counsel through the review of the witnesses' statements to the police and in testimony from the grand jury proceedings and preliminary hearing, as well as routine investigation.

a. Robert Thompson

On the date of the offense, eyewitness Robert Thompson gave the police a detailed account of what he saw. These details included the fact that Mr. Thompson observed a car with a White woman, later identified as

[50] Among the witnesses called by the prosecution, the only other witness who actually observed the shooting, Oscar Martin, identified Cummings as the passenger who stepped from the car and continued firing the gun. (67 RT 7360-61.)

Pamela Cummings, and two male passengers, one Black and one White, being pulled over by a police officer. (Ex. 45 at 1641-42.) In response to a loud noise, Mr. Thompson looked again in the direction of the car and saw the officer holding his chest and backing away from the car. The Black male passenger, seated in the rear seat, was extending his arm out of the car and pointing a gun at the officer. The Black man, wearing a short-sleeved brown shirt, then forced open the car door and continued shooting the officer, firing the last shot at point-blank range. (*Id.*)

Respondent admits that on the date of the offense, Mr. Thompson described the shooter as being the rear passenger, "a Black man with a medium to dark complexion." (Return at 113, ¶ 280.) Respondent also admits that at that time Mr. Thompson described the passenger in the front seat as a "White man," and was explicit in telling the police that "'the back seat passenger, *and only the back seat passenger*, emerged from the car to shoot the decedent.'" (*Id.* at 280; 115, ¶ 283 [emphasis added].)

By the time of the preliminary hearing approximately three months after the offense, Mr. Thompson's purported recollection of events had dramatically changed. As respondent admits, Mr. Thompson's testimony then, and at trial, "'fully supported the state's version of the shooting.'" (*Id.* at 113, ¶ 281.) The changed version included identifying petitioner as the White passenger, and saying he, rather than the Black passenger, exited the car and shot the victim. (*Id.*) Respondent also admits that the only factor that accounts for this substantive changes in Mr. Thompson's story is that he had "his memory refreshed in part by the walk through with [the prosecution's investigator] Detective Holder." (*Id.* at 114, ¶ 281)

It is clear that far from having his memory "refreshed," Mr. Thompson was provided with a new and different "memory" as a result of rehearsing events with the police. The 180 degree change from Mr.

Thompson's statement to the police – uncontaminated by influence from law enforcement seeking to conform it to the prosecution's "theory" – and his later testimony was fertile ground for impeachment.

As respondent implicitly acknowledges, and as Mr. Thompson revealed, the "walk through" with Detective Holder was only "part" of the prosecution's efforts to alter the witness's memory. Mr. Thompson disclosed that it "[s]eemed like every day was something [the police] wanted me for. They wanted me for this. They wanted me for that." (68 RT 7609.) What the police "wanted" Mr. Thompson for were repeated sessions at his home with "two white, male police officers," lasting "for several hours each time," during which the officers "went over and over what Robert had seen like they were helping him memorize it." (Ex. 85 at 2100.)

Yet, as respondent further admits, Shinn "'failed to question Mr. Thompson about his initial, consistent descriptions of how the dark skinned passenger emerged, shooting, from the back seat.'" (Return at 119, ¶ 289.) As a result, the jury did not hear evidence that in Mr. Thompson's *first* statement to police he described how the shooter "was firing while he was exiting the vehicle," and *emphasized* that the shooter was "def[initely] a black man." (Ex. 45 at 1644.) The presentation of this evidence would have demonstrated that, notwithstanding the implausible explanations for the later changes in Mr. Thompson's story, his first, unadulterated version of events wholly exonerated petitioner.[51] Moreover, the consistency

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[51] Among the incredible explanations for Mr. Thompson's changing story was the notion that, although he recognized petitioner at a physical lineup, he intentionally misidentified two African American males because he did not want to be involved as a witness. (3 CT 708 [preliminary hearing]; 69 RT 7664 [trial].) If his goal had been to avoid involvement in the investigation, however, he would not have purported to identify *anybody*.

between Mr. Thompson's first version and the exonerating eyewitness testimony Shinn also failed to introduce demonstrates the cumulatively prejudicial effect of counsel's ineptitude.

Given the extraordinary change between Mr. Thompson's police statement and his preliminary hearing testimony, trial counsel should have been especially vigilant about uncovering impeachment evidence against Mr. Thompson. The evidence that was readily available by simply interviewing a family member would have compassionately explained why Mr. Thompson was susceptible to prosecution efforts to extensively and continually reconstruct his memory of the shooting to fit the state's theory of the crime. The long-term impacts of Mr. Thompson's military service in Vietnam were highly relevant to, and colored the way in which Mr. Thompson experienced witnessing the murder of Officer Verna.[52] Petitioner's jury should have known about Mr. Thompson's increasingly fragile emotional state that resulted from witnessing the murder of Officer Verna. That Mr. Thompson's drinking significantly increased after the shooting (Ex. 85 at 2100, ¶ 5), is highly relevant to how reliable his successive versions of the shooting were compared to his initial version,

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Similarly, his initial, emphatic statement that the shooter was definitely a Black male would have shown that his later claims of uncertainly were merely a pretext for adopting the prosecution's "theory" of petitioner's culpability.

[52] It is significant that when Mr. Thompson gave a taped statement to Kenneth Lezin and without prompting recounted his first version of events – the dark skinned man that exited the rear passenger seat was solely responsible for Officer Verna's murder – he stated he was able to recall the shooting so well because it had a similar effect on him as when he witnessed the death of a friend when he was in the military. (Trial Ex. 322; Peo's Trial Ex. 322A For ID Only at 7 [transcript of interview].) Former Deputy District Attorney Watson was aware that Mr. Thompson had been in the military. (3 CT 772.)

told immediately after the shooting and before he started to experience dramatic mood swings, flashbacks, insomnia, agitation, and substance abuse (*id.* at 2100-01, ¶¶ 4-8).

Shinn, however, failed to undertake any investigation of the witness, and thereby failed to uncover his vulnerability to the overbearing techniques of the prosecution or the repeated sessions of suggestive questioning described above, which "help[ed] him memorize" the prosecution's version of events.

b. Marsha Holt.

As respondent admits, Marsha Holt's claim to have witnessed the shooting was susceptible to substantial impeachment from Gail Beasley, who testified at the preliminary hearing that Ms. Holt was in bed watching television when Ms. Beasley informed her that the victim had been shot. (Return at 124, ¶ 297, citing 2 CT 548-552.) This Court also noted that at petitioner's penalty retrial, Ms. Holt's description of events was impeached by her mother's denial that she had been with Ms. Holt when she allegedly witnessed the incident. *People v. Gay*, 42 Cal. 4th at 1226. Ms. Holt's mother also confirmed that Ms. Beasley was the person who first reported the shooting. *Id.* Such impeaching testimony was also available to Shinn at the time of petitioner's guilt phase trial. (*See* 1 Supp. CT 281.)

The inherent incredibility of Ms. Holt's claim that she had the opportunity or ability even to witness the shooting would have further underscored the impeaching significance of her inconsistent police statements and testimony regarding the alleged events. Shinn, however, again failed to meaningfully cross-examine on these and other areas of material impeachment. Thus, Shinn failed to bring to the jury's attention the facts that even though Ms. Holt claimed to have heard and seen the entire shooting, she could never consistently state how many shots she

heard. Instead, Ms. Holt variously reported witnessing as many as five shots and as few as two shots. (*See* Ex. 42 at 1621-22; 1 Supp. CT 203-04).

Immediately after the shooting, Ms. Holt reported to the police that she heard the first shot, turned to look out the window and witnessed the suspect fire five more shots. (Ex. 42 at 1622.) Within hours of this first statement, Ms. Holt was equivocating, saying that she heard one shot, *may* have then witnessed two more shots and then witnessed the final two shots. (Ex. 42 at 1621.) Thus both the number of shots fired (six versus five) and the number Holt claimed to have witnessed (five, four, or two) had changed quickly. By the time of the grand jury proceedings, Ms. Holt described seeing or hearing a total of only two to three shots. (1 Supp. CT 203-04.)

Shinn also failed to restrain the prosecutor's overreaching conduct in leading Ms. Holt to fill in the blanks of her obviously non-existent recall of events. Ms. Holt was unable to answer the prosecutor's question "did you actually see Mr. Gay get out of the car?" (68 RT 7530-31)[53] She was also unable to describe in any coherent fashion whether petitioner allegedly walked in front or in back of the car towards the victim.[54] Nor could she give a responsive answer to whether she allegedly had seen a gun.[55] To overcome these weaknesses in Ms. Holt's alleged recollection of events, the prosecutor misleadingly questioned her as if she had testified to seeing the shooter approach the victim. (*Id.* at 7532 ["When Mr. Gay was coming

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[53] "Well I was like I seen the car door open up, but he was standing outside the car and he told the girl, 'Hurry up.' You know 'Hurry up. Come on.' Because he had already shot the police officer[.]" (68 RT 7530-31.)

[54] *See* 68 RT 7531-32 (unable to say because she "was like in and out, you know, the window").

[55] "You know, Okay. You know, the girl - anyway - he got out of the car, went around." (68 RT 7533.)

around, coming closer to the policeman, where were his arms and his hands?"]). Eventually, Ms. Holt simply endorsed leading questions that suggested she saw petitioner "get out of the car, walk around and start talking to the police officer." (*Id.* at 7580.)

Shinn's failure to make timely and appropriate objection to the prosecutor's leading and foundationless questions allowed the prosecution unfairly to bolster its manufactured "pass the gun" theory.

Similarly, Shinn failed to investigate or present readily available information that would have provided additional impeachment of Ms. Holt. Foremost among Shinn's inept failings was his ignorance of impeachment testimony available through Don Anderson, Ms. Holt's former husband. Shinn had been informed, and his investigator confirmed that Mr. Anderson was prepared to testify Ms. Holt admitted lying to the police and perjuring herself before the grand jury and at petitioner's preliminary hearing. Ms. Holt had disclosed to Mr. Anderson the by-now-obvious fact that she had not witnessed the shooting. (Ex. 20 at 223; EH 5 RT 808.)

Contrary to respondent's suggestion, Shinn's failure to make use of such valuable impeachment evidence was *not* the product of a tactical decision based on concern over Mr. Anderson's criminal history or possible bias in favor of petitioner. (Return at 80-81, ¶ 198.) Respondent's record citation to support this purported "tactical" decision (EH 2 RT 481; EH 3 RT 536) refers to Shinn's concerns with Willie Campbell, an inmate and friend of petitioner's. The portion of the evidentiary record demonstrating Shinn's blunder in not calling *Don Anderson* to testify explicitly establishes Shinn's mistaken – and incompetent – belief that Mr. Anderson's testimony would have been inadmissible hearsay. (*See* EH 1 RT 83-84 [Shinn unable to recall any reason for not calling Anderson]; EH 5 RT 860, 862 and 2 RT

479-80 [Shinn's investigator and petitioner testifying to Shinn's expressed belief that Anderson's testimony was hearsay].)

Thus, as in *Wilson*, 3 Cal. 4th at 949, counsel's own explanation for his inaction establishes his deficient performance. If Shinn had known, or bothered to research California's hearsay rule, he would have known that Ms. Holt's admissions to Mr. Anderson were clearly admissible as prior inconsistent statements, under CAL. EVID. CODE §§ 770, 1235, or as a declaration against interests, *id.* at § 1230, in the event Ms. Holt claimed the privilege against self-incrimination, and refused to answer questions on the subject.

Shinn's ignorance of such a basic tenet of law fell below any objective "standard of reasonableness under prevailing professional norms," *Strickland v. Washington*, 466 U.S. at 694, which further plummeted when he failed to research how he could introduce this compelling impeachment evidence he erroneously believed to be inadmissible. As a consequence of trial counsel's ignorance of basic evidence law, petitioner's jury never knew Ms. Holt had confessed to lying to the police as well as to committing perjury in grand jury and preliminary hearing proceedings, in a capital murder case.

Neither does the fact that Mr. Anderson had a criminal history suggest that the jury would have rejected his testimony, thereby curing the prejudice of Shinn's failing. First, Mr. Anderson's testimony regarding Ms. Holt's admission would have been fully corroborated by the testimony of Ms. Holt's *mother* as well as Gail Beasley. Both witnesses' testimony tended to establish that Ms. Holt knew nothing about the shooting until it was all over and Ms. Beasley reported it to her.

Second, the fact that Ms. Holt was involved with a person who had a criminal background was consistent with another avenue of impeachment

that Shinn failed to investigate: Ms. Holt was a notorious and habitual drug user. Respondent admits that one Richard Delouth "'was heavily involved in drug sales,'" and does not dispute that Mr. Delouth would have testified that he "'was well-acquainted with the extensive drug habits of two of his most frequent customers, Marsha Holt and Gail Beasley.'" (Return at 84, ¶ 208.) Although Mr. Delouth was incarcerated at the time of the shooting, he was directly familiar with Ms. Beasley's and Ms. Holt's consistent and habitual drug abuse during prolonged periods continuing to within "a few months prior to the" shooting, and for several years after the shooting. (Ex. 79 at 2084-86, ¶¶ 12-16; *see also* EH 1 RT 248-50.) He therefore had the foundation for testifying that consistent with Ms. Holt's (as well as Ms. Beasley's) habit and custom, she would have been affected by acute intoxication or the effects of drug withdrawal at the time of the shooting. (Ex. 79 at 2085-86, ¶ 16.)

c. Gail Beasley.

Due to Gail Beasley's avoidance of service, she was initially deemed an unavailable witness, and her preliminary hearing testimony was introduced at trial over defense objection. (74 RT 8272-73.) When Ms. Beasley was later arrested on a body attachment warrant and brought into court before the close of the prosecution's case, Shinn inexplicably failed to cross-examine her.[56] As respondent admits, Shinn thus *never* cross-

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[56] Ms. Beasley was produced in court on April 25, 1985. Shinn's request that she be ordered back on June 6, 1985 left his investigator and co-defendant's counsel incredulous. (79 RT 8949-51.) The trial court, obviously skeptical about the reasonableness of the requested date, warned Shinn that it would not delay the trial, which was "proceeding fairly rapidly." Shinn assured the court he had "projected [his] witnesses through the 6th." (*Id.* at 8951.) In fact, the defense rested over two weeks before the requested date, without Shinn making any attempt to call Ms. Beasley for cross-examination or as a witness on petitioner's behalf.

examined Ms. Beasley, and the jury never heard her attempted explanation, regarding the conflict between her initial statement to the police, which described the shooter as wearing clothing similar to Raynard Cummings' attire, and her preliminary hearing testimony, in which she claimed that only petitioner got out of the car and shot the victim. As with Robert Thompson, Ms. Beasley's initial statement to the police – which absolved petitioner of responsibility for the shooting – soon morphed 180 degrees to place petitioner's finger on the trigger of the murder weapon. As with Robert Thompson, the most plausible explanation for this dramatic alteration of purported memory was the suggestive influence exerted by the prosecutor and/or his investigator, including reviewing "pictures" with her on unknown occasions. (*See* 2 CT 539-40.) As with Robert Thompson, Shinn wholly failed to develop this impeaching evidence for the jury's consideration.

Ms. Beasley initially described the shooter's clothing as being consistent with that described by other eyewitnesses. It also matched the clothing Raynard Cummings wore at the crime scene: burgundy colored top, levis and black dress shoes. (Ex. 12 at 157.) Ms. Beasley gave an even more detailed description of clothing worn by another man outside the car, who she said was dressed in a gray top and gray gym shorts with white piping on the side. (Ex. 12 at 157.) When she testified before the grand jury, however, Ms. Beasley was unable to recall seeing anyone other than the shooter and the female driver outside of the car. (1 Supp. CT 191-92.) At that time, she expressed the opinion that petitioner "very close[ly] resembled the shooter," and recalled seeing only the head of a black man in the back seat of the car. (*Id.*)

By the time Ms. Beasley testified at the preliminary examination her recollection of the back seat passenger had become even more "vague[]." She was then unable to describe either the race or gender of the individual.

The degree to which petitioner resembled the shooter, however, had increased to 9.5 on a scale of 1 to 10. (2 CT 565.)

Shinn failed to cross-examine Ms. Beasley on the incredible evolution of her alleged recollections, or to point out to the jury the suspicious manner in which the witness's changed recollection conveniently meshed (once again) with the prosecution's theory. Respondent admits that Shinn did not ask Ms. Beasley how she could have given detailed descriptions of the two men outside the car, but three months later "'only 'vaguely' recalled seeing'" one of them, "'and only then in the back seat of the car.'" (Return at 129, ¶ 307.) Neither did Shinn ask Ms. Beasley to describe the details or effect of the prosecutor showing her "pictures" to enhance her recollection of events. (2 CT 539.)

Instead, at the preliminary hearing, Shinn left unchallenged Ms. Beasley's testimony, in response to the prosecutor's question, that she simply had been "mistaken" in her earlier statements identifying Raynard Cummings as having been outside the car. (2 CT 539.) Shinn made no effort to question how Ms. Beasley had become aware of this purported "mistake," or to challenge the veracity of her claim that she later realized upon reflection that Cummings was not outside the car. (*Id.*)

Minimally prepared counsel would have been aware any explanation for Ms. Beasley's unconvincing change in memory offered substantial impeaching evidence. As with Marsha Holt's testimony, the jury should have been permitted to assess Ms. Beasley's testimony – and her casual attitude toward testifying at trial – in light of the evidence of her drug use at the time of the shooting. The effects of drug use are generally known, and the jurors may well have given greater credence to the effects of Ms. Beasley's drug use around the time of the shooting as explaining why she retracted her earlier statement of seeing a third person outside the car, and

then transposed the clothing of Raynard Cummings, the back seat passenger, onto petitioner.

Ms. Beasley's implausible change in recollection also could have been impeached with evidence of the relationship between her mother, Mackey Como, and Raynard Cummings' mother, Mary Cummings. Mackey Como and Mary Cummings were friends or acquaintances. The relationship was familiar enough that Gail Beasley was aware of the reputation the Cummings family, including Mary, had for violence. Shortly after the shooting, Mary Cummings paid an unusual visit to Como, even though the two women had not seen each other in some time. These facts reasonably would have led competent counsel to explore whether Ms. Beasley had revised her purported recollection of events to protect the son of her mother's friend, and/or to avoid potential retaliation from Mary Cummings and her family.

Likewise, minimal investigation, including interviewing Ms. Beasley, likely would have yielded adequate information to discredit her changing recollection of events. Although Ms. Beasley allegedly attempted to avoid the prosecution's attempts to subpoena her for trial, she was ultimately produced. At that point she was readily available for Shinn to interview if he had wanted to do so. (Return at 75, ¶ 184.) As noted above, Shinn passed up the opportunity to interview Ms. Beasley, and did not attempt to bring her back to court before the guilt phase trial had ended.

Thus, as with the other witnesses, it was clear Shinn had no interest in interviewing Ms. Beasley for substantive information. The information Shinn could have obtained from Ms. Beasley about her state of mind at the time of the shooting would have been invaluable impeachment evidence. Ms. Beasley's acknowledgement of her traumatized mental state and "blurry memory," is wholly corroborated by her inability to recall a single

consistent story of the shooting. That Ms. Beasley consistently testified the back seat passenger never exited the car and that the shooter wore clothing similar only to the clothing worn by the backseat passenger (Ex. 12 at 157), would have been easily understood by the jury as a product of Ms. Beasley's "foggy," "blurry" memory of the shooting because she was in shock (Ex. 75 at 2071, ¶ 5). More important, that admission would have weighed heavily against the reliability of her identification of petitioner as the shooter, and placed Cummings outside the car near the shooting.

Trial counsel's failure to investigate and interview impeachment witnesses, like most of his other failures, fell far below the standard of care. *See, e.g., Anderson v. Johnson*, 338 F.3d 382 (5th Cir. 2003) (counsel's reliance on the state's investigative work is unreasonable). Shinn's failure to even interview known impeachment witnesses is inexcusable, especially in a capital murder case that depends solely on the credibility of the prosecution's witnesses.

d. Shannon Roberts.

Shannon Roberts eventually identified petitioner, Raynard Cummings and Pamela Cummings. (2 CT 499-500 [identified Raynard and Pamela Cummings at preliminary hearing]; 69 RT 7783 [purportedly identified petitioner at trial].) Mr. Roberts, who was eleven-years old at the time of the offense, did not identify petitioner until trial, when he said petitioner was the shooter. (3 CT 733-34 [did not identify petitioner at preliminary hearing].) He earlier identified Cummings, at the grand jury hearing, as being the person who had picked up the gun after a car "different" from the suspect's car returned to the scene.

It should have been reasonably evident to minimally qualified trial counsel that, to the extent Mr. Roberts observed the offense, he had transposed the roles petitioner and Cummings each played in the events. Irrespective of whether Shinn's timely investigation could have uncovered the corrupting influence of the prosecution's suggestive behavior in coaching Mr. Roberts at trial, Shinn clearly failed to consult with an expert in memory function and eyewitness recollection. Appropriate consultation with such an expert and presentation of expert testimony would have assisted the jury to understand the significance Mr. Roberts' ability to describe the general appearance of the suspects while at the same time reversing the picture of who did what. *See Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001) (petitioner entitled to hearing on counsel's failure to present necessary experts).

4. Failure to Introduce Expert Forensic Analyses

Shinn falsely promised petitioner's jury that "the defendant is going to show you that the events did not occur the way that [the prosecutor] has just suggested to you." (58 RT 6293 [Guilt phase opening statement by Shinn].) Instead, Shinn unreasonably failed to consult or present testimony from any of the types of forensic and medical experts who could have convincingly explained why only Raynard Cummings could be responsible for firing all six shots. Petitioner's jury may have intuitively understood it would have taken petitioner longer to exit the passenger side of the car than for Cummings to do so. Expert testimony, however, would have assisted the jury in understanding that, *at most*, only 2.5 seconds elapsed between the first and second shot. (Ex. 17 at 174) Readily available expert testimony also would have established that it would have taken petitioner a minimum of 7 seconds to exit the driver's door and reach the shooter's position in order to fire the second shot. (*Id.* at 179.) By contrast, it would

have taken Cummings only 1.5 seconds to "place[] his right arm out the driver's door and point[] the gun towards the rear of the vehicle and continue[] the shooting" after the first shot was fired. (*Id.*)

Petitioner's jury was unable to consider these impressive and definitive timing statistics because they were not presented at trial and, therefore, were not part of the evidentiary mix used to determine petitioner's guilt. Expert testimony regarding timing should have been complemented and corroborated by expert medical testimony that explained how the direction and pattern of each wound helped to tell the story of how the shooting occurred. Testimony explaining the sequencing of the gunshot wounds and how sequencing aided in determining the victim's approximate position was crucial – but missing from petitioner's trial. *See In re Sixto*, 48 Cal. 3d 247 (counsel deficient for failing to test petitioner's blood for alcohol and investigate PCP use).

Shinn's failure to consult with and present the testimony of forensic and medical experts meant petitioner's jury did not have actual evidence explaining why it was physically impossible for petitioner to have fired any of the shots; while Cummings easily could have fired the first shot at Officer Verna from the back seat then, within the requisite time frame, while holding the gun in his right hand, pushed the driver's seat up with his left hand and with one leg out of the car "turned around approximately 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," (2 Supp. CT 457 [prosecutor Watson describing for the record Mr. Thompson's physical demonstration of how he saw the back seat passenger/shooter exit the car]), to exit the car and continue the shooting.

As demonstrated by the expert testimony presented or proffered at petitioner's penalty retrial, credible medical and other scientific evidence

regarding the distance from which each of the gunshots was inflicted (Dr. Vincent Guinn); the angle and trajectory of the gunshot wounds (Dr. William Sherry); the likely sequence of bullet wounds (Dr. Martin Fackler) and the biomechanical and human factors implicated by timing and positioning of the persons present (Dr. Kenneth A. Solomon) effectively undermined the prosecution's entire "pass the gun" theory.

Moreover, respondent's efforts to diminish the significance of the conclusions supported by the medical and other scientific evidence serve to demonstrate the synergistic effect of Shinn's failings. In response to the scientific determination that the maximum elapse of 2.5 seconds between the first and second gunshots effectively rules out the possibility that petitioner participated in the shooting (Ex. 17), respondent is forced to rely only on the testimony of Marsha Holt, who estimated that *30* seconds to 2 *minutes* elapsed between the first two shots. (*See* Return at 53, ¶¶ 125, 126; at 103, ¶ 257; at 110, ¶ 274.) This is, of course, the same witness whose own mother reported that she did not even know a shooting had occurred until she was informed by Gail Beasley. (2 CT 548-49.) This is also the witness whose former husband reported that she admitted she lied about witnessing the shooting. (EH 1 RT 208.)

If Shinn had presented such devastating impeachment it would have buttressed the further point that Ms. Holt's time estimate is not credible in light of the evidence as a whole. It is clear from the testimony of the other witnesses – who consistently described hearing all the shots in a much quicker succession – that Ms. Holt's estimate was simply and wildly inaccurate. For example, although Mr. Thompson's description of the shooter was ultimately altered by the prosecution's suggestive interview techniques, he testified that the entire assault "all took place" within approximately 15 seconds. (69 RT 7684.)

B. PETITIONER WAS PREJUDICED BY SHINN'S FAILURES.

Petitioner's penalty phase retrial provides a useful measure by which to assess the prejudicial impact of trial counsel's unethical and woefully incompetent representation of petitioner in the guilt phase of his trial.

> "There were a couple of jurors who ... believed that Mr. Gay might be innocent. At least two of the woman felt he was innocent and did not find the testimony of Pamela Cummings credible. Another older male juror did not believe the gun could have exchanged hands."

(In re Gay, Los Angeles Supreme Court case No. 130598, Petition for Writ of Habeas Corpus, Exhibit 153, Declaration of Retrial Juror Martina Martin at 2705, ¶ 19.)[57] Even with most of the lingering doubt evidence erroneously barred by the trial court, it is clear that had this been a guilt phase trial, more than one juror probably would have found the evidence insufficient to convict petitioner.[58] By presenting only a fraction of the

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[57] Juror Martin's declaration on this score is not offered to impeach the verdict based on revelations concerning the jurors' subjective thought processes. *See* CAL. EVID. CODE § 1150; *People v. Keenan*, 46 Cal. 3d 478, 541 (1988) (juror's reaction to stressful comments of other juror inadmissible to prove coercion). Rather, her observations are proffered to show how the evidence, and questions of petitioner's culpability, "apparent to one" on the scene of the penalty retrial. *Lowenfeld v. Phelps*, 484 U.S. 231, 240 (1988).

[58] "The jury's request for clarification of the instructions on the issue of residual doubt, combined with the jury's previous request for the court to read back the eyewitness and expert testimony relating to the circumstances of the murder, strongly indicate that the jury was focused on defendant's role in the murder." *People v. Gay*, 42 Cal. 4th at 1227. This strong focus on culpability, in light of the retrial jurors having been erroneously informed by Judge Wiatt that petitioner's guilt had been "conclusively proven," *id.* at 1225, is further evidence of the strength of even the minimal lingering doubt evidence retrial counsel was able to present.

evidence petitioner has presented in these post-conviction proceedings, retrial counsel was able to convince several retrial jurors that the prosecution's theory of the crime, the pass-the-gun theory, did not happen. As this Court observed, a defense that disputed petitioner's involvement in the shooting:

> "had particular potency in this case, given the absence of physical evidence linking [petitioner] to the shooting and the inconsistent physical and clothing descriptions given by the prosecution."

People v. Gay, 42 Cal. 4th at 1226.

The retrial jury's focus was drawn to this issue even without the jurors having received *any* exculpatory testimony about Cummings' numerous confessions, *id.* at 1214-15, 1227; eyewitnesses to the shooting who described a darker skinned man resembling Cummings, not petitioner, as the shooter, *id.* at 1216, 1223-24; a crime scene reconstruction expert, *id.* at 1216, 1228, n.10; or an eyewitness expert, *id.* at 1228, n.10. As this Court concluded:

> "Had the jury been allowed to hear – and consider – the four statements in which Raynard Cummings claimed to be the sole shooter, the testimony of the four defense eyewitnesses excluding defendant as the shooter, and the testimony that defendant nonetheless was the man who came out of the car to retrieve a weapon from the ground (thus offering an explanation why the prosecution eyewitnesses had been able to recognize him), there is a reasonable possibility the jury would have selected a different penalty."

Id. at 1227. Petitioner submits that for the same reasons, and more, there is a reasonable probability that the jury would have reached a different result at the guilt phase but for Shinn's incompetent performance.

In addition to supporting petitioner's defense by allowing the jury to hear – and consider – Cummings' confessions that *exculpated* petitioner, a competent attorney also would *not* have created *incriminating* evidence by inducing petitioner to confess falsely to the robberies. Competent counsel would not have "made the prosecution's case," for robbery and murder, as Shinn incompetently did, by enabling "the prosecutor to portray petitioner as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies." *In re Gay*, 19 Cal. 4th at 488.

In light of the significance the prosecution attached to petitioner's alleged guilt of robberies as supplying a motive for the capital murder, any competent counsel would have utilized all the evidence that raised a reasonable doubt as to petitioner's involvement in those offenses. *See In re Gay*, 19 Cal. 4th at 792-93. To the extent the jury concluded petitioner had no reason to fear prosecution as a "serial robber," it necessarily would have rejected the prosecution's theory that such fear motivated petitioner to participate in the homicide.

Instead, Shinn helped the prosecution establish the purported fact that petitioner had as much reason to kill the victim as Raynard Cummings did. At trial he then merely re-called three prosecution witnesses – Rose Marie Perez, Rosa Martin and Pamela Cummings – none of whom advanced the defense theory that the gun was not passed from Cummings to petitioner or that Cummings alone murdered Officer Verna. Pamela Cummings' testimony was in fact damaging to petitioner's defense because she continued to testify that she saw petitioner slide across the front car seat, exit the driver's side door, and shoot Officer Verna. *People v. Cummings & Gay*, 4 Cal. 4th at 1269-70.

Other than scant evidence supporting the defense theory that seeped through from cross-examination, Shinn failed in his promise to show the

jury that events did not transpire the way the prosecution had suggested. (*See* 58 RT 6293 [Guilt phase opening statement by Shinn]). Coupled with Shinn's other broken promise that "Mr. Gay is going to get up and testify. He is going to tell you his version of what occurred on that date," (*id.* at 6299), petitioner's jury was ultimately led to believe that there was no evidence that could rebut the prosecution's theory of the case. Nothing could have been further from the truth; even a minimal investigation based on nothing more than the potentially exculpatory leads contained in the discovery would have given trial counsel enough evidence to raise a strong reasonable doubt as to petitioner's guilt.

Because Shinn failed to investigate, the prosecution's witnesses, interview known exculpatory witnesses, hire and consult with appropriate qualified experts, and offer the wealth of evidence available from these sources he broke the promise he made to the jury to show them petitioner was not involved in Officer Verna's murder. Worse still, Shinn's failures condemned petitioner to a sham of a capital murder defense – due solely to Shinn's unethical and dishonest behavior, petitioner's freedom and life were placed in Shinn's wholly incompetent, conflict-burdened hands. Trial counsel's representation fell "far below the standards one would expect of a competent defense lawyer, particularly in a capital case." (Ex. 8 at 56, ¶ 4.) In light of how favorably the retrial jurors reacted to the limited lingering doubt evidence retrial counsel was permitted to introduce, Shinn's failure to give petitioner a minimally adequate defense resulted in "a trial whose result is unreliable." *Strickland v. Washington*, 466 U.S. at 666. As demonstrated by the evidence introduced in support of lingering doubt at the penalty trial, "there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." *In re Gay*, 19 Cal. 4th at 826.

C. Respondent Has Not Disputed The Material Facts That Demonstrate Shinn's Prejudicially Deficient Performance.

As the foregoing discussion notes, respondent has affirmatively admitted many of the material facts demonstrating that Shinn's performance was prejudicially deficient under the *Strickland* standard. To the extent respondent has refused to admit material facts, his attempts to deny them are insufficient to create a genuine dispute or show cause why petitioner is not entitled to relief.

At this stage of the proceedings, the Order to Show Cause reflects this Court's determination "that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief." *People v. Duvall*, 9 Cal. 4th at 475. This preliminary determination shifted the burden to respondent to "respond to the allegations of the petition that form the basis of petitioner's claim that the confinement is unlawful," by "either admitting the factual allegations set forth in the habeas corpus petition, or *allege additional* facts that *contradict* these allegations." *Id.* at 476, 483 (emphasis in original). Where appropriate, respondent also should present documentary evidence responsive to the allegations. *Id.* at 476.

Respondent has admitted factual allegations that establish Shinn's pervasive failure to prepare the defense case in a competent manner including, *inter alia*, the failure to interview exculpatory eyewitnesses (*see, e.g.*, Return at 46, ¶ 102; 48, ¶ 108); interview exculpatory impeachment witnesses (*see, e.g., id.* at 54, ¶ 128; 82; ¶ 203); interview the numerous exculpatory witnesses to whom Raynard Cummings confessed murdering Officer Verna (*see, e.g., id.* at 64, ¶ 156; 65, ¶ 157; 69, ¶ 167); and, present the testimony of exculpatory medical experts (*see, e.g., id.* at 101, ¶ 255). Well established law renders respondent's admissions sufficient to satisfy the deficient performance prong of *Strickland.* "[B]efore counsel

undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. If counsel fails to make such a decision, his action-no matter how unobjectionable in the abstract-is professionally deficient." *In re Gay*, 19 Cal. 4th at 807 (inner citations omitted); *Strickland v. Washington*, U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). In turn, this Court's observations quoted above, regarding the prejudicial impact of preventing the jury from hearing and considering all of the categories of testimony that respondent admits Shinn failed to pursue, illustrate the prejudice of counsel's failings.

Respondent nevertheless relies on general denials purportedly to dispute either the absence of a strategic decision to explain counsel's failings or the existence of any prejudice resulting from counsel's acts and omissions. Respondent's rote denials are purportedly based on (1) trial counsel Shinn's unavailability for respondent to interview; (2) petitioner's failure to allege specific facts, acts or omissions; (3) the absence of any prejudice in light of the trial record evidence of petitioner's guilt; and/or (4) respondent's asserted good faith belief that the factual allegations in the petition are untrue. (*See, e.g.*, Return at 3, ¶ 6; 5, ¶ 12; 11-12, ¶ 29; 25, ¶ 66; 29-30, ¶ 78; 37, ¶ 89; 38, ¶ 90.) None of these is sufficient to suggest a factual or legal basis to deny petitioner relief.

Respondent also fails to offer any additional evidence to dispute petitioner's allegations.

1. <u>Rote Denials.</u>

a. <u>Shinn's Unavailability</u>

In *People v. Duvall*, 9 Cal. 4th 464, 475-480 (1995) and *In re Gay*, 19 Cal. 4th at 783 & n.9, this Court explained that where the truth of factual

allegations is known only to petitioner, respondent may deny them based on an explanation that the evidence to refute them is unavailable. Respondent apparently relies on this exception to the prohibition against general denials, *see In re Lewallen*, 23 Cal. 3d 274, 278 & n.2 (1979), in denying that Shinn lacked a tactical justification for his repeated acts of incompetence. Respondent's reliance is misplaced.

In order to proffer a satisfactory explanation that the evidence needed to refute an allegation is unavailable, respondent must be able to allege (i) he has "acted with diligence; (ii) crucial information is not readily available; and (iii) that there is good reason to dispute certain alleged facts or question the credibility of certain declarants." *People v. Duvall*, 9 Cal. 4th at 485. Respondent must further "set forth with specificity: (i) why information is not readily available; (ii) the steps that were taken to try to obtain it; and (iii) why a party believes in good faith that certain alleged facts are untrue." *Id.*

Contrary to respondent's suggestion, the fact that Shinn has passed away does not satisfy the showing required by *Duvall*. Rather, as in *In re Hardy*, 41 Cal. 4th 977 (2007), trial counsel's acts and omissions, as well any justification he may have had to offer for them, already have been the subject on an evidentiary hearing. *See In re Gay*, 19 Cal. 4th 771. As a result, as in *In re Hardy*, here:

> "petitioner's present factual allegations are based *on both evidence presented at that hearing that has already been evaluated by the referee, and on witnesses who testified at the hearing whom the referee has already found credible*. Stated differently, petitioner has already presented evidence in a contested hearing, and the referee has already determined the truth of the facts alleged, including the credibility of various witnesses.

In re Hardy, 41 Cal. 4th at 991 (emphasis in original).

One of the witnesses whose credibility the referee had the opportunity to assess was trial counsel Shinn. Similarly, at the time of the hearing respondent "had ample incentive" to explore "defense counsel's strategic choice[s]" and why he "would have been justified in not presenting [certain] evidence." *Id.* Thus, respondent has not and cannot explain how access to Shinn at this late date would improve respondent's ability to dispute the current allegations in the petition.

Indeed, the record of the earlier habeas corpus proceedings demonstrates that the Attorney General had greater access to Shinn than did petitioner's counsel. *See, e.g.*, *In re Gay*, 19 Cal. 4th at 783, n.8 (lower court "directed Shinn to assist petitioner's habeas corpus counsel"). Although respondent exploited this favored position to obtain a declaration from Shinn to file in support of the Return, it wholly failed to address such significant issues as Shinn's role in inducing petitioner to confess to the robberies. (*See* EH 1 RT 31[Shinn signed a declaration for the AG]; *In re Gay*, 19 Cal. 4th at 771 & n. 9). Respondent has been on notice of petitioner's conflict of interest and ineffective assistance of counsel claims since the first habeas proceedings, and had free access to Shinn at that time, when he already was of advanced age. To the extent respondent suggests there was additional, material information Shinn might have offered to refute petitioner's allegations, respondent's failure to act with due diligence cannot be excused under *Duvall*. *Id.*, 9 Cal. 4th at 485.

Moreover, respondent has not suggested that if Shinn were currently available he would be likely to provide respondent, or this Court, with credible and trustworthy information. At the evidentiary hearing in 1996, Shinn either answered that he was unable to recall or gave contradictory (usually self-serving) testimony. *See In re Gay*, 19 Cal. 4th at 808 n.17.

Several years earlier in his 1994 deposition, Shinn claimed an inability to recall facts pertaining to the time of petitioner's trial. (*See generally* Ex. 25.)

Neither Shinn's memory of the time period that included petitioner's trial, nor his credibility during petitioner's first habeas corpus hearing or his 1990 State Bar proceedings, was sufficient to merit a determination that Shinn possessed credible, "critical information." *See In re Gay*, 19 Cal. 4th. 808, n.17 ("Our review of Shinn's testimony confirms that as to matters of which he had any recollection, his answers were evasive, inconsistent, and often nonresponsive"[59]); *see also* (Ex. 33 at 534, n.6 [State Bar Court deems testimony by Shinn "not credible"]).

Equally significant, respondent has recently admitted that, among other transgressions in this case, Shinn instructed petitioner to misinform and mislead the trial court to assist Shinn in securing his appointment as petitioner's counsel. (Return at 3-4, ¶ 8.) In light of Shinn's denial of such conduct during the evidentiary hearing, respondent's current admission constitutes an acknowledgment that Shinn likely perjured himself at the hearing. (*See* EH 1 RT 115-16.) Thus, respondent cannot show that access to Shinn would fairly enable respondent to address the allegations in the petition, or that Shinn's current unavailability puts respondent at any unfair disadvantage.

b. <u>Assertion that Petitioner's Failure to Allege Specific Acts and Omissions .</u>

Respondent's assertions that petitioner's allegations fail to specify acts and omissions is generally prefatory to an acknowledgment that the

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[59] This Court later graciously noted in reference to Shinn's anemic ability to recall while under oath, he was "79 years old at the time of the reference hearing and the trial had occurred 12 years earlier." *Id.* at 823, n.23.

allegations in question list such specifics. (*See, e.g.,* Return at 46, ¶¶ 101, 102; 97, ¶¶ 244, 245; 135, 136, ¶¶ 324, 326.) In light of respondent's concession, the purported lack of specificity does not provide any basis for a good faith of "denial" allegations in the petition.

c. Assertion of Harmless Error Based on Trial Record Evidence.

Respondent's assertion that any deficiencies in Shinn's performance were not prejudicial ignores the numerous volumes of evidence petitioner submitted in support of his entitlement to relief. Each instance of respondent's claimed lack of prejudice is predicated solely on the trial record. (Return at 38, ¶ 90; 44, ¶ 98; 71, ¶ 171; 145-46, ¶ 343.) These rote, trial-record based, harmless error assertions are at odds with the requirement that the prejudice of deficient performance must be determined by evaluating the totality of the evidence, including "both that adduced at trial, and the evidence adduced in the habeas proceeding." *Williams v. Taylor*, 529 U.S. at 397. Respondent's narrow view of the harmless error analysis in habeas corpus proceedings is legally incorrect.

d. Alleged Good Faith Belief the Allegations in the Petition Are Untrue.

As with the asserted unavailability of Shinn, respondent failed to "set forth with specificity," or even vaguely, what efforts were made to verify petitioner's allegations and w*hy* respondent purportedly believes the alleged facts are untrue. (*See, e.g.*, Return at 3, ¶ 6; 12, ¶ 29; 27, ¶ 74; 58, ¶ 142; 97, ¶ 244; 131, ¶ 313.) It is not enough simply to claim as self-serving good faith belief that that the allegations are untrue. *Duvall*, at 9 Cal.4th at 485.

Thus, respondent cannot rely on the *Duvall* exception to excuse his failure to allege facts that contradict petitioner's factual allegations. Respondent's failure to fulfill the minimal pleading requirements required in its Return, "indicates the People's willingness to rely on the record,"

People v. Duvall, 9 Cal. 4th at 479, and grant petitioner relief on the pleadings.

2. Respondent failed to Support His Denial of Petitioner's Sworn Declaration Evidence.

Petitioner submitted thirty-five sworn declarations in support of his claims for relief. Two of these declarations were from prosecution witnesses: Shannon Roberts and Gail Beasley. Both Mr. Roberts and Ms. Beasley provided strong evidence, in their declarations, that trial counsel's failures completely undermined "the reliability of the result of the proceeding." *Strickland v. Washington*, 466 U.S. at 693.

a. <u>Respondent Did Not Interview Shannon Roberts About His Exculpatory Sworn Declaration Statements.</u>

Shannon Roberts saw something the day Officer Verna was shot, but to this day, he admits he is not sure exactly what. Mr. Roberts is sure of one thing – he could never *honestly* testify that he saw petitioner, or even Raynard Cummings, shoot Officer Verna. Mr. Roberts admits he does not now, and did not at the time he testified, know the identity of the person who shot Officer Verna. (Ex. 23 at 244, ¶ 11; Ex. 83 at 2096, ¶ 9.) Despite Mr. Roberts' frank admissions under oath, respondent proffers only a general denial by former Judge Watson that he "never coached any witnesses into making any particular statements at trial or into identifying anyone at trial. Specifically, I never told Robert Thompson …" (Return Ex. 7 at 32, ¶ 6.) Former Judge Watson's declaration fails to address the salient issues raised by Mr. Roberts – that it was "the detectives" who were responsible for ensuring he was able to identify "Kenneth Gay" as "the shooter." (Ex. 83 at 2096 at ¶ 9.) Former Judge Watson's declaration is not responsive to the factual allegations alleged as a result of Mr. Roberts' declaration; therefore, petitioner's concerns about the credibility of former

Judge Watson's declaration are of no consequence and require no evidentiary hearing. Respondent's failure to provide a declaration from Mr. Roberts is understandable. For over thirteen years, Mr. Roberts has consistently insisted, to both petitioner and codefendant's counsel, that at the time of trial he was unable to identify the shooter and only identified petitioner with assistance from law enforcement (*Cummings v. Calderon*, United States District Court Central District of California, Case No. CV-95-7118 "Amended Petition for Writ for Habeas Corpus," Exhibit 201 at 164-65, ¶ ¶ 6-7.)

b. <u>Respondent Failed to Provide Documentary Evidence Contradicting Gail Beasley's Exculpatory Sworn Declaration Statements.</u>

Gail Beasley recalled as a result of witnessing the shooting of Officer Verna,

> [b]y 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.

(Ex. 75 at 2071, ¶¶ 4-5.) Ms. Beasley acknowledged that petitioner's habeas counsel was the first to inquire about "my state of mind at the time of the shooting and my [subsequent] experience with the police," and if petitioner's prior counsel had asked her, she "would have gladly told them what I said." (*Id.* at 2073, ¶ 10.) In response to Ms. Beasley's sworn declaration statement that she was in shock and her memory was "still blurry" when she spoke to the police, respondent simply denies that Ms.

Beasley went into shock[60] (Return at 76, ¶ 186), and makes the circular argument "she was able to process the events of the murder based on her ability to report the crime and testify to her memory" (*id.* at ¶ 187.) Petitioner did not allege Ms. Beasley was unable to talk to the police or to testify to her impaired memory of the events. Respondent's failure to produce a declaration from Ms. Beasley contradicting her earlier sworn statements left him in the position of refuting specious arguments of his making instead of the factual allegations actually contained in the petition. *But cf. In re Hamilton*, 20 Cal. 4th 273, 284-85 (1999) (Return included juror declaration that contradicted facts alleged in claim included in OSC).

Ms. Beasley's uncontroverted declaration also includes vital evidence of how she and other witnesses contaminated each other's memories by discussing what they had seen prior to participating in the live line-up. (*See* Ex. 75 at 2072, ¶ 6; *see also* Ex. 76 at 2075, ¶ 9 [Ms. Chamberlain was the last person on the bus but recalls witnesses conversing prior to viewing the line-ups].)

III. Based on the Prosecution's Misconduct, the Double Jeopardy Clause Bars Retrial.

Pursuant to the federal double jeopardy clause of the Fifth Amendment to the United States Constitution, when a prosecutor commits misconduct with the *intent* to provoke a mistrial, retrial of criminal charges is prohibited following the grant of the defendant's motion for mistrial. *Oregon v. Kennedy*, 456 U.S. 667 (1982). The protection against double

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[60] The only discernible pattern in respondent's medical pronouncements on who suffered from shock as a result of witnessing the shooting appears to be related to whether or not the "shock" redounded to the benefit of the prosecution (Mr. Thompson suffered shock) or the defense (Gail Beasley did not). (*See* Return at 73, ¶ 178 [discussing Thompson's shock]; 75, ¶ 183 [same].

jeopardy contained in the California Constitution, article I, section 15, also prohibits retrial under the circumstances contemplated in *Kennedy*. *People v. Batts*, 30 Cal. 4th 660, 666 (2003). The state constitution, however, provides additional protection by barring retrial when misconduct is committed for the purpose of avoiding what the prosecutor believes to be a likely acquittal, and the circumstances at trial objectively supported a reasonable prospect the defendant would have been acquitted. *Id.*

In *Sons v. Superior Court*, 125 Cal. App. 4th 110 (2004), the Court of Appeal resolved a related issue left unaddressed in *Batts*: the application of the state and federal double jeopardy clause protection in cases where the prosecutorial misconduct produces not a mistrial but a reversal on appeal. *Id.* at 116. *See Batts*, 30 Cal. 4th at 665 & n.1. The *Sons* court explained that the teaching of *Batts* requires a determination of "whether there is a double jeopardy interest impinged by the misconduct, not simply whether unfairness, however gross, has resulted." *Sons*, 125 Cal. App. 4th at 119.

Sons identified two double jeopardy interests that are thwarted by the intentional provocation of a mistrial: the defendant's interest in the "finality" of the likely judgment of acquittal, and an interest in having the first jury determine the case. *Id.* at 117-118. As *Sons* explained, however, these interests generally are not directly implicated where prosecutorial misconduct results in a *reversal* because, by definition, such cases have not resulted in an acquittal and the first jury was not prevented from reaching a verdict. *Id.* at 118. A court nevertheless may assess abridgment of double jeopardy interests in the reversal context by determining whether, *at the time* the prosecutor committed misconduct, he or she "acted in order to prevent an acquittal." *Id.* at 120.

In *Sons*, the appellate court noted that at the time of the prosecutor's misconduct in suppressing potentially exculpatory evidence, he had no case-

or jury-specific reasons to view an acquittal as a *likely* outcome. Rather, he acted for the crucially different, albeit improper concern that he might not obtain a conviction if he did not suppress the evidence. *Id.*

By contrast, here the prosecutor knew before *and throughout* trial that petitioner likely would be acquitted if the prosecution did not persist in following a pervasive pattern of misconduct necessary to avoid the jury's rejection of the wholly fabricated "pass the gun" theory. Many instances of misconduct were so blatant that the prosecutor must have known they would be found to constitute error on appeal. *See, e.g., People v. Cummings & Gay*, 4 Cal. 4th at 1321-22 (error, but harmless, to admit evidence of co-defendant's guilty plea to robberies, and conviction of petitioner's wife for accessory to murder). The degree to which other acts intentionally distorted the evidence to fit the prosecution's theory also reflected the prosecutor's awareness that, but for such distortions, petitioner would be acquitted: e.g., the prosecution's repeated but undisclosed use of suggestive techniques on Mr. Thompson and Ms. Beasley that led then to identify petitioner as the shooter. Equally significant, the brazenness of the prosecution's misconduct demonstrated that its goal was to avoid an acquittal, and to falsely imprison petitioner, irrespective of whether he might eventually obtain relief after appeal or collateral attack of the invalid judgment. The prosecution's scheme has succeeded for more than a quarter century.

Application of the double jeopardy principles analyzed in *Batts* and *Sons* to bar retrial in this case is particularly appropriate because, as respondent does not dispute, Shinn's ineffectiveness explicitly included his *failure to request a mistrial* for the prosecution's pervasive misconduct. As set forth in the traverse, and incorporated by this reference, respondent has failed to deny or even address Shinn's failure to seek appropriate remedies,

including mistrial, for the prosecutor's "knowing presentation of perjured evidence," including "false testimony," as well as "for discovery violations" and the presentation of "false argument." (*See* Traverse , *ante* at 48-49; Petition at 125-29; Return at 45, ¶ 98.)

As further set forth in the Petition and discussed above, this pervasive misconduct included the failure to disclose impeachment evidence regarding Mr. Thompson, Ms. Beasley and Ms. Holt, including reports of the prosecution's efforts to alter Mr. Thompson's and Ms. Beasely's recollection of events, and the drug histories and arrests for Ms. Beasley and Ms. Holt; presentation of Shannon Robert's knowingly false identification testimony; and the prosecutor's false and misleading arguments regarding the strength of the identification testimony.

Thus, in the absence of Shinn's undisputed failure to make a meritorious motion for mistrial, the motive and circumstances surrounding the prosecutor's misconduct would have barred petitioner's retrial. Accordingly, petitioner is entitled to that remedy now.

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CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition and Reply to the Informal Response, petitioner should be granted relief, including the reversal of his conviction and an order barring further prosecution for the alleged offenses underlying his unlawful confinement.

Dated: October 19, 2010

Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: Gary D. Sowards By: Patricia Daniels

Gary D. Sowards

Patricia C. Daniels

Attorneys for Petitioner:
Kenneth Earl Gay

PROOF OF SERVICE

I, Patricia Daniels, declare that I am a citizen of the United States, employed in the City and county of San Francisco; I am over the age of 18 years and not a party to this action or cause; my current business address is 303 Second Street, Suite 400 South, San Francisco, California, 94107.

On October 19, 2010, I served a true copy of the following documents:

PETITIONER'S AMENDED TRAVERSE

on each of the following in said cause by placing a true copy thereof in a sealed envelope, with first class postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as follows:

Lance Winters
Office of the Attorney General
300 South Spring Street, Ste 5212
Los Angeles, CA 90013

Kenneth Gay
P.O. Box D-15601
San Quentin, CA 94974

California Appellate Project
101 Second St., Suite 600
San Francisco, CA 94105

Service for Kenneth Earl Gay will be completed by hand-delivering a copy to him at San Quentin State Prison within the 30-day time period permitted by this Court.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 19, 2010, at San Francisco, California.

Patricia Daniels