IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S130263

In re KENNETH EARL GAY On Habeas Corpus	CASE NO. (Related Capital Case Nos S004699, S030514 and S 093765 (Los Angeles Superior Court No. A392702

PETITION FOR WRIT OF HABEAS CORPUS

SUPREME COURT
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PETITION FOR WRIT OF HABEAS CORPUS

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:

Petitioner, Kenneth Earl Gay, through his counsel, the Habeas Corpus Resource Center ("HCRC"), petitions this Court for a writ of habeas corpus and by this verified petition sets forth the following facts and causes for the issuance of the writ:

I. INTRODUCTION

This petition challenges petitioner's conviction for capital murder rendered in Los Angeles Superior Court Case No. A392702, on September 20, 1985, and affirmed by this Court, along with the judgment of death, in *People v. Cummings and Gay* (1993) 4 Cal. 4th 1233. In related habeas corpus proceedings, this Court granted petitioner penalty phase relief from the judgment of death based on the deficient performance of petitioner's conflicted, defrauding and ultimately disbarred trial attorney. (*In re Gay* (1998) 19 Cal.4th 771.) The Court, however, left petitioner's capital murder conviction undisturbed. (*Id.*, at 830.) At the penalty phase retrial, petitioner was again sentenced to death by the Los Angeles Superior Court on December 4, 2000.

Contemporaneous with petitioner's renewed automatic appeal to this Court of the newly imposed death judgment, he was permitted to pursue federal habeas corpus review of his underlying capital murder conviction in the United States District Court for the Central District of California (*Gay v. Woodford*, CV 01-5368-GAF). Following the filing of his federal petition for writ of habeas corpus, the district court determined that certain claims were unexhausted based, in part, on additional information demonstrating petitioner's factual innocence that had been uncovered during the investigation and preparation for the retrial of the penalty phase, and thus previously had not been presented to this Court.

II. PROCEDURAL HISTORY AND BACKGROUND

A. Petitioner is unlawfully imprisoned under a judgment, conviction and sentence of death at San Quentin State Prison, at San Quentin, California by

Jill Brown, Warden and Jeanne S. Woodford, Director of the California Department of Corrections.

B. Petitioner is confined pursuant to the commitment and judgment of death rendered in Los Angeles County Superior Court in *People v. Cummings*, Case No. A392702, on September 20, 1985, and as a result of this Court's denial of relief in *People v. Cummings and Gay*, 4 Cal.4th at 1233.

C. On July 20, 1983, a grand jury returned an indictment charging petitioner with one count of murder (Pen. Code § 187) with the special circumstances allegations that the victim was a police officer engaged in the performance of his duties (Pen. Code § 190.2(a)(7)), and the offense was committed for the purpose of avoiding and preventing a lawful arrest (Pen. Code § 190.2(a)(5)), and further alleging petitioner was armed (Pen. Code §§ 211, 12022(a)) and personally used a firearm (Pen. Code §§ 12022.5, 1203.06(a)(1)) during the commission of the offense; 10 counts of robbery (Pen. Code § 211) with an arming clause; one count of robbery with the further allegations that petitioner both was armed and inflicted great bodily injury (Pen. Code §§ 12022.7); one count of robbery with the further allegations that petitioner both was armed and personally used a firearm; two counts of attempted robbery (Pen. Code § 664/211) with arming clauses; one count of conspiracy to commit robbery (Pen. Code § 182/211); one count of being an ex-convict in possession of a gun (Pen. Code § 12021); and, one count of conspiracy to obstruct justice (Pen. Code § 182(5)).

D. Petitioner requested a preliminary hearing, which began on August 22, 1983. At the conclusion of the preliminary hearing, on August 31, 1983, petitioner was held to answer on all 11 counts. (4 CT 944.)

E. Petitioner's motion for severance and change of venue were both denied. (4 CT 1103, 1113.)

F. On October 17, 1984, the superior court granted petitioner's motion to dismiss one count of robbery with an arming clause, and the one count of conspiracy to obstruct justice. (6 CT 1572.)

G. An information was filed on October 22, 1984, realleging the murder with special circumstances; conspiracy to commit robbery; being an ex-convict in possession of a firearm; two counts of attempted robbery; and the remaining eleven counts of robbery with the addition of allegations of personal use of a firearm as to four of the counts.

H. Twelve jurors and seven alternates were impaneled and sworn to try the cause on January 29, 1985. (6 CT 1730.)

I. On March 11, 1985, the court granted petitioner's motion for acquittal as to Count XV (one of the robbery charges) and denied the motion as to Count VII (another robbery charge). (7 CT 1821.)

J. On May 31, 1985, petitioner was found guilty of murder in the first degree, and the special circumstances were found to be true. (8 CT 2183-84.)

K. On June 5, 1985, the jury found petitioner guilty of the remaining ten counts of robbery, two counts of attempted robbery, conspiracy to commit robbery and being an ex-convict in possession of a gun. All the special allegations were also found to be true. (9 CT 2361-67.)

L. Petitioner's penalty phase trial began on June 24, 1985, after an eight-day adjournment taken to accommodate the penalty phase trial of his co-defendant. (9 CT 2394.) On July 2, 1985, the penalty phase jury began penalty deliberations. (9 CT 2399.)

M. On July 3, 1985, the jury returned a verdict of death. Petitioner was thereafter sentenced to death by Judge Dana Senit Henry on Friday, September 20, 1985. (4 CT 970-998.)

N. On direct appeal, this Court reversed the robbery, attempted robbery, and conspiracy to commit robbery counts but the judgment in all other respects was affirmed including the sentence of death. (*People v. Cummings*, 4 Cal.4th at 1257, 1343.)

O. During the pendency of the direct appeal, petitioner filed a petition for writ of habeas corpus in this Court. Based upon the state habeas petition the Court appointed a referee, Los Angeles County Superior Court Judge J. Stephen Czuleger, who made factual findings concerning the effect of counsel's representation on the penalty determination. The Court denied relief as to all guilt phase claims. However, it held that the cumulative prejudicial effect of counsel's ineffectiveness in misleading petitioner into confessing to robberies, failing to adequately investigate and discover mitigating sentencing evidence, and selecting and using mental health experts, required reversal of death penalty verdict. The sentencing judgment was vacated and remanded for new penalty trial. (*In re Kenneth Earl Gay*, *supra*, 19 Cal.4th 771.)

P. Petitioner was retried as to penalty only, in the Los Angeles Superior Court, Case No. A392702. On August 21 and 22, 2000, twelve jurors and four alternates were impaneled and sworn to try the case. (7 CT 1931-33.)

On September 8, 2000, the court determined that lingering doubt evidence was inadmissible and not relevant to the penalty retrial. The defense request for a continuance was denied, and opening statements were given on September 9, 2004. (7 CT 2002.) The trial court, thereafter, denied the admission of extensive evidence of petitioner's innocence.

Q. On October 18, 2000, the jury returned a death verdict against petitioner. (8 CT 2139.) On December 4, 2000, the Defendant's Motion For New Trial and Automatic Modification of the Verdict and Finding Imposing the Death Penalty were heard and denied by the Court. A judgment of death was once again imposed. (8 CT 2233-34.)

R. Petitioner's automatic appeal regarding the penalty retrial pursuant to Penal Code section 1239(b), followed. On April 30, 2001, the Court appointed Therene Powell of the Office of the State Public Defender to represent petitioner on his automatic appeal.

S. On June 18, 2001 and September 24, 2001, respectively, petitioner filed in the United States District Court, Central District of California, an *Ex Parte* Application For Appointment of Counsel and Motion That Petitioner Be Permitted To Litigate Exhausted Guilt Phase Claims On Habeas Corpus. Counsel was appointed on the issue of whether petitioner was entitled to proceed on federal habeas corpus as to the guilt phase issues while the penalty retrial was on state appeal. The Court, on October 24, 2001, determined that petitioner was permitted to proceed federally with exhausted guilt phase issues. Robert R. Bryan was appointed as counsel on petitioner's behalf on November 14, 2001.

T. On December 31, 2002, the Court appointed the Habeas Corpus Resource Center to represent petitioner in habeas corpus and executive clemency proceedings.

U. A Petition For Writ Of Habeas Corpus regarding the guilt phase claims was filed in the Central District Court on July 17, 2003.

V. On November 25, 2003, Judge Fees of the United States District Court concluded that claims 1 through 7, 10, 11, 16, and 18 through 24 were unexhausted. The Court determined that petitioner could either file an amended petition deleting the unexhausted claims, proceed on the exhausted grounds only and seek permission to stay the proceeding while attempting to exhaust claims in this Court, or dismiss the petition in its entirety while he pursued the unexhausted claims in state court. (Order Denying Respondent's Motion To Dismiss, *United States District Court, Central District of California*, November 25, 2003.)

W. By order filed March 2, 2004, the federal court granted petitioner's motion to hold federal proceedings in abeyance, and ordered petitioner to present the unexhausted claims, along with all claims in the original petition, to this Court so that it may assess the cumulative effect of all constitutional error alleged by petitioner.

III. STATEMENT OF FACTS

In the early evening of June 2, 1983, petitioner, a fair skinned black man, sat in the front passenger seat of a car driven by Pamela Cummings. Her husband, Raynard Cummings, was in the back seat holding a loaded gun. After a Los Angeles Police Department motorcycle officer, Paul Verna, pulled the car over for a routine traffic stop, and Mrs. Cummings

had exited and moved to the rear of the vehicle, Raynard Cummings decided to ensure that his wife would not be arrested for driving without a license. As the officer leaned into the window of the car, Raynard Cummings, a dark skinned black man, responded to the officer's request for identification with "I've got your I.D. right here!" and began firing his gun at the officer. Raynard Cummings did not stop shooting as he pushed forward the driver's seat, he did not stop shooting as he exited the car, he did not stop shooting until he had emptied his gun into the retreating officer whose bullet riddled body had been paralyzed by a shot to the spinal cord. Terrified by the sudden turn of events, petitioner jumped out the passenger door and stood watching, incredulous, on the sidewalk, and involuntarily urinated in his trousers. Before ordering his wife and the petitioner back into the car, Raynard Cummings threw his own gun at the victim's prone body, and picked up the officer's still loaded weapon.

As Mrs. Cummings began to drive away from the officer, under the direction of her husband, Raynard Cummings realized he should not have left his emptied gun at the scene and ordered her to return, which she did. With the officer's fully loaded gun in his hand, Raynard Cummings ordered petitioner out of the car to retrieve the empty weapon. Petitioner did as he was told, jumped out the passenger side of the car, ran around the front end, and picked up Raynard Cummings's empty gun, which was lying near the fallen officer. With Raynard Cummings's gun in hand petitioner returned to the passenger side of the car, and Pamela Cummings drove them away.

Raynard Cummings ordered his wife to drive to his aunt's house where they stayed for a short time before his aunt drove Raynard and

Pamela to his mother's house, and petitioner's wife, Robin Gay, picked him up. After speaking with her son, Mary Cummings, long known for her mental instability and violent nature, drove to the scene of the shooting to find out who had seen her son shoot the officer.

Then Raynard began bragging. Raynard and Pamela Cummings met up with petitioner and Robin Gay later that evening at Robin Gay's apartment, and Raynard Cummings gave the first of his many confessions. His admissions to being the sole shooter involved in the murder of Officer Verna did not stop there. Once arrested, he told inmate after inmate, both in jail and in prison, often relating the events in great detail. By the time of trial, at least seven institutional reports contained Raynard Cummings's admissions, exculpating petitioner. But none of these admissions was introduced on petitioner's behalf at trial.

Pamela Cummings also admitted to several people that her husband was solely responsible for the officer's death. But because neither of them wanted Raynard Cummings to get caught, the two of them began naming other men as the shooter. First, Pamela Cummings accused a man by the name of Milton Cook, who was nowhere near the scene of the shooting, but who conveniently looked very similar to her husband. Then Pamela and Raynard Cummings began naming petitioner as the shooter, even though they all knew he had not fired a single bullet at the officer.

This Court has already reversed his death sentence once for what happened next.

Once petitioner was charged capitally for the death of the officer and appointed a public defender, Daye Shinn, a now disbarred lawyer then under investigation by the same district attorney's office that was

prosecuting the petitioner, illegally orchestrated his appointment to represent petitioner.

From the minute he met petitioner, Daye Shinn used him as leverage to curry favor with the district attorney's office for leniency regarding his own investigation, as well as, quite simply, a way to collect fees.

Even had he tried, Daye Shinn could not ethically, effectively have represented petitioner while under threat of prosecution for his own wrong doings, by the same district attorney's office. Yet, Daye Shinn went one step further, actively sabotaging petitioner's defense by, for example, orchestrating a confession for certain non-capital crimes later used against the petitioner to suggest motive, and by failing to do even the most rudimentary investigation into readily available exculpatory eyewitnesses.

As a result of Shinn's conflict-burdened, incompetent performance, the jury at petitioner's trial did not hear the truth of what happened on June 2, 1983. Several witnesses to the shooting reported seeing Raynard Cummings, the dark skinned black man, standing on the driver's side of the car, shoot the victim. Two witnesses specifically saw Raynard Cummings shoot the victim from the back seat of the car, then exit through the driver's door and continue shooting until the officer fell. Two eyewitnesses, who heard the shots but only saw petitioner retrieve the empty gun, confused the sequence of events, which is a normal occurrence with eyewitnesses. Uniformly, those witnesses with the least obstructed view reported seeing Raynard Cummings alone, shoot the officer.

The death of Officer Verna triggered an all-out drive by the police and the prosecution to ensure at least one conviction. Both petitioner and

Raynard Cummings were charged with the murder. To reconcile witness reports of both a fair skinned and a dark skinned shooter, the prosecution argued that both Raynard Cummings and petitioner shot the officer. The prosecution argued a "pass-the-gun" theory of the shooting, in which Raynard Cummings first shot the victim from the back seat, attempted to exit the car to continue shooting but, unable to do so, passed the gun to the six-foot tall petitioner, who then took the gun, pushed back the driver's seat, slid over the two bucket front seats, over an arm rest, past a steering wheel and exited the car to continue the shooting Raynard Cummings had started.

For two and a half months after the shooting, not a single witness report fit the prosecution's "pass-the-gun" theory. None of the witnesses was able to identify petitioner at the initial line-ups. Mr. Verna's friends and colleagues, however, would not relent until they heard the only information they wanted. The police encouraged witnesses to remember their version of the shooting and, as time passed, witness accounts changed shape to fit the state's theory.

In addition to law enforcement's shaping witnesses' stories to fit the prosecution's "pass-the-gun" theory, the prosecuting authorities committed other acts of misconduct, including, but not limited to, the presentation of false testimony; arguing facts not in evidence; engaging in unreported witness contacts, after which witness accounts of the shootings changed to support the prosecution's theory; and the knowing presentation of perjured testimony.

Robert Thompson, who was directly across the street from the shooting, recalled a drastically different version of events upon his initial police interview than the one he was coached to give at the preliminary

hearing. His police report stated that he had seen a white man in the front passenger seat and a dark-complexioned man getting out of the back seat with a smoking gun in his hand, firing at the officer. At the grand jury hearing he demonstrated the way the dark-complexioned shooter got out of the car. But, by the preliminary hearing, he testified that he saw a light-complexioned man getting out of the driver's side of the car and that the dark-complexioned man remained in the back seat. During his trial testimony, after a "walk through" of the crime with Los Angeles Police Detective John Holder, Mr. Thompson added that he saw the gun first in the hand of the dark-complexioned man in the back seat and then in the hand of the light-complexioned man as he came out of the car. His story evolved to conveniently bolster the prosecution's "pass the gun" theory.

Many witnesses were unclear about what they saw and susceptible to the state's influence. For example, Shannon Roberts, a fatherless boy playing in a front yard on Hoyt Street, never identified petitioner as the shooter until his trial testimony, just moments after an officer showed him, through the courtroom door, which man he was supposed to pick.

The prosecution also shaped the statements of purported eyewitnesses Gail Beasley, and Marsha Holt, both of who were widely known in the neighborhood to be addicted to narcotics both at the time of the offense and during the trial. Had that information been presented to the jury, it would have powerfully impeached their credibility.

Furthermore, both Gail Beasley and Holt's mother, Mackey Como, were close friends with the Cummings family. Raynard Cummings's mother drove straight to Mackey Como's house, after hearing about the shooting from her son, while officers were still on the scene. Beasley and Como

were clearly susceptible to impeachment on the basis of this bias, had Shinn simply investigated. Marsha Holt, in turn, was susceptible to impeachment based on statements admitting she had not actually witnessed the shooting.

A number of the witnesses were unwavering in their identification of a dark skinned black man as the shooter. Oscar Martin was the closest eyewitness to the events and consistently reported that he saw a dark-complexioned black man get out of the back of the car and shoot at the officer. He never identified petitioner and maintained that Raynard Cummings was the shooter. Shequita Chamberlain, who was driving in a car past the nearest intersection, said she saw a dark-complexioned man shooting at the officer. Rose Perez, who was also driving in a car, testified that she saw petitioner by the passenger side of the car with nothing in his hands at the same time that she saw the officer falling, making it impossible for him to have been shooting the officer.

If petitioner had been represented by counsel free of Shinn's conflicts who would have developed and presented such readily available, exculpatory evidence, and had petitioner's jury not been rife with misconduct including sleeping jurors, premature deliberations and consideration of extraneous third party information, petitioner would not have been wrongfully convicted for the murder of Officer Verna.

IV. BASIS FOR JURISDICTION

Petitioner's judgment of conviction and sentence of death is not yet final inasmuch as the automatic appeal is currently pending before this

Court. Consistent with this Court's Policies, and applicable case law, this petition is timely filed within the presumptively timely period, and the claims presented herein are otherwise cognizable by virtue of petitioner's actual innocence as well as factual innocence within the meaning of *In re Clark* (1993) 5 Cal. 4th 750. This petition is necessary because petitioner has no other plain, speedy or adequate remedy at law for the substantial violations of his constitutional rights as protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the California constitutional analogues and Penal Code Section 1473, in that the bulk of the factual bases for these claims lies outside the record developed on appeal.

V. JUDICIAL NOTICE AND INCORPORATION

Petitioner hereby requests that this Court take judicial notice of the record on appeal and the briefs filed in *People v. Kenneth Gay*, Case Nos. S004699 and S093765, and *In re Gay*, No. S030514, to avoid duplication of those voluminous documents, a copy of which this Court and counsel for respondent already possess.

Petitioner also requests that this Court take judicial notice of the contents of the file, pleadings, records, judgment and findings, and the record and decision on review in all proceedings in the State Bar Court of the State Bar of California Hearing Department, Los Angeles, the Review Department of the State Bar Court; *In the Matter of Shinn*, 2 Cal. State Bar Ct. Rptr. 96; and this Court's order filed September 16, 1992, in *In re Daye Shinn on Discipline*, S027609 (State Bar Court Case No. 85-0-11506); and of the contents of the file, pleadings, records, judgment and record on

appeal in *People v. Linda Sue Jones*, Los Angeles Superior Court, Case No. A088857.

VI. SCOPE OF CLAIMS AND EVIDENTIARY BASES

Because a reasonable opportunity for full and factual investigation and development through access to a complete appellate record, this Court's subpoena power and other means of discovery, to interview material witnesses without interference from State actors, and an evidentiary hearing have not been provided to petitioner or his habeas corpus counsel, the full evidence in support of the claims which follow is not presently reasonably obtainable. Nonetheless, the evidentiary bases that are reasonably obtainable and set forth below, adequately support each claim and justify issuance of the order to show cause and the grant of relief.

VII. CLAIMS FOR RELIEF

A. CLAIM ONE: PETITIONER IS ACTUALLY INNOCENT OF CAPITAL MURDER.

The conviction of capital murder was rendered in violation of petitioner's rights to a fair, reliable, and rational determination of guilt and individualized determination of penalty based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant record evidence presented during the trial and as to which petitioner had notice and a fair opportunity to test and refute, to have the jury give full effect to all evidence in mitigation of penalty, to the privilege against self-incrimination, to confrontation and compulsory process, to a jury trial by a fair and impartial jury, to conviction beyond a reasonable doubt, and to the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law because petitioner did not participate in or otherwise commit, aid or abet the homicide, and is actually innocent of the offense. His arrest, conviction and deprivation of liberty in both pre-trial and post-judgment confinement for over twenty-one years constitutes a grave miscarriage of justice that requires immediate remedy independent of the presence or absence of constitutional violations affecting the outcome of his trial below.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. The facts alleged in support of all other claims in this petition are hereby incorporated by this reference as though fully set forth herein.

2. The substantial, credible and compelling evidence of petitioner's affirmative innocence of the homicide charge against him includes, but is not limited to, the testimony of independent, percipient witnesses who conclusively exclude petitioner as the perpetrator and/or identify his co-defendant, Raynard Cummings, as the lone assailant who shot the decedent, a Los Angeles Police Department motorcycle officer, during a traffic stop.

3. Said witnesses were and are able to describe and identify petitioner and Cummings to varying degrees of specificity, and all witnesses and parties agree that the male suspects observed at the scene could be distinguished as either a light-complexioned man, which referred to, signified and otherwise identified petitioner; or a dark-complexioned man

of African descent, which referred to, signified and otherwise identified the co-defendant Cummings.

a. Shequita Chamberlain, witnessed the shooting, reported her observations to the police, attended physical line-ups of possible suspects, and testified truthfully and credibly under oath at a preliminary hearing and at petitioner's trial in 1985.

(1) The consistent sum and substance of all such statements, identifications and testimony by said witness is that Cummings was the lone individual who shot the decedent; that Cummings's complexion was the same as that of the shooter; and that petitioner could not have been the shooter she observed because his complexion is too light. (*E.g.*, 68 RT 7524.)

(2) At the time of the offense, the witness's attention was drawn to Cummings and the decedent by the sound of a gunshot as the two men stood in close proximity to one another.

(3) After hearing more gunfire, the witness observed the decedent fall on his back and then observed Cummings get into a car, which was stopped near a police motorcycle, and drive away.

b. Oscar Martin, a twelve-year-old resident of the neighborhood in which the offense occurred, identified Cummings as the person who emerged from the left rear passenger seat of the stopped vehicle and repeatedly shot the decedent.

(1) Mr. Martin accurately described Cummings's dark complexion, general build, hairstyle, sideburns and a distinctive "burn mark" on the side of his face. Mr. Martin thereafter identified Cummings's photograph during testimony before the grand jury, and confirmed his

identification of Cummings in court at the preliminary hearing and trial. (1 Supp. CT 253; 3 CT 632; 67 RT 7360-61.)

(2) The consistency of Mr. Martin's description and identifications of Cummings was corroborated by Cummings's general appearance and the "burn mark" on the left side of his face.

c. Ejinio Rodriguez, another area resident, also witnessed the offense, and identified Cummings as the lone perpetrator. As more fully described by Mr. Rodriguez in his declaration filed as Exhibit 24 in support of this petition, and incorporated by this reference as though fully set forth, he observed the events in question beginning near the inception of the traffic stop.

(1) Shortly after the decedent had contacted the female driver of the car, Mr. Rodriguez observed a man of African descent with a dark complexion shoot the officer multiple times. (Exhibit 24, Declaration of Ejinio Rodriguez at 245, ¶ 5.)

(2) Mr. Rodriguez then observed the suspect vehicle drive away, make a u-turn and return to the scene, where a light-skinned man emerged from the car, picked up a gun near the decedent, and returned to the car before it again drove away. (*Id.*, ¶ 8.) Mr. Rodriguez has consistently and explicitly distinguished the light-skinned man as not being the same person who shot the decedent. (*Id.*)

d. Martina Lizbeth Jimenez also observed the events in question, beginning with the inception of the traffic stop, and both identified Cummings as the person who committed the homicide and excluded petitioner as having been involved in the shooting. Ms. Jimenez's recollections are detailed in her declaration, filed as Exhibit 27 in support of

this petition and incorporated by this reference as though fully set forth herein.

(1) Shortly before the events in question, Ms. Jimenez had been in the front yard of her home at the intersection of Gladstone and Hoyt, conversing with the decedent. The decedent indicated that he was going to make a traffic stop, and invited Ms. Jimenez to observe him from the safety of her yard.

(2) Ms. Jimenez observed two men of African descent in the car, one of whom was very dark-complexioned and seated on the left side of the car. Ms. Jimenez identified this dark-complexioned man as the perpetrator who shot the decedent numerous, consecutive times without stopping. (Exhibit 27, Declaration of Martina Lizbeth Jimenez at 497-98, ¶ 4.)

(3) Ms. Jimenez further observed that Cummings did not relinquish control or possession of the gun to petitioner at any time during the commission of the offense. (*Id.*)

e. Irma Esparza, whose mother lived on Hoyt Street, was on the sidewalk across the street and approximately two houses away from the actual crime scene when she witnessed the homicide. She subsequently reported her observations to officers of the Los Angeles Police Department who memorialized them in a report that is filed as Exhibit 13 in support of this petition, and incorporated by this reference as though fully set forth.

(1) Initially, Ms. Esparza observed a gray automobile containing two males of African descent, one of whom was dark-complexioned and the other of whom she described as light-skinned.

(Exhibit 13, Los Angeles Police Department Interviews of Irma (Rodriguez) Esparza at 162-63.)

(2) Ms. Esparza observed the dark-complexioned man, who was positioned on the driver's side of the car, shoot the decedent, first in the neck and then at least two more times. (*Id.*)

(3) Ms. Esparza then observed the officer fall to the street, the suspect vehicle drive away and then return, at which time the light-skinned man retrieved a gun lying near the decedent.

4. The inherently reliable, affirmative proof of petitioner's innocence also includes, but is not limited to, the repeated, spontaneous and voluntary admissions and confessions made by Raynard Cummings describing his role as the sole perpetrator of the homicide and absolving petitioner of any responsibility or involvement in the crime. As more fully detailed the factual allegation contained in Claim Three and the supporting witness declarations and other exhibits cited therein, all of which are incorporated by this reference as though fully set forth herein, Cummings made credible, spontaneous statements admitting and confessing his sole commission of the crime to law enforcement officers and other inmates including, but not limited to, the following:

a. Cummings made incriminating statements to Deputy William McGinnis that made it clear to the officer "that Cummings alone pulled the trigger and was the sole person responsible for killing officer Verna." (Exhibit 29, Declaration of William McGinnis at 501, ¶ 5.)

b. Cummings stated to Deputy Sheriff McMullan that the decedent was a ghost and that Cummings had "put six in him," referring to

the number of bullets that had struck the decedent. Deputy McMullan later heard Cummings say "[h]e took six of mine." (65 RT 7050, 7148-50.)

c. Deputy Sheriff La Casella overheard Cummings boasting that he knew how the decedent received all of the shots and that he knew "exactly where [the decedent] was when he got them." (76 RT 8606-40.)

d. David Elliot and Norman Pernell both heard Cummings confess to being the person who alone shot the decedent. (Exhibit 61, Identification of Witnesses Currently in Custody at Los Angeles Jail at 1957.)

e. Cummings gave a detailed confession to fellow inmate John Jack Flores including, but not limited to, describing the fact that he fired one shot from the back seat of the car and exited through the driver's door, and continued shooting. (Exhibit 6, Los Angeles Police Department Interview of John Jack Flores at 39, ¶ 2.; *see also* Exhibit 6, Declaration of Jack John Flores at 36, ¶¶ 3-4.)

f. Cummings made a detailed confession to inmate Michael David Gaxiola that both admitted his guilt for the shooting, and exculpated petitioner of any involvement. (Ex. 6 at 39, ¶¶ 2, 3-4; Exhibit 14, Los Angeles Police Department Interviews of Michael Gaxiola at 164-65.)

g. Cummings made a full confession to Gilbert Anthony Gutierrez, in which he took full responsibility for committing the homicide. Cummings then proceeded to confess to being the sole shooter to anyone who was interested enough to listen to him. (64 RT 6988-89.)

h. Cummings described in detail to James Edward Jennings how he "had a 38 cal revolver hidden between his legs, and when Verna asked him, Raynard, if he had I.D., Cummings stated, [']I've got I.D.,['] pulled the gun from between his legs and shot Verna" a total of six times in the chest, neck and back. (Exhibit 5, Los Angeles Police Department Interviews of James Edward Jennings at 35.)

i. Cummings's admission to Mr. Jennings, describing his response to the request for "I.D.," provides significant corroboration and buttresses the testimony of other affirmatively exculpatory witnesses.

(1) Debbie Warren recalled Pamela Cummings telling her that when the officer asked for identification, Raynard said "Yeah, I have I.D.," and started shooting. Ms. Cummings did not say anything about petitioner also firing the gun.

(2) Robin Gay, petitioner's wife, testified before the grand jury that on the night of the offense, Raynard admitted having fired all the shots, and described how he initiated the assault when the officer requested identification: "He said, 'Yes, I have I.D. for you, you MF so-and-so,' and he shot the cop." (3 Supp. CT 716-18.)

j. The consistency and congruence of the various witness statements conclusively demonstrates that in a variety of settings and contexts, Raynard Cummings freely and accurately admitted that he alone shot the decedent.

5. The prosecution did not, and cannot produce any credible incriminating eyewitness testimony sufficient fairly or rationally to refute the foregoing credible exculpatory witnesses who exonerated petitioner of the commission of the homicide. At trial, the state relied on five purported

eyewitnesses whose incriminating testimony was the product of overreaching and suggestive interview tactics by investigating officers and other law enforcement personnel, witness intimidation and/or familial bias in favor of the co-defendant Cummings.

a. Shannon Roberts was eleven years old at the time of the crimes, and a playmate of Ejinio Rodriguez.

(1) Mr. Roberts was with Mr. Rodriguez when the latter witnessed the shooting of the decedent. In contrast to Mr. Rodriguez, Mr. Roberts did not have a clear perception or recollection of the suspect's appearance, and offered various racial and ethnic descriptions of the persons he saw. (2 Supp. CT 534-35; 3 CT 713-14, 715.)

(2) As more fully detailed in the witness's declarations filed as Exhibits 23 and 83 in support of this petition, and incorporated by this reference as though fully set forth, the police, prosecutors and/or other law enforcement officials and personnel engaged in an improper, overbearing and coercive course of conduct that was designed to and did in fact cajole, induce and persuade Mr. Roberts to alter his independent recollection of events to incriminate petitioner by offering false, misleading and unfounded testimony including, but not limited to falsely identifying petitioner as a perpetrator of the homicide.

(3) The police subjected the child to an ongoing psychological campaign in which they implicitly and explicitly suggested to him the acceptable version of events they wanted him to endorse, and openly and expressly rewarded his adoption of the officially supported version of events. (Exhibit 83, Declaration of Shannon Roberts at 2095-96, ¶¶ 5-8.)

(4) Said campaign had among its objectives obtaining the witness's testimony falsely and unreliably identifying petitioner as a perpetrator of the homicide.

(5) This objective was accomplished through official misconduct including, but not limited to, pointing petitioner out to the witness before the latter entered the courtroom to testify at petitioner's trial. Law enforcement officials were actually aware that but for such official misconduct, the witness would not have been able to purport to identify petitioner as a perpetrator of the homicide. (*Id.*, ¶ 9.)

(6) As a result of this and other knowing and intentional official misconduct, the witness's incriminating testimony against petitioner was not the product of the witness's truthful, independent recollection in any material respect, but was the product of his acquiescence in endorsing any version of events suggested to him by the prosecuting authorities. (*See id.*)

b. Marsha Holt claimed to have witnessed the shooting while she was visiting the home of witness Gail Beasley and her mother, Mackey Como. Ms. Holt identified petitioner as the shooter in the course of multiple conflicting statements and testimony describing the events she purportedly witnessed.

(1) Ms. Holt is an objectively incredible witness in light of the inherently unreliable nature of her conflicting, internally inconsistent testimony during the preliminary hearing and trial (*see* 2 CT 321-48, 436-62, 471-76; 68 RT 7526-90), as well as on the basis of independent impeachment and contradiction of her various versions of events.

(2) Said independent impeachment and contradiction includes, but is not limited to, the following:

(a) In contrast to Ms. Holt's testimony that she observed the events in question through the window of a bedroom in the Beasley/Como residence, her hostess, Ms. Beasley testified that when she ran into the room to inform Ms. Holt of the events occurring outside, Ms. Holt was just arising from a bed and asking about the nature of the disturbance. (*E.g.*, 2 CT 548-549.) It was only after Ms. Beasley reported the offense that Ms. Holt looked out the window. (2 CT 549-50.)

(b) In further contradiction of Ms. Holt's claim to have witnessed the offense, her husband at the time, Donald Anderson, has testified under oath that she admitted to him she did not see the shooting, and specifically did not see petitioner commit any shooting or homicide. (Exhibit 20, Evidentiary Hearing Testimony of Donald Anderson at 223.)

(c) No reasonable, impartial trier of fact would have confidence in Ms. Holt's purported observations because at the time of the offense, she was a narcotics abuser who, pursuant to her established habit and custom, would have been under the influence of PCP, crack cocaine, methamphetamine, LSD, or any combination thereof, on the second day of the month, when the events in questions occurred. (*See* Exhibit 79, Declaration of Richard Delouth at 2084-85, ¶¶ 12, 14.)

c. Pamela Cummings, the co-defendant's wife, was called as a prosecution witness to testify that she saw petitioner shoot the decedent at least three times. Pamela Cummings's testimony is inherently suspect in light of her obvious motives for testifying, and thereby currying favor with

the prosecution, both as a co-defendant in the case and the wife of Raynard Cummings. Additional grounds, individually and cumulatively, also discredit her testimony including, but not limited to the following:

(1) The trial prosecutors have explicitly acknowledged that Ms. Cummings's trial testimony was materially false, self-serving and perjurious. Pursuant to the prosecutor's assessment of the knowingly untruthful and calculated nature of Ms. Cummings's testimony, the District Attorney informed the Los Angeles County Superior Court in a letter, filed as Exhibit 22 to this petition and incorporated herein by this reference as though fully set forth, that Ms. Cummings had violated the terms of her plea bargain, which had required her to testify truthfully, and that she should be sentenced to state prison. (Exhibit 22, Letter from John Watson to Commissioner Irwin H. Garfunkel, September 9, 1985, at 240-42.)

(2) The prosecutor's letter reflects the reasonable conclusion and belief regarding Ms. Cummings's character trait, proclivity and motivation to, and that she did in fact, lie under oath and otherwise testify without regard for the truth in any manner that she thought served her own interests.

(3) The fabricated, self-serving, misleading and perjurious nature of Ms. Cummings's testimony was consistent with a pattern of falsehood and deception she engaged in to deflect and distract the authorities from evidence that Raynard Cummings was the instigator and sole perpetrator of the homicide.

(4) By virtue of having witnessed the commission of the capital murder, Ms. Cummings knew from the outset that her

husband was the sole perpetrator. Because Raynard Cummings had committed the acts by himself, in full view of numerous witnesses, his and Ms. Cummings's first strategy was to claim that someone who closely resembled Cummings had actually committed the crimes.

(5) In furtherance of said plan and scheme, Ms. Cummings telephoned the police and other individuals in the community including, but not limited, to her sister, to disseminate the false information that the actual perpetrator was one Milton Cook, an individual whose features, build and dark complexion closely resembled Raynard Cummings.

(6) Ms. Cummings's false allegations against Mr. Cook demonstrate her conscious awareness that her husband was the actual perpetrator, and further reflected her reasonable fears and expectation that accurate eyewitness accounts would have implicated Mr. Cummings, or someone who closely resembled him, as the culprit.

d. Robert Thompson witnessed the events in question from the front yard of a house located almost directly across the street from the crime scene. Mr. Thompson initially reported to the police and testified before the grand jury that Cummings was the only shooter, and that petitioner, whom he described as a Caucasian male, had nothing to do with the shooting. The police thereafter engaged in a concerted campaign of psychological pressure, inducements and coercion, which was designed to, and did in fact, cause Mr. Thompson to adopt an irreconcilably conflicting version of events that implicated petitioner.

(1) Mr. Thompson's description of events to police on the date in question and his testimony before the grand jury expressly

differentiated between a male Caucasian who was seated in the right front passenger seat, and a medium-dark-complexioned African-American male in the rear passenger seat. (2 Supp. CT 457-61.) He was also explicit that the dark-complexioned man in the back seat had gotten out of the car to shoot the decedent. (*E.g.*, 2 Supp. CT 456-57.)

(2) As the prosecution worked to develop a theory that Cummings shot the police officer, and then passed the gun to petitioner, the police focused a psychological campaign of inducements, persuasion and coercion to force Mr. Thompson to adopt their version of events.

(3) As more fully detailed in the declaration of Cecilia Thompson, filed as Exhibit 85 in support of this petition and incorporated by this reference as though fully set forth herein, the law enforcement officials' psychological campaign included, but was not limited to, dispatching police officers to Mr. Thompson's home to rehearse the story of the crime with him for many hours, and help him memorize the official version.

(4) Said psychological campaign was intended to, and did in fact, exploit and capitalize on Mr. Thompson's psychiatrically impaired condition including, but not limited to, symptoms of post-traumatic stress disorder and chemical dependency. As a result of said campaign, Mr. Thompson became increasingly unstable and symptomatic, and dramatically increased his consumption of alcohol in an effort to self-medicate and ameliorate his symptoms. Under the increasing pressure from the police and prosecuting officials, Mr. Thompson's express purpose for consuming alcohol was "to forget" his experiences associated with having witnessed the homicide. (Ex. 85 at 2100, ¶ 5.)

(5) When approached by petitioner's retrial counsel, and without the overriding influence of the police department, Mr. Thompson spontaneously described events as he had initially described them to the police and the grand jury, once again completely exculpating petitioner and inculpating Raynard Cummings. (*See* Retrial 29 RT 4023-24.)

(6) As with other purportedly incriminating testimony from witnesses who were the focus of the police program of inducement, persuasion and coercion, Mr. Thompson's inculpatory trial testimony, which conflicts with both his initial, exculpatory statements to the police and his exculpatory grand jury testimony, would not be credited by any reasonable, impartial trier of fact.

e. Gail Beasley initially described the light-skinned suspect as doing the shooting and eventually identified petitioner at trial. Beginning with Ms. Beasley's mental state at the time of the offense, there are several bases upon which a reasonable, impartial fact finder would not credit her testimony. Said bases include, but are not limited to, the following:

(1) Ms. Beasley maintained the same habit and custom as her friend Marsha Holt of ingesting narcotics regularly, particularly on and around the first and second day of each month. Pursuant to said habit and custom, at the time of the offense in question, Ms. Beasley was visiting Ms. Holt, and the two women had and were ingesting narcotics.

(2) As a result of Ms. Beasley's drug intoxication and/or pre-existing mental health problems, she actively dissociated at the

time of the alleged offense. (*See* Exhibit 75, Declaration of Gail Blunt at 2073-75, ¶¶ 3-5.)

(3) Ms. Beasley's purported recollection of events was further contaminated and compromised by the intervention of Mary Cummings, the co-defendant's mother and long-time friend of Ms. Beasley's own mother, Mackey Como. As more fully set forth in Claim Three, and incorporated by this reference as though fully set forth, Mary Cummings was known as a vicious and violent woman, who immediately began contacting, intimidating, threatening and otherwise dissuading witnesses from providing the police with any information that might incriminate her son, Raynard Cummings.

(4) Pursuant to Mary Cummings's entreaties, cajoling and threats of bodily injury, Ms. Beasley agreed not to disclose any information harmful to Raynard Cummings, and to disseminate false information implicating petitioner.

(5) As more fully documented in Ms. Beasley's statement to the police and her testimony before the grand jury and at the preliminary hearing, all of which are incorporated by this reference as though fully set forth herein, her recollections regarding her opportunity to see the offense, and whether she actually saw it, changed materially. (*See* Exhibit 12, Los Angeles Police Department Interviews of Gail Beasley at 156; 2 CT 559.)

(6) The major conflicts and inconsistencies in Ms. Beasley's testimony include, but are not limited to, the fact that in contrast to her statements to the police that she saw both males outside the vehicle, she later claimed to have seen only the light-complexioned suspect

outside of the car; and in describing the clothing purportedly worn by this suspect, she described the clothing actually worn by Raynard Cummings.

6. Expert scientific analysis also demonstrates that petitioner is actually innocent of the homicide.

a. The report and conclusions of Dr. Kenneth Solomon, an expert in crime and accident reconstruction, human factors and biomechanics, filed as Exhibit 17 in support of this petition and incorporated by this reference as though fully set forth, are based on Dr. Solomon's extensive review of the testimony, eyewitnesses' prior statements and other evidence in this case; and reach the following conclusions:

(1) Petitioner could not have physically performed the shooting in the manner described by any of the witnesses, including Pamela Cummings, Gail Beasley, Marsha Holt or Shannon Roberts.

(2) Raynard Cummings could have easily exited the vehicle in the short amount of time between the first shot and the second shot.

(3) Raynard Cummings is the only individual at the scene who could have performed the shooting both inside and outside of the vehicle. (*See* Exhibit 17, Report of Kenneth Soloman, Ph.D., June 14, 2000 at 179, ¶ 9.)

b. Through time, motion and human behavior analyses, Dr. Solomon has demonstrated, as a scientific fact, that the prosecution's theory that Raynard Cummings "passed the gun" to petitioner during the commission of the crime is completely invalid. (*Id.*, ¶ 9.)

c. Dr. Solomon further correlated Gail Beasley's testimony with the observations of other eyewitnesses, analyzed the factors affecting her opportunity accurately to perceive the events in question and the accuracy of her recollections, and identified numerous material failings and lack of reliability in her testimony. Said failings and indicia of unreliability include but are not limited to the following:

(1) Her initial statements to police demonstrate she had an opportunity to observe all three occupants of the car, thereby permitting her to observe the clothing worn by Raynard Cummings, which she then attributed to the shooter.

(2) Various objects, structures and other obstructions prevented Ms. Beasley from observing any detail about the appearance of a passenger in the back of a car, again demonstrating that she must have observed Cummings and his clothing while he was outside of the car.

d. Dr. Solomon also analyzed the reliability of exculpatory witness testimony in the context of the case as a whole, and noted the consistency and accuracy of testimony such as that from Shequita Chamberlain, whom he found to be very consistent with the physical evidence, and the time frames established by the other witnesses.

e. Dr. Paul Michel, an optometrist and vision consultant, analyzed the police reports, testimony, photographs and other data, including, but not limited to, that gathered during a personal visit to the crime scene, and identified factors supporting the reliability of the exculpatory eyewitnesses and undercutting the credibility of the purportedly inculpatory witnesses. Dr. Michel's findings are detailed in his report filed

as Exhibit 21 in support of this petition and incorporated by this reference as though fully set forth herein. (Exhibit 21, Report of Paul B. Michel, O.D. at 237-39.) Said findings include, but are not limited to:

(1) Confirmation of the accuracy of Oscar Martin's identification of Cummings as the sole perpetrator, based on factors including, but not limited to, Mr. Martin's vantage point for observing the events in question, the overall consistency of his statements and testimony, and the particularized detail with which he initially identified and described Cummings.

(2) Documentation of the presence and obstructing effect of the barriers to Marsha Holt's view of the crime scene from the Beasley/Mackey residence. Combined with the measured distance from the scene of the shooting, the various barriers afforded the purported eyewitness only a limited view of the crime scene and significantly limited her ability to discern details from her vantage point. (Ex. 21 at 238, ¶ 2.)

7. The foregoing allegations and supporting documentary materials detailing the testimony of exculpatory eyewitnesses; the statements of the co-defendant exculpating and inculpating the co-defendant; the lack of any substantial evidence against petitioner and the scientific evidence establishing the physical impossibility of petitioner's involvement as the actual shooter constitute an extraordinarily strong showing of petitioner's actual innocence. In comparison to the relatively weak case the prosecution presented at trial, which resulted in petitioner's conviction only because the major inadequacies of trial counsel's representation, as further alleged and detailed in Claims Two and Three in

this petition, the current evidentiary showing, including that to be presented at an evidentiary hearing, points unerringly to petitioner's innocence.

8. This Court should appropriately afford petitioner a mechanism for the expedited consideration of this claim, the full development of the evidentiary record and the grant of habeas corpus relief.

B. CLAIM TWO: TRIAL COUNSEL'S REPRESENTATION OF PETITIONER WAS UNCONSTITUTIONALLY AND PREJUDICIALLY BURDENED BY MULTIPLE CONFLICTS OF INTEREST AND COUNSEL'S ABANDONMENT OF PETITIONER.

The judgment of conviction was unlawfully and unconstitutionally imposed in violation of petitioner's rights to a trial by 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, to present a defense, to confrontation and compulsory process, to the privilege against self-incrimination, to the enforcement of mandatory state laws, to a trial free of materially false and misleading evidence, to a fair trial, to an impartial and disinterested tribunal, to equal protection, and due process of law and to a fair and objective judicial determination pursuant to Penal Code section 190.4, subdivision (e) as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, and Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution, by virtue of trial counsel's unlawful, fraudulent and unethical behaviors that included but were not limited to intentionally or negligently abandoning and denying petitioner any assistance of counsel at all critical stages of the proceedings; failing wholly or meaningfully at all times from petitioner's arraignment to the commencement of trial, to consult with petitioner, conduct a thorough

investigation and prepare a meaningfully defense; entirely failing to subject the prosecution's case to meaningful adversarial testing at trial; and actively representing multiple conflicting interests that adversely affected the adequacy of all aspects of counsel's representation of petitioner.

The foregoing constitutional violations further and independently resulted from the state's failure to disclose to the trial court or to petitioner the existence of multiple, disabling conflicts of interests that arose prior to and during trial, and continued throughout petitioner's capital proceedings, and which arose by virtue of trial counsel's awareness of criminal investigations of trial counsel conducted by the Los Angeles County District Attorney's Office and other law enforcement agencies directly involved in the investigation and prosecution of the case against petitioner. Trial counsel was actually aware that such investigations included, but were not limited to, potential criminal charges of murder, arson and embezzlement, and while simultaneously representing himself engaged in ongoing negotiations with the District Attorney on his behalf including, but not limited to, agreeing to become a state's witness in the murder case for which he was being investigated.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts and allegations set forth in Claims One, Three, Eight, Eleven, Twelve, Sixteen, Seventeen, Twenty-two and Twenty-six, and the accompanying exhibits are incorporated by reference as if fully set forth herein.

2. The factual findings supported by allegations set forth in the verified petition for writ of habeas corpus, exhibits, depositions, admissions and stipulations in the evidentiary hearing testimony, and otherwise expressed or implied in the referee's report and this Court's opinion in *In re Kenneth Earl Gay*, Capital Case No. S030514, reported as *In re Gay* (1998) 19 Cal. 4th 771, are incorporated by this reference as though fully set forth herein.

3. Petitioner requests that this Court take judicial notice of the certified record on appeal in the case of *People v. Linda Sue Jones*, Los Angeles Superior Court, Case No. A088857, to avoid duplication of those voluminous documents.

4. The factual findings supported by the allegations set forth in the pleadings, admissions in the transcripts of proceedings, and otherwise expressed or implied in the decision of the State Bar Court of the State Bar of California Hearing Department, Los Angeles, opinion of the Review Department of the State Bar Court, *In the Matter of Shinn*, 2 Cal. State Bar Ct. Rptr. 96, and this Court's order filed September 16, 1992, in *In re Daye Shinn on Discipline*, S027609 (State Bar Court Case No. 85-0-11506), are incorporated by this reference as though fully set forth herein.

5. Said factual findings constitute conclusive determinations, fairly and substantially supported by the evidentiary record, of material facts including, but not limited to the following:

a. 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.

(1) The fraudulent means included, but were not limited to, employing and exploiting the services of Marcus McBroom.

(a) Shinn and McBroom approached petitioner in the county jail following petitioner's arrest in this matter. At that time both Shinn and McBroom were actually aware that petitioner was represented by the Los Angeles County Public Defender. McBroom, an American of African descent who was dressed in clerical garb, represented to petitioner that he was an ordained minister. (*See, e.g., In re Gay*, 19 Cal. 4th at 794-95.)

(b) McBroom, in Shinn's presence and with his explicit approval, further falsely informed petitioner that McBroom represented a group of Black businessmen who wished to hire a private lawyer for petitioner. (*See, e.g., In re Gay*, 19 Cal. 4th at 794-95.)

(c) Both McBroom and Shinn encouraged, cajoled and persuaded petitioner to agree that Shinn should be retained by the purported group of businessmen to represent him. (*See, e.g., In re Gay*, 19 Cal. 4th at 794-95.)

(2) Shinn's and McBroom's ruse regarding the non-existent group of businessmen was the *modus operandi* of an ongoing pattern, practice and scheme by which Shinn approached represented criminal defendants and fraudulently induced them to seek, request and otherwise effectuate the substitution of Shinn as their attorney of record. Other criminal defendants who were victimized by Shinn's similarly fraudulent behavior included, but were not limited to John Kim. (Exhibit 82, Declaration of Edwin Printemps at 2093, ¶¶ 4-6.)

(3) The fraudulent means by which Shinn secured his appointment in petitioner's case also included, but were not limited to Shinn making or causing knowingly false and misleading representations to be made to the trial court. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 794.)

(a) After inducing petitioner to accept Shinn's legal representation, which ostensibly was being financed by a group of businessmen, Shinn thereafter instructed, directed and coerced petitioner to misinform and mislead the trial court to believe that petitioner's parents had paid Shinn's retainer. Shinn, with the intent to defraud the court and thereby engineer an appointment as petitioner's attorney, was present when petitioner so misinformed the trial court; and Shinn did not correct the representations he knew to be false. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 794-95; Exhibit 18, Declaration of Frances Gay at 197, ¶ 2.)

(b) Shinn thereafter instructed, directed and coerced petitioner to make misrepresentations to the trial court, which Shinn again knew to be false and misleading, to the effect that petitioner's parents were unable to continue paying for Shinn's services and to request the court to appoint Shinn to represent petitioner. Shinn additionally provided petitioner with a sample motion to proceed in *propria persona*, which included the false representation that petitioner was seeking to represent himself because he could not afford to pay Shinn's legal fees; and further instructed him to copy it verbatim in his own handwriting for submission to the court. (5 CT 1332.)

(c) Based upon further misleading representations Shinn knew to be false, and presented to the court on July

18, 1984, the trial court appointed Shinn to represent petitioner in his capital proceedings on the same date. (CT 2812-22.) Shinn thereafter was the only attorney of record for petitioner throughout the trial of the guilt phase, first penalty trial and imposition of the judgment of death on September 20, 1985. (Exhibit 8, Declaration of Howard Price at 57, ¶ 5.)

b. McBroom, Shinn and at least one other individual, Fred Weaver, M.D., were parties and principles in, and maintained, an illegal capping relationship, which created a conflict of interest between the financial interests of said individuals, by virtue of their involvement in the illegal arrangement, and the interests of petitioner to whom Shinn owed constitutional, professional and ethical duties to provide minimally adequate representation.

(1) Pursuant to the capping arrangement, Shinn retained Weaver in any cases in which McBroom had arranged for Shinn to be counsel. Further, pursuant to this pattern and practice, whenever McBroom introduced Shinn to a client, Shinn did not consider retaining experts other than Weaver. (*See, e.g., In re Gay*, 19 Cal. 4th at 796.)

(2) 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. (*See, e.g., In re Gay*, 19 Cal. 4th at 797.)

(a) Weaver had no experience in death penalty cases, and Shinn did not hire him based on any perceived or demonstrated areas of expertise or competence. Shinn's and Weaver's pre-existing, mutually beneficial capping arrangement was the sole motivating

factor for Shinn's action in retaining Weaver to whom Shinn funneled public monies in exchange for appearing to work on petitioner's case. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 795.)

(b) 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. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 796.)

(c) Shinn unreasonably failed to arrange for Weaver to perform any assessment of petitioner in a minimally timely fashion. Weaver was not even contacted until after the conclusion of the guilt phase at petitioner's capital trial. (*In re Gay*, 19 Cal. 4th at 797.)

(d) Shinn intentionally and unreasonably failed to undertake and/or instruct Weaver to undertake the minimally adequate investigation and preparation of mental state evidence that is expected of competent professionals in a capital case. (*In re Gay*, 19 Cal. 4th 797-800.)

(e) Shinn affirmatively and unreasonably limited and restricted the scope of Weaver's professional services to seeing petitioner once or twice, performing a perfunctory assessment and reporting back to Shinn. (*See, e.g.*, *id.* at 797.)

(f) Pursuant to the limitations imposed by Shinn, and under which Weaver knew he was operating, Weaver understood he was to render only pro forma services requiring he do no

more than "go through the motions," rather than provide petitioner the benefit of his best clinical and forensic skills. (*See, e.g.*, *id.* at 797.)

(g) Pursuant to such limitations and understanding of the scope of his services, Weaver regarded the minimal investigation of petitioner's drug use or interviews with his family members as an unnecessary "frill." (*See, e.g.*, *id.* at 797.)

(h) Weaver was not provided with nor did he otherwise request or obtain any school, medical, hospital, correctional, employment, military or juvenile records for Kenneth Gay or any of his family members, and had no adequate or reliable source of clinically significant data at the time of his meetings with petitioner. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 797-800.)

(3) Shinn was aware and expected that, pursuant to the illegal capping arrangement, hiring Weaver to perform a pro forma evaluation would result in McBroom also receiving a share of case-generated funds on the pretense of performing diagnostic testing of petitioner. Shinn knew or reasonably should have known that both McBroom and Weaver were not licensed, and were unqualified to administer any indicated testing including, but not limited to, neuropsychological testing; and that authorizing and permitting McBroom to perform such testing constituted an intentional failure to vindicate petitioner's constitutional right of access to the assistance of a competent mental health professional. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 795; Declaration of Gretchen White at 2-3, ¶¶ 5-6, 9.)

(a) As a result of his lack of qualifications, McBroom failed to select and/or competently administer any appropriate

clinical instruments, and failed to obtain any readily available, reliable, or useful data.

(b) McBoom's failures included, but were not limited to, administering the Wechsler Intelligence Scale for Children (WISC), which is appropriate only for children, rather than administering the age-appropriate Wechsler Adult Intelligence Scale – Revised; and the Bender Gestalt test for organicity, which, is an insufficient measure of organic brain damage. (Declaration of Gretchen White at 2, ¶¶ 5-6.)

c. 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. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 832-834 (Werdegar, J., concurring).)

(1) In the early fall of 1983, Oscar Dane reported to Deputy Los Angeles County District Attorney Al MacKenzie that Shinn had embezzled the proceeds, in the amount of approximately $200,000, awarded to Dane in an eminent domain proceeding that resulted in the sale of Dane's Santa Monica home. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 832-834; Exhibit 35, State Bar of California, Exhibits, *In the Matter of Daye Shinn*, No. 31854, Case No. 85-0-11506-CWS, Los Angeles at 1439-43.)

(2) In response to Dane's allegations, Deputy District Attorney Albert MacKenzie commenced a criminal investigation, and assigned Los Angeles County Sheriff's Detective Charles Gibbons as the principle investigator. As part of the ensuing investigation, Detective

Gibbons made repeated telephonic contacts with Shinn in an unsuccessful effort to obtain an explanation and documentation for the handling and disbursement of Dane's funds; and thereafter conducted several personal interviews with Shinn, either by himself or with the participation of Deputy District Attorney MacKenzie, during which the authorities pointedly questioned Shinn about the whereabouts and disposition of Dane's money. (Exhibit 34, State Bar of California, Transcript of Proceedings, *In the Matter of Daye Shinn*, No. 31854, Case No. 85-0-11506-CWS, March 12-15, 1990 and March 20, 1990, Los Angeles, at 970-91; Exhibit 80, Declaration of Charles Gibbons at 2088, ¶¶ 3-6.)

(3) Throughout the course of said telephonic and personal contacts with the investigating authorities, Shinn attempted to maintain an appearance of being cooperative while evading questions, withholding information and reneging on promises to provide relevant records and documentation, all for the intent and with the effect of stalling the investigation. (Ex. 80 at 2088, ¶ 3.)

(4) Shinn's embezzlement of Dane's funds was motivated by improper personal interests including, but not limited to, the need to cover up his fraudulent behavior toward other clients including, but not limited, to his misappropriation of approximately $90,000 from Rebecca and Alexander Korchin. (*In the Matter of Shinn*, 2 Cal. State Bar Ct. Rptr. at 105-06; Ex. 35 at 1541-96.)

(5) Shinn's intent and attempts to appear cooperative with the District Attorney's Office and other investigating agencies, while simultaneously misdirecting and frustrating the investigation, were motivated by his knowledge that a reasonably minimal

investigation would lead to conclusive evidence of his pattern and practice of fraudulent, criminal behavior toward his clients, which exposed Shinn to liability for successful criminal prosecution, imprisonment and disbarment. Said pattern and practice of criminal and fraudulent misconduct included, but was not limited to, the following:

(a) In February 1981, Shinn attempted to tender a check in the amount of $172,729.68 to his client Oscar Dane. (Ex. 35 at 1461-64; Ex. 34 at 594-649; Ex. 33 at 538.)

(b) Dane refused Shinn's tender of the check because it was an amount less than Dane had authorized Shinn to accept as a settlement on Dane's behalf for his property and losses that had been appraised at over $2,000,000, and for which he had instructed Shinn not to settle for less than $1,600,000. Dane also demanded a detailed accounting from Shinn. (Ex. 33 at 538.)

(c) Shinn could not and did not provide an accounting, and instead pursued a course of conduct designed to and which in fact did continue to mishandle and misappropriate Dane's funds for Shinn's personal benefit, while concealing and obfuscating Shinn's course of unlawful conduct. (*In the Matter of Shinn*, 2 Cal. State Bar Ct. Rptr. at 104; Ex. 35 at 1497-502; Ex. 33 at 554-56.)

(d) On February 10, and March 14, 1983, Shinn used Dane's money to make successive, improper purchases of Certificates of Deposit (CDs). (Ex. 33 at 548-49.)

(e) Shinn made successive improper and unlawful purchases of CD's on May 16, 1993, June 15, 1983 and July 15, 1983. (Ex. 34 at 806-07, 813-17; Ex. 33 at 532-49.)

(f) On August 15, 1983, Shinn used the funds to purchase another CD in the amount of $139,536.95. The account was payable to the Daye Shinn Trust Account in contravention of Shinn's awareness that all monies used to fund the account properly belonged to Dane. (Ex. 34 at 819.)

(g) On September 14, 1983, Shinn used the liquidated proceeds of the fund to purchase two separate CDs, again executing and converting the instruments as payable only to the Daye Shinn Trust Account, despite Shinn's knowledge that the funds were the exclusive property of his client. (Ex. 34 at 820.)

(h) As of said date, Shinn further had depleted the account of approximately $25,000, which he had disbursed in a manner, by means and for purposes that he would not describe or disclose. (Ex. 34 at 821-22.)

(i) On October 14, 1983, Shinn purchased another CD in the amount of $141,872.25, payable to the Daye Shinn Trust Account, at which point he owed Dane approximately $166,401. (Ex. 34 at 822-23.)

(6) In late 1983 and early 1984, Shinn endeavored to convert all monies from the unlawful CD accounts to his personal use and cover up his embezzlement by blaming others for the theft, and by destroying all relevant records and documentation of his unlawful financial transactions.

(a) On or about January 11, 1984, Shinn closed the last of the CD accounts, obtaining a check for over $145,000 payable to his account. (Ex. 34 at 825-26.)

(b) On or about January 16, 1984, Shinn set fire to a portion of his office causing damage to, *inter alia*, a wall and a photocopying machine. (Ex. 34 at 596.)

(c) Shinn thereafter falsely claimed that the check he obtained on January 11, 1984, had been issued for the benefit of his client, Oscar Dane; that it had been stolen from Shinn's office by Linda Jones, the wife of Shinn's law partner, Lewis Jones; and that the records showing his proper handling of Dane's funds had been destroyed inadvertently in the fire in his office. (Ex. 34 at 824-25.)

(d) Independent investigation by law enforcement personnel including, but not limited to, Detective Charles Gibbons and Hassan Attalla, Supervising Investigative Auditor for the Los Angeles County District Attorney's Office, determined that Shinn made knowingly false representations regarding the exculpatory contents of the records that were purportedly destroyed in the office fire. Shinn's misrepresentations included, but were not limited to, falsely describing the terms and conditions of the retainer agreement into which he had entered with Dane, and falsely claiming he had placed Dane's funds in a single account and maintained the principle and interest for Mr. Dane's benefit. (Ex. 33 at 549-51.)

(e) Gibbons's and Attalla's investigations revealed in fact that Shinn had shifted the monies through a labyrinth of accounts for no legitimate purpose, and no purpose other than to conceal his misappropriation of the funds, and that Shinn had consistently skimmed off the interest as it accrued in each account. (Ex. 35 at 1506-13, 1517; Ex. 80 at 2087, 2089-90, ¶¶ 2, 7-15.)

(7) On or about March 1, 1984, Detective Gibbons met with Shinn to again question him regarding the whereabouts of Dane's money, and to secure Shinn's authorization to obtain Shinn's banking records in light of the purportedly accidental destruction of such records in Shinn's office fire. (Ex. 34 at 970; Ex. 80 at 2088, ¶¶ 3-5.)

(8) During the above-described interview with Gibbons, Shinn verbally agreed to authorize the release of his banking records, but then claimed he needed several days to review the contents of a three-line release Gibbons asked him to sign to formalize his authorization for release of the records. At no time thereafter did Shinn execute or return the release to Gibbons or any other law enforcement personnel. (Ex. 34 at 975; Ex. 80 at 2088, ¶¶ 3-5.)

(9) Shinn thereafter continued to obstruct and delay the investigation by making further unfulfilled promises and false assurances that he would timely provide the District Attorney's Office with documentation of his proper handling of Dane's funds. Such promises and assurances were advanced by Shinn pursuant to his purpose and intent to appear cooperative with the District Attorney's investigation while simultaneously taking all steps available to him to frustrate the legitimate aims of said investigation. (Ex. 80 at 2088, ¶¶ 3-5.)

(10) Following further unsuccessful attempts to obtain the requested and promised documentation and records from Shinn, and commencing in or about the summer of 1984, Detective Gibbons secured and served the first of several search warrants to obtain Shinn's banking records. The number and complexity of accounts and transactions Shinn utilized to misappropriate the funds of Oscar Dane and other clients

reasonably led and required Detective Gibbons thereafter to obtain successive search warrants authorizing the seizure of Shinn's banking records, including but not limited to, warrants that were issued during petitioner's capital murder trial proceedings, through and including May 18, 1986. (Ex. 34 at 644; Ex. 80 at 2088-90, ¶¶ 5-13.)

(11) In the midst of petitioner's trial proceedings, Shinn responded to the intensifying investigation, and the intervention of the offices of Congressman Edward Roybal, by providing a purported accounting of the money he owed Dane and the interest that had accrued. Shinn also tendered a check on behalf of Dane. Shinn's alleged accounting was false and misleading, and the proffered check was for less than the amount owed to Dane. (Ex. 35 at 1497-502; Ex. 80 at 2089, ¶¶ 10-11.)

d. Beginning shortly after Shinn fraudulently engineered his appointment as petitioner's attorney, and contemporaneous with his knowledge that he was being investigated for misappropriation of client funds, Shinn also was aware that he was being investigated for murder and arson by the office of the same district attorney who was his adversary in the prosecution of petitioner.

(1) Approximately three-and-a-half weeks after Shinn set fire to his office and claimed that a $145,000 check had been stolen from him by Linda Jones, the wife of Shinn's law partner, Lewis Jones, Mr. Jones was shot to death.

(2) Shinn reasonably believed he was a suspect in both the Jones murder case and the arson at his office. (Ex. 34 at 730-31, 1383.)

(3) Shinn was aware that he had possible, plausible motives for killing Lewis Jones including, but not limited to, eliminating witnesses to his theft and misappropriation of Dane's client funds, and/or concealing his culpability for such acts by falsely claiming Linda Jones had stolen the check with which he intended to reimburse Dane and then engineering Linda Jones's conviction for killing her husband.

(a) Within days of Mr. Jones's murder, Shinn arranged for Linda Jones, the decedent's wife, and her family, to meet with him for the ostensible purpose of advising Mrs. Jones regarding her potential exposure for prosecution in the matter of her husband's death. (Exhibit 59, Declaration of Robert Badger at 1954, ¶ 4; Exhibit 58, Declaration of Richard Badger at 1952, ¶ 4.)

(b) Shinn thereupon questioned Mrs. Jones and her family in his office for several hours regarding a wide range of issues including, but not limited to Mrs. Jones's behavior, the extent of her and her family members' knowledge of the case, as well as Mr. Jones's finances. (Ex. 59 at 1954, ¶ 4; Ex. 58 at 1952, ¶ 4.)

(c) At the conclusion of the interviews, Shinn announced that he could not represent Mrs. Jones because he had a conflict of interest. (Ex. 58 at 1952, ¶ 4.)

(d) Thereafter, Shinn exploited the information he had obtained from Mrs. Jones and her family members as part of his plan that was intended to, and did in fact, assist the prosecuting authorities in shifting suspicion away from himself and onto Linda Jones, and testified as a prosecution witness at Jones's murder trial. Shinn's

unethical and duplicitous conduct in this regard was motivated by his reasonable fear and concern of possible jeopardy to himself.

(e) As a further part of his plan and scheme to avoid any possible jeopardy in connection with his partner's murder, Shinn falsely and misleadingly maintained that he was not Lewis Jones's law partner and that he was merely Jones's tenant. (Exhibit 66, Testimony of Daye Shinn, *People v. Linda Jones*, Los Angeles Superior Court, Case No. A088857 at 1992.)

(f) Shinn feared that the detective investigating his embezzlement of client funds was gathering evidence to show that Shinn was involved in Jones's murder as a way to take the money. Shinn sought to frustrate this aspect of the authorities' investigation by refusing to authorize Detective Gibbons to review records of Shinn's numerous bank accounts. (Ex. 80 at 2088, ¶ 5.)

(4) Shinn was also reasonably aware that the police knew he had an obvious motive to commit the arson as part of his efforts to conceal his theft of client funds, including but not limited to those he embezzled from Oscar Dane; and that the suspicious nature of the fire would be evident upon investigation. (*People v. Linda Jones*, Los Angeles Superior Court, Case No. A088857, RT 1910-21.)

(a) 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. (Ex. 80 at 2088, ¶ 3.)

(b) Shinn's false claims were intended to provide him with a pretext for claiming that all of his ledgers and other accounting documents related to the Dane matter had been destroyed inadvertently, thereby necessitating further delay in responding to official investigators' inquiries while he purportedly undertook to contact various banks to obtain account information. (Ex. 34 at 644.)

(c) Expert analysis at the scene of the fire demonstrated that it was not accidentally caused by the copier, based on physical findings including, but not limited to, the fact that the side of the machine containing the electrical wiring was not burned, while the other side was. (*People v. Linda Jones*, Los Angeles Superior Court, Case No. A088857, RT 1910-21.)

(d) In the face of official inquiry, Shinn was unable to maintain a consistent story regarding the date and circumstances of the fire, and he altered his purported memory of events about when the fire occurred. (Ex. 34 at 725-26.)

e. Throughout the time Shinn purported to act as petitioner's counsel, Shinn's representation was burdened by the conflicting demands of other State Bar disciplinary matters and/or lawsuits by former clients, the factual bases of which all evidenced Shinn's lack of technical competence as an attorney as well as his inability to understand and/or his unwillingness to adhere to the most fundamental responsibilities of an attorney as embodied in the provisions of the Business and Professions Code and the Rules of Professional Conduct. (*In the Matter of Shinn*, 2 Cal. State Bar Rptr. at 107; Ex. 8 at 57-58, ¶¶ 7-10.)

(1) In April 1982, Shinn was notified that the State Bar had begun an investigation of his misappropriation of an award for more than $90,000 that Shinn had received on behalf of Rebecca and Alexander Korchin. (Ex. 34 at 1387-88.)

(2) 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. (Exhibit 68, *Steinberg, et al. v. Shinn, et al.*, Complaint For Damage For Malpractice, Los Angeles Superior Court, Case No. WEC076558 at 2000-16.)

(3) On July 26, 1983, the Korchins filed a lawsuit against Shinn for mishandling their client funds. (Ex. 35 at 1572-73.)

(4) In September of 1983, shortly after the conclusions 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. (Ex. 34 at 1391.)

(5) During the time the foregoing matters were all pending, John Kim also filed a lawsuit against Mr. Shinn for legal malpractice. (Exhibit 67, *John Kim v. Daye Shinn*, Complaint For Damages, Los Angeles Superior Court, Case No. C519627 at 1994-99.)

(a) As alleged above, Kim was another victim of Shinn's fraudulent capping scheme.

(b) In a 1982 criminal matter, Shinn contacted Kim, who already was represented by counsel, falsely represented himself as a "criminal trial specialist," and assured Kim that he had a good

defense. Shinn did not then, or at any other time, possess any Bar certification. (Ex. 82 at 2093, ¶¶ 4-6.)

(c) Consistent with the *modus operandi* of his ongoing fraudulent scheme, Shinn induced Kim to discharge his counsel of record, Edward Printemps, by falsely representing to Kim that Shinn had been retained by a group of Korean businessmen to undertake Kim's representation. (*Id.*, ¶¶ 4-5.)

(d) Kim's subsequent discovery of Shinn's fraudulent behavior exacerbated his already impaired mental state and provoked him to discharge Shinn and proceed to represent himself, after which he was convicted and sentenced to prison. (*Id.*)

(6) Shinn's unlawful and dishonest conduct in these and other cases demonstrated the accuracy of his reputation in the legal community as an unethical, unsavory blowhard who would promise his clients anything just to make a dollar, and for not understanding the rudimentary elements of the law. (Ex. 80 at 2093-94, ¶ 6.)

f. Throughout the events described in the foregoing factual allegations, and continuing through Shinn's eventual disbarment, Shinn compounded his criminal, dishonest and unethical acts of moral turpitude by continuing to pursue a pattern and practice of bad faith, dishonesty and concealment marked by conduct including, but not limited to a lack of candor and cooperation to the victims of his criminality; repeatedly providing inconsistent and contradictory versions of events; and committing repeated acts of perjury, all with the primary purpose of concealing his unlawful misconduct and avoiding criminal prosecution and professional disciplinary sanctions. (Ex. 33 at 535, 548, 575-76, 580.)

g. Shinn was reasonably and actually aware that he was acting unethically, unprofessionally and contrary to petitioner's interests throughout the periods of the foregoing described events, and intentionally, willfully and dishonestly failed to apprise petitioner, independent counsel or the trial court of the conflicting personal, financial, legal and ethical burdens that prejudicially compromised his purported representation of petitioner. (Ex. 8 at 57, ¶ 7.)

h. At all times relevant to the foregoing events, the District Attorney's office and all law enforcement agencies involved in the investigation of petitioner's and Shinn's cases deliberately, intentionally, negligently, unlawfully and prejudicially failed to inform petitioner or the trial court of the disabling conflicts of interest that burdened Shinn's purported representation of petitioner.

i. As a result of the individual and multiple instances of Shinn's active representation of conflicting interests and/or the burden of his competing, distracting and otherwise disabling and compromising personal financial, ethical and/or legal problems, Shinn abandoned and denied petitioner any assistance of counsel at each and every critical stage of the proceedings; failed at all times, from petitioner's arraignment to the commencement of trial, to undertake the steps necessary to the adequate preparation of a defense including, but not limited to failing to consult with petitioner, conduct a thorough investigation and meaningfully prepare a defense; entirely failed to subject the prosecution's case at trial to any meaningful adversarial testing; and adversely and/or prejudicially affected the adequacy of all aspects of his purported representation of petitioner. (Ex. 8 at 57-58, ¶¶ 7-10.)

(1) As also alleged with more particularity in Claim Three and incorporated by this reference as though fully set forth herein, instances and examples of the nature, impact and effect of Shinn's failings include, but are not limited to the following:

(a) Approximately three weeks after being interviewed by Detective Gibbons in the intensifying criminal embezzlement investigation that eventually led to Shinn's disbarment, Shinn sought to and did curry favor with the prosecution by inducing petitioner to confess falsely to several robbery charges. (58 RT 6248-61.)

(i) Shinn intentionally misled petitioner to believe that the defense had reached an express understanding with the prosecution that in return for Mr. Gay's confession to the robbery charges, and his testimony against his co-defendant on the capital murder charge, the prosecution would dismiss the murder charge against petitioner. (58 RT 6248-61.)

(ii) Shinn further intentionally misled petitioner to believe that if the prosecution did not consummate the agreement, any statements made by petitioner admitting participation in the robberies could not be used at trial. (58 RT 6248-61; *see, e.g.*, *In re Gay*, 19 Cal. 4th at 793-94.)

(iii) Shinn further falsely and misleadingly induced petitioner to submit to coaching by Shinn to learn the facts of the alleged robberies, and to agree to give a false, but incriminating account of petitioner's purported involvement in the crimes to the district attorney.

(iv) As a result of Shinn's false, misleading, overbearing and coercive statements and behavior, petitioner gave a false, inaccurate and unreliable confession of his purported involvement in the robberies, which

the prosecution intended to, and did in fact, introduce against him at his capital trial. (58 RT 6248-61.)

(v) But for Shinn's statements, actions and behavior in manufacturing petitioner's false confession, the prosecution would not have been able to prove petitioner's guilt for the robberies.

(vi) By so doing, Shinn acted as a second prosecutor by creating evidence that led to petitioner's conviction of robberies for which the State otherwise would not have been able to convict him, and 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. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 793-94.)

(vii) Petitioner's alleged guilt of the robberies was the centerpiece of the prosecution's theory of motive for petitioner committing the charged capital murder. (*Id.*)

(b) For the direct purpose of representing and protecting interests conflicting with those of petitioner including, but not limited to, currying favor with the prosecutor's office that was investigating Shinn for murder, arson and embezzlement, maximizing the monetary gains realized by the principles of the capping relationship and accumulating funds with which to satisfy the claims of defrauded clients, Shinn neither conducted, nor authorized, supervised or effectively utilized the results of any guilt phase investigation; and took affirmative steps to introduce and permit the introduction of evidence prejudicial to petitioner.

(i) Shinn did not retain, consult or present the testimony of any expert criminalists, forensic pathologists, mental health professional or other experts whose professional expertise and services were reasonably

necessary to conduct an independent, reliable and informed review, examination and testing of all physical evidence and testimony, and test and refute the prosecution's guilt phase theory including, but not limited to, the "pass the gun" scenario necessary to implicate petitioner.

(ii) Shinn wholly failed to undertake any independent investigation of guilt phase witnesses including, but not limited to failing to interview, cause to be interviewed or evaluate the credibility and/or strategic significance of any actual or potential percipient witnesses.

(iii) Shinn presented a *pro forma* defense to the capital murder charge by recalling and examining three marginal prosecution witnesses: Rosa Martin and Rose Perez, both of whom saw petitioner at the scene of the shooting, but did not see him firing a gun (86 RT 9773-85); and Pamela Cummings, the co-defendant's wife, who reiterated her false, misleading and self-serving claim that after the first shot was fired she saw petitioner slide across the front seat of the car, exit the vehicle and shoot the decedent. (86 RT 9787-816.)

(iv) Shinn made no effort to interview or present the readily available, reliable, credible and persuasive testimony of witnesses who affirmatively exculpated petitioner including, but not limited to Ejinio Rodriguez, Martina Jimenez and Irma Esparza, all of whom would have truthfully testified that co-defendant Cummings was the only shooter. (Exhibit 24, Declaration of Ejinio Rodriguez at 245, ¶¶ 6-8; Exhibit 27, Declaration of Martina Lizbeth Jimenez at 497, 499, ¶¶ 4, 7; Exhibit 13, Los Angeles Police Department Interview of Irma Esparza at 162-63.)

(v) Shinn made no effort to interview or present the readily available, reliable, credible and persuasive testimony of witnesses who

affirmatively exculpated petitioner, and inculpated co-defendant Cummings based on Cummings's custodial admissions that he was the sole shooter who killed the decedent. Said witnesses, who included both inmates and law enforcement officers, included but were not limited to Jack John Flores, James Edward Jennings, Michael David Gaxiola and William McGinnis, all of whom would and could have testified truthfully that Cummings made admissions and/or confessions to being the sole shooter who killed the decedent. (Exhibit 6, Declaration of John Jack Flores at 36, ¶¶ 2-5; Exhibit 32, Declaration of Michael David Gaxiola at 520-21, ¶¶ 2, 5-7; Exhibit 29, Declaration of William McGinnis at 501, ¶¶ 2, 4-5; *see, e.g.*, *In re Gay*, 19 Cal. 4th at 785.)

(vi) Following the trial court's dismissal of the count charging petitioner with the robbery of Christopher Poehlmann, who specifically did not recognize petitioner as one of the perpetrators (59 RT 6457-62), Shinn prejudicially called Poehlmann to testify that he did recognize co-defendant Cummings as a perpetrator; and then called Pamela Cummings who identified petitioner as another participant in the Poehlmann robbery. (59 RT 6462-64; 85 RT 9704-05, 9707-27.)

(vii) Shinn elicited prejudicial testimony from prosecution investigator Officer Holder that there had been no agreement or tacit understanding that petitioner's confession to the robbery charges made during plea negotiations would not be used against him; and Holder's opinion that petitioner had been truthful in confessing to the robberies, but had lied about denying his commission of the murder of the decedent. (58 RT 6254-56.)

(viii) Shinn unreasonably failed to join in co-defendant Cummings's meritorious motion to preclude the prosecution from using an photographic re-enactment of the alleged events to illustrate the State's theory for the jury that two assailants, Cummings and petitioner, shot the decedent. Because of Shinn's otherwise unexplicable failure to advocate against the prosecutor's office with whom he was attempting to curry favor, the prejudicial re-enactment was used only in front of petitioner's jury. (58 RT 6286-92; 7 CT 1861-66.)

(2) The foregoing results, impacts, effects and influences of Shinn's failure to provide any or conflict-free representation were prejudicial under any and all standards governing the complete denial of counsel at critical stages of the proceedings, a total breakdown of the adversarial system, the active representation of conflicting interests and the denial of the effective assistance of counsel.

C. CLAIM THREE: PETITIONER'S CONVICTION IS A DIRECT RESULT OF TRIAL COUNSEL'S INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner's first-degree murder conviction was rendered in violation of petitioner's rights to a fair and impartial jury, to a reliable, fair, non-arbitrary, and non-capricious determination of guilt, to the effective assistance of counsel, to present a defense, to confrontation and compulsory process, to the enforcement of mandatory state laws, and, to due process of law all as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law, because petitioner's trial counsel, Daye Shinn, rendered constitutionally deficient representation at all critical stages of the criminal proceedings.

Petitioner's conviction was the direct result of a complete breakdown in the adversarial process. As an indigent defendant, petitioner was subject to a capital trial without the assistance of counsel. Petitioner's defense attorney failed to undertake even the most minimal investigation and trial preparation and effectively deprived petitioner of any constitutionally meaningful assistance of counsel.

Petitioner's statutory and constitutional rights were irreparably prejudiced by trial counsel's failure to adequately investigate, prepare, and present a defense to the charged crimes. But for counsel's inadequate, unprofessional, and highly unethical representation of petitioner, the result of the guilt phase would have been different.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Trial counsel unreasonably and prejudicially failed to investigate and present evidence of petitioner's innocence.

a. Shinn unreasonably failed to undertake minimally adequate investigation of readily available, materially exculpatory information including, but not limited to, avenues of investigation that were or reasonably should have been, evident to any minimally qualified attorney who was familiar with the contents of the police reports counsel received in discovery, as well information provided by petitioner who alerted Mr. Shinn to numerous important witnesses.

b. Counsel's deficiencies in this regard included, but were not limited to, the failure to interview numerous witnesses whose names and locations were disclosed in police reports and whose testimony

would have exculpated petitioner. The testimony of such witnesses demonstrated that there was only one shooter, a person who did not match petitioner's description, and would have prevented the state from carrying its burden of proof. Said witnesses included, but were not limited to, the following:

(1) Ejinio Rodriguez would have testified truthfully that the "shooter was a black man who had dark skin," and this did not match petitioner's description. Mr. Rodriguez would have further testified that the other man, who was in the car had much lighter skin "was not the shooter." (Exhibit 24, Declaration of Ejinio Rodriguez at 245, ¶ 6.)

(a) Mr. Rodriguez would have testified that the "man with the much lighter skin then jumped out of the car and picked up a gun that belonged to the police officer. This was not the man who actually shot the police officer." (*Id.*, ¶ 8.)

(b) Minimal investigation would have revealed that Mr. Rodriguez was playing with his friends Shannon and Walter Roberts on the day of the shooting, and like Shannon and Walter, Mr. Rodriguez saw the shooting. (*Id.*, ¶ 3.)

(c) This fact, as well as Mr. Rodriguez's name and approximate address appear in both Shannon Roberts's and Walter Roberts's police reports, and in Shannon Roberts's grand jury and preliminary hearing testimony. (Exhibit 40, Los Angeles Police Department Interviews of Shannon Roberts at 1615; Exhibit 44, Los Angeles Police Department Interviews of Walter Roberts at 1636; 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.)

(d) Shinn never interviewed Mr. Rodriguez, thus depriving petitioner of an important exculpatory witness.

(2) Martina Jimenez had spoken to the decedent moments before the shooting, watched him as he approached the suspect vehicle, saw the shooting, and informed the police during an interview that she saw a black man near where the victim fell to the ground. (Exhibit 43, Los Angeles Police Department Interviews of Martina Elizabeth Jimenez at 1628.)

(a) Ms. Jimenez would have testified that the man she saw involved in the shooting was "very dark complected," thereby excluding petitioner as the perpetrator. (Exhibit 27, Declaration of Martina Elizabeth Jimenez at 497-99, ¶ 4.)

(b) Ms. Jimenez also would have testified truthfully that the dark skinned man "shot numerous times consecutively without stopping. He did not hand the gun to the passenger at any point." (*Id.*)

(c) The available testimony regarding the rapidity with which the entire shooting took place, would have served to undermine the prosecution's theory that there was enough time between the first and second shots for Mr. Cummings to hand a just fired gun to petitioner.

(d) If called as a witness, Ms. Jimenez would have conclusively excluded petitioner as having fired any of the shots during the offense. (*Id.*, ¶ 7.)

(3) Walter Roberts, the older brother of Shannon Roberts, saw "the driver exit the car, stand up over the officer point a small handgun [] and shoot two more rapid-fire shots at the officer." (Ex. 44 at 1636.)

(a) Mr. Roberts would have described the "driver as a male Negro, black unknown 6-0/6-1, 175, 25/30 medium complexion, 3 - 4 inch Afro, clean shaven, thin, wearing a dark blue long sleeve shirt, blue Jean pants, dark shoes." (*Id.*)

(b) The description excluded petitioner as being the shooter, and Mr. Roberts could have so testified.

(4) Gustavo Gomez would have provided testimony helpful to unraveling the state's pass-the-gun theory.

(a) Mr. Gomez could have testified that by the time he ran outside the shooting had ended; however, as he stood there, a car passed him and stopped in the middle of the street, about three houses away from his house. (Exhibit 81, Declaration of Gustavo Gomez at 2091, ¶ 1.)

(b) He watched as "a tall African American man, with a gun, got out of the car and then back in again." (*Id.*)

(c) Mr. Gomez's testimony demonstrated that, contrary to the state's theory, petitioner's co-defendant was in possession of at least one gun. (*Id.*)

(5) Linda Lee Orlik was another witness whose identity and location were readily available from discovery materials. (Exhibit 48, Los Angeles Police Department Investigation Log [regarding house to house interviews] at 1663.)

(a) Ms. Orlik could, and would have testified, that she heard "three simultaneous shots, followed by two separate shots. All of the shots were fired rapidly in a short amount of time." (Exhibit 21, Declaration of Linda Lee Orlik at 500, ¶ 3.)

(b) Such independent witness testimony would have further convinced the jurors that the shooting happened much too quickly for a gun to have been passed from one person in the back seat of a car to another person in the front seat.

(c) Petitioner's jury never received this crucial evidence that independently undermined the state's pass-the-gun theory.

(6) Mackey Como would have provided circumstantial, highly probative, information that refuted the state's theory, that the darker skinned back seat passenger did not exit the car during the shooting, which would have served to undermine the theory that petitioner shot the victim.

(a) Ms. Como lived across the street from where the shooting occurred, and she was the mother of eyewitness Gail Beasley.

(b) She would have provided important information regarding the extent of Raynard Cummings's involvement in the shooting.

(c) After the shooting, petitioner's co-defendants, Raynard and Pamela Cummings, went to Mr. Cummings's mother's house. (Exhibit 47, Los Angeles Police Department Interviews of Eula Heights at 1657; 73 RT 8178.) After this visit from her son,

Mr. Cummings's mother, Mary Cummings, paid a visit to Mackey Como, whom she had not seen in a long time.

(d) Mary Cummings's visit to Ms. Como was not a social one; instead, it lasted only about five minutes - long enough for Mary Cummings to gather information on whether Ms. Como saw the shooting. (Exhibit 49, Los Angeles County Public Defender Investigations Report of Mackie Como at 1666.)

(e) Ms. Como found Mary Cummings's visit unusual, especially given the events of the day. (Retrial 24 RT 3072; Ex. 49 at 1666.)

(f) Introduction of this testimony would have permitted counsel to argue that if Mr. Cummings did not exit the car, he had no reason to be concerned whether anyone saw him, and thus, his mother would have no reason to question Ms. Como or other neighbors whether or not they saw the shooting.

(g) No such argument was presented, and the jury was unable to come to a similar conclusion on its own because trial counsel unreasonably failed to present Ms. Como's testimony.

(7) Mary Cummings also immediately threatened her sister, Eula Heights, to falsely report her recollection of events in a manner designed to avoid incriminating Mr. Cummings as the shooter. Ms. Heights admitted that because she feared her nephew, Raynard Cummings, and her sister, Mary Cummings, she lied under oath before the grand jury. (3 Supp. CT 707-08; Ex. 47 at 1658.)

(a) Said perjury included, but was not limited to, a description of Raynard Cummings and Pamela Cummings's activities immediately after the commission of the offense.

(b) Mary Cummings's threats to Ms. Heights were part of an ongoing course of conduct designed to, and which did in fact, persuade and coerce percipient and other witnesses to change their reported recollection of events to conceal the fact that Raynard Cummings was the sole shooter and perpetrator of the murder.

(c) Said course of conduct included, but was not limited to, reviewing the pretrial testimony of witnesses including, but not limited to, Ms. Heights, and making threats against them in a successful effort to prevent them from testifying wholly or truthfully. (Ex. 47 at 1658.)

(d) Investigation and presentation of said course of conduct and witness intimidation would have led to the presentation of further evidence persuading the jury to discredit the testimony of Gail Beasley and Marsha Holt.

(e) Said evidence included, but was not limited to, the fact Marsha Holt knew Mr. Cummings since they were children, and Ms. Beasley's mother was a good friend of Mary Cummings. (Retrial 18 RT 1956, 1959.)

(f) Ms. Holt and Ms. Beasley were, therefore, very familiar with Mr. Cummings and his notoriously vicious family. (Ex. 47 at 1658; Exhibit 64, Declaration of James Cummings at 166, ¶¶ 13-14; Exhibit 65, Declaration of Darrell Cummings at 1972-73, ¶¶ 11, 13.)

(g) Ms. Holt was the only close eyewitness to the shooting who failed to ever report seeing a third, or a dark skinned, man outside of the car.

(h) With such information, a jury could understand that Ms. Holt's failure to report seeing a third man outside of the car, and both Ms. Holt and Ms. Beasley's false reports that petitioner shot the victim, were purely a function of Mary Cummings's sudden intimidating visit to the crime scene.

(8) Counsel unreasonably failed to call Robin Gay, who would have testified that, soon after the shooting, Pam Cummings told her that when the officer asked for ID "Renard [sic] said yea I've got I.D, and pulled out a gun and shot him in the neck and the officer spun around. Renard [sic] fired more shots. The officer went down and Renard [sic] got out of the car and shot him in the back." (Exhibit 46, Los Angeles Police Department Interviews of Robin Louise Gay at 1654.)

(a) Ms. Gay's testimony that Raynard bragged that he alone shot the victim and that petitioner expressly denied shooting the victim, would have served the dual purpose of presenting a witness who could affirmatively tell the jury that petitioner was innocent, and seriously impeach the testimony of Pam Cummings. (Exhibit 16, Declaration of Robin Gay at 168-69.)

(b) Ms. Gay's testimony was not subject to impeachment with prior inconsistent statements regarding the person responsible for the shooting, as was Pamela Cummings's trial testimony.

(c) Ms. Gay's testimony is highly consistent with eyewitness Robert Thompson's statement to the police and his grand

jury testimony (Exhibit 45, Los Angeles Police Department Interviews of Robert Thompson at 1641-51; Exhibit 50, Grand Jury Testimony of Robert Thompson, July 13, 1983, at 1667, respectively); Oscar Martin's statement to the police and his grand jury, preliminary hearing, and trial testimony (Exhibit 36, Los Angeles Police Department Interviews of Oscar Martin at 1597-1600; 1 Supp. CT 249; 1 CT 1714-16; 67 RT 7361-62, respectively); as well as Pam Cummings's statements to Debbie Warren (3 Supp. CT 663); and Ms. Cummings's statement to her sister, Debra Cantu immediately after the shooting, that the back seat passenger was the sole shooter. (Retrial 28 RT 3747-52.)

(9) Counsel unreasonably failed to call any of the witnesses to co-defendant Raynard Cummings's confessions and admissions made soon after he was arrested.

(a) From July 1983 through the capital trial, Mr. Cummings admitted to several inmates at the Los Angeles County Jail that he alone was responsible for the murder of Officer Verna.

(b) Reports of these confessions were provided to Shinn, who failed to interview or call any of the identified, readily available witnesses to testify on petitioner's behalf. No tactical reason justified counsel's failing in this regard.

(c) The witnesses counsel failed to interview or call at trial included, but were not limited to, the following:

(i) David Elliot and Norman Pernell, whose names appeared on a list of exculpatory witnesses, and were both described as having heard Mr. Cummings confess to being the person solely responsible for the

shooting of Officer Verna (Exhibit 61, Identification of Witnesses Currently In Custody At Los Angeles County Jail, at 1957.)

(ii) Jack John Flores, to whom Raynard Cummings confessed that he alone shot Officer Verna, and described to Mr. Flores how he first shot the victim from inside the back seat of the car, then exited the back seat through the driver's door and continued shooting (Exhibit 6, Declaration of Jack John Flores at 38-40.)

(iii) Michael David Gaxiola, to whom Cummings made a detailed confession including, but not limited to, incriminating himself and exculpating petitioner:

> Cummings told me the officer then again pointed with his left hand at Cummings, who was in the rear driver's seat of the car, and asked him for identification. Cummings told me that all at once he yelled "I've got ID for you," or something to that effect, and fired his gun at the officer. Cummings said he shot the officer in the upper portion of his body, perhaps a couple of times, 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. (Exhibit 32, Declaration of Michael David Gaxiola at 520-22, ¶ 5.)

(iv) No tactical reason existed for trial counsel's failure to present this exculpatory testimony to petitioner's jury, or to follow up on the police report counsel was provided regarding this conversation between Mr. Gaxiola and Raynard Cummings that occurred on or around June 11, 1984. (Exhibit 14, Los Angeles Police Department Interviews of Michael Gaxiola at 165.)

(v) Mr. Gaxiola would have been willing to present this highly exculpatory testimony to petitioner's jury. (Ex. 32 at 520-22, ¶ 5.) Again, petitioner's jury was denied essential evidence that would have forced them to acquit petitioner of the murder charge.

(vi) Counsel unreasonably failed to investigate inmate Alfred Montes's report that Cummings bragged about the fact "[he] killed a cop" who had been awarded a medal for valor. (64 RT 7008.)

(vii) Trial counsel's failure to investigate and research much of the above clearly exculpatory statements prevented him from pursuing Mr. Montes's vague response that Mr. Cummings had "said a few things," when asked by Cummings's counsel if his client had ever confessed to him. (64 RT 7014.)

(viii) Mr. Cummings's counsel did not follow-up to clarify Mr. Montes's answer, and Shinn's unreasonable failure to investigate left him ignorant of Mr. Montes's much stronger potential testimony. Shinn therefore declined to cross-examine this witness to elicit this exculpatory statement from him. (64 RT 7033.)

(ix) James Edward Jennings would have testified, *inter alia*, that Cummings "stated that he had a .38 cal. revolver hidden between his legs, and when Verna asked him, Raynard, if he had I.D., Cummings stated, [']I've got I.D.,['] pulled the gun from between his legs and shot Verna twice in the upper body, once in the neck or shoulder area, and once in the upper body area...Verna then spun around, at which time Cummings stated he shot Verna in the back." (Exhibit 5, Los Angeles Police Department Interview of James Edward Jennings at 35.)

(x) Mr. Jennings also would have testified that Cummings continued to make confessions and incriminating statements during his capital murder trial, including, but not limited to, admitting that he was solely responsible for Officer Verna's death, and repeatedly admitting that petitioner was innocent of the crime, because he alone killed the victim. (*Id.*)

(xi) Gilbert Anthony Gutierrez, a witness called by the prosecution, testified, consistent with his police statement, that not only did petitioner deny shooting the victim, but also in a separate conversation, Mr. Cummings took full responsibility for murdering Officer Verna (Exhibit 63, Los Angeles Police Department Interview of Gilbert Anthony Gutierrez at 1960-62; 64 RT 6984, 6953-54, respectively.); and further testified that Cummings confessed to being the sole shooter to just about anyone who would listen (64 RT 6988-89).

(xii) A reasonably timely interview of Mr. Gutierrez, and investigation of his statement would have led any minimally competent attorney to further investigate, evaluate, and present the testimony of many other inmates who heard Mr. Cummings's confessions, and whose credible, consistent testimony would have given the jury a highly reasonable doubt that petitioner was guilty of shooting the victim.

(xiii) Trial counsel also failed to investigate Raynard Cummings's confessions and admissions to Deputy William McGinnis, including, but not limited to, his statement: "Ya well I put three in front of the motherfucker and he wouldn't have got two in the back if he hadn't been running – the punkass coward motherfucker." (Exhibit 60, Los Angeles

County Sheriff's Department Memorandum Re Raynard Cummings at 1956.)

(xiv) The context and substance of Cummings's admissions made "clear to me then as it is now that that Cummings alone pulled the trigger and was the sole person responsible for killing Officer Verna." (Exhibit 29, Declaration of William McGinnis at 501, ¶ 5.)

(xv) Shinn's failure to conduct even a minimal investigation prevented the jury from hearing powerful, credible testimony regarding petitioner's innocence from a law enforcement officer.

(xvi) Trial counsel was well aware that Cummings had confessed to shooting the victim – Shinn was in possession of a police report written by Deputy William McGinnis, and he was present when Deputy McGinnis gave testimony about Cummings's confession at a hearing pursuant to Evidence Code section 402. (Ex. 60 at 1956; 65 RT 7037 et. seq.)

(xvii) Petitioner was denied a strong defense as a result of Mr. Shinn's failure to interview, and call as a witness, Deputy McGinnis. The deputy's testimony also would have given even greater credibility to the inmate witnesses who did testify, and should have testified, to Cummings's confessions to them. Shinn had no tactical reason for failing to present it.

c. Trial counsel unreasonably failed to interview impeachment witnesses who were readily available and who could have provided extensive impeachment evidence. Counsel's unreasonable failure to undertake even a minimal investigation, prejudicially prevented him from uncovering and presenting significant evidence that would have seriously undermined the credibility of the state's case against petitioner including, but not limited to, the following:

(1) Minimal investigation and interviews of Robert and Cecilia Thompson would have provided trial counsel with significant impeaching evidence based on the traumatic impact witnessing the shooting of Officer Verna had on Robert Thompson (*see, e.g.*, 2 Supp. CT 429 [recess called when Mr. Thompson breaks into tears during his grand jury testimony]), coupled with evidence of the extent to which Mr. Thompson's pre-existing psychological and emotional state affected his memory, ability to recall, and susceptibility to suggestion. Said information and evidence that Mr. Thompson's mental state and emotional well-being were severely compromised before, and had further decompensated after the offense, included, but was not limited to, the following:

(a) Mr. Thompson was a Vietnam veteran, and witnessing the shooting of a man in uniform caused him to experience sudden and unexpected flashbacks of the shooting and his war experiences. (Exhibit 85, Declaration of Cecilia Thompson at 2101, ¶ 8.)

(b) After witnessing the shooting, in an attempt to "try and forget what he had seen," Mr. Thompson's alcohol consumption increased to the point where "all he wanted to do was drink beer all night and then sleep." (Ex. 85 at 2100, ¶ 5.)

(c) The psychiatric symptoms Mr. Thompson manifested after witnessing the shooting – hypervigiliance, agitation, jumpiness, increased alcohol and tobacco consumption, flash backs, sleep disturbance – made his later statements regarding the shooting highly unreliable. (Ex. 85 at 2100-01, ¶¶ 4-8.)

(d) The police exploited Mr. Thompson's avoidant behaviors and other psychological symptoms he experienced from

memories of the shooting by persuading him to adopt a different recollection of events that was less exculpatory of petitioner than Mr. Thompson's independent, uncontaminated recollection, and thereafter coached him for hours at a time to help him memorize his statement. (*Id.*, ¶ 6.)

(e) Introduction of this material evidence would have led petitioner's jury to reject the reliability of Mr. Thompson's later manufactured "memory" that he saw the light-skinned man rather than only the darker complexioned man shoot the victim.

(2) Trial counsel's failure to interview known, testifying witnesses, prevented him from introducing readily available evidence to challenge the reliability of Gail Beasley's memory and overall credibility including, but not limited to, the following:

(a) Ms. Beasley went into "shock" when she heard the gunfire, and observed events as if "everything was happening in slow motion." (Exhibit 75, Declaration of Gail Blunt at 2071, ¶ 3.)

(b) Her description of he mental state at the time is consistent with a dissociated, unconscious state:

> By the time I went outside, *my mind had gone numb. I saw things, but did not really recognize them*; I knew I was supposed to be scared, but I was unable to feel anything. Even though it was still daylight outside, I remember the light being very dim... The night of the shooting I spoke to a number of police officers and gave them a statement. I told the police that my memory was still foggy from the shock of what I had witnessed, but they wanted me to tell them what I had seen, anyway. I was still very shaken up and *when I gave my statement, my memory was still blurry*. (*Id.*, ¶¶ 4-5 (emphasis added).)

(c) Ms. Beasley's reported recollection of what she thought she saw was influenced by conversations with other eyewitnesses who informed her they all saw something different. (Ex. 75 at 2072, ¶ 6.)

(d) Trial counsel's failure to interview Ms. Beasley resulted in petitioner's jury relying on the testimony of a witness who has now admitted that she could not consistently remember a single version of events, even with the assistance of the police. (*Id.*, ¶ 9.)

(3) Trial counsel failed to investigate and present numerous readily available bases for impeaching Shannon Roberts including, but not limited to, the facts that:

(a) At the time of the shooting, he was eleven years old; cared for by a non-parent guardian; and, he simply wanted to "please the police officers." (Exhibit 23, Declaration of Shannon Roberts at 243, ¶ 8; Exhibit 83, Declaration of Shannon Roberts at 2095-96, ¶¶ 4, 6.)

(b) The police took full advantage of this young boy's willingness to please and "coach[ed him] into making a statement." (Ex. 23 at 243, ¶ 8.)

(c) The police intentionally made extraordinary efforts to make Mr. Roberts feel special for the purpose, and with the result of, inducing Mr. Roberts to give the statements and testimony the police fed him. (*Id.*, ¶ 10.)

(d) The police detectives told Mr. Roberts what they believed happened, and psychologically, emotionally, and

otherwise rewarded Mr. Roberts's adoption of their version of events, despite it not being what Mr. Roberts recalled. Said rewards and inducements provided to Mr. Roberts in return for identifying petitioner as the shooter, even though he did not know who shot the victim included, but were not limited to, treating him to attendance at a Dodger's baseball game. (Ex. 83 at 2095-96, ¶¶ 5-7.)

(e) Investigation and introduction of such evidence would have led the jury to credit Douglas Payne's testimony that before trial, he saw the prosecutor and Mr. Roberts together, looking into a courtroom at petitioner (86 RT 9828-29); as well as Shinn's closing argument that Mr. Roberts's identification of petitioner as the shooter was coached by the state.

(f) Timely interview of this important witness would have further led the jury to conclude that Mr. Roberts did not know who shot the victim, he just knew that if he said petitioner shot him that the police were nice to him. (Ex. 83 at 2095-96, ¶¶ 5, 6.)

(4) Timely interview of Don Anderson would have enabled minimally competent counsel to introduce evidence irreparably impeaching the credibility of Marsha Holt, one of the prosecution's key eyewitnesses including, but not limited to, the following evidence:

(a) Ms. Holt did not see the shooting or any involvement by petitioner in the shooting.

(b) Ms. Holt explicitly admitted that "she didn't see who shot the police officer, she just heard gunshots" (Exhibit 20, Evidentiary Hearing Testimony of Donald Anderson (1996) at 223.)

(c) Mr. Anderson was Ms. Holt's husband at the time and had been specifically identified by petitioner as someone trial counsel should interview and call as a witness. (Evidentiary Hearing 2 RT 479.[1])

(d) Trial counsel neither called Mr. Anderson to testify nor even interviewed him. (Ex. 20 at 224.) Petitioner's jury, therefore, was left with the fatal misimpression that Ms. Holt actually witnessed petitioner shoot the victim.

(e) Trial counsel's inexcusable failure to interview Mr. Anderson and present evidence of Ms. Holt's uncontested false statements and perjured testimony implicating petitioner contributed greatly to petitioner's erroneous murder conviction.

(5) Minimal investigation, including an interview of Richard Delouth, would have uncovered vital information that undermined the reliability and credibility of two of the state's key witnesses against petitioner including, but not limited to, the following:

(a) Both Marsha Holt and Gail Beasley were very well-known in the neighborhood in which the shooting occurred as drug users and were especially well-known to the local drug dealers. (Exhibit 79, Declaration of Richard Delouth at 2084-85, ¶¶ 12-14.)

(b) At all times relevant, Richard Delouth was heavily involved in drug sales, and was well-acquainted with the extensive drug habits of two of his most frequent customers, Marsha Holt

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[1] All future references to the Evidentiary Hearing Reporter's Transcript will be denoted with "EH."

and Gail Beasley. (Ex. 79 at 2085, ¶ 13; Exhibit 19, Declaration of Richard Allen Delouth, Junior at 201, ¶ 14.)

(c) Delouth would have credibly testified that, "like clockwork, both Marsha and Gail would be constantly high beginning at the first of each month. Because both Marsha Holt and Gail Beasley had children, they received money from welfare around that time." (Ex. 79 at 2085-86, ¶ 16.)

(d) This witness could have also completed the impeachment picture depicting Ms. Holt and Ms. Beasley as highly unreliable witnesses by connecting the last two damning dots: "I know that both Gail and Marsha claimed to have seen an officer shot to death in the beginning of June 1983. Since they would have had their welfare checks by then, it would have been very unusual if both of them were not either high or coming off a high when the officer was shot." (Ex. 79 at 2085-86, ¶ 16.)

(6) Trial counsel's failures unconstitutionally and prejudicially prevented the jury from having access to testimony that completely discredited the reliability of the state's key witnesses. Shinn's failure to undertake even the minimal investigation discussed above - by simply following-up on witnesses identified in police reports and pretrial hearings - fell below the standard of care for a misdemeanor case. Such representation in a capital case violates the most basic tenets of constitutional law and legal ethics.

d. Trial counsel failed to consult with necessary experts in order to present a defense to the charged crimes by presenting readily available and credible evidence to explain 1) why petitioner could not have been the shooter, 2) why some eyewitnesses believed they saw him shoot

the victim, and 3) why petitioner did not leave his co-defendant after the shooting. Reasonable and timely consultation with the appropriate experts would have enabled counsel to present evidence the jury would have found credible and worthy of belief in understanding why, despite contrary eyewitness testimony, it was virtually impossible for petitioner to have shot the victim; why the memories of the prosecution's key eyewitnesses were highly unreliable; and, how extreme psychological factors prevented petitioner from trying to escape from his murderous co-defendant including, but not limited to, the following:

(1) The confidence of a witness in the memory of an event is often unrelated to the accuracy of the memory (Exhibit 71, Testimony of Dr. Elizabeth Loftus, *People v. Patrick Bruce Gordon*, California Court of Appeal, Third Appellate District at 2032-2033, 2037-2038), and a variety of factors demonstrate the weaknesses in eyewitness testimony, in general and specifically, the reasons why the prosecution's key witnesses testimony was highly unreliable in petitioner's case.

(a) Post-event information often interferes with and colors the memories of eyewitnesses. (Exhibit 7, Declaration of Elizabeth Loftus, Ph.D. at 49-52; Ex. 71 at 2029-31, 2048-49.) Thus, for example, media coverage of a crime can affect a witness's memory of an event.

(i) The media coverage of the shooting and petitioner's trial was extensive. (*See generally* 4 CT 1103 [Notice of Motion for Change of Venue or Dismissal]; 5 CT 1155 [Notice of Motion for Protective Order Against Publicity].) In particular, petitioner's photograph received exceptional attention. In a June 8, 1983 news article about the shooting, a

large photograph of petitioner – and only petitioner – is centered in the middle of the article; whereas, significantly smaller photos of each of his co-defendants are placed at the bottom of the article. (Exhibit 70, News Article, *Officer's Killing recounted, Five Arraigned on Variety of Charges in Case*, Los Angeles Times (June 8, 1983) at 2018.) Such media coverage made petitioner's photograph much more memorable, and also served to suggest that he was the most culpable party.

(ii) Several key prosecution witnesses frankly admitted that media coverage had affected their memory of the shooting.

(iii) Robert Thompson admitted that his memory of the shooting had been corrupted by the extensive media coverage it received. (2 Supp. CT. 438; 3 CT 689.)

(iv) Gail Beasley, also, acknowledged that the extensive media coverage affected her ability accurately to recall what she had witnessed. (1 CT 1869-70.)

(v) Marsha Holt was also influenced by exposure to media coverage. (68 RT 7563-65; 1 CT 1787-89.)

(2) Other post-event information or circumstances affected witness perception in this case including, but not limited to witness exposure to prejudicial post-event information that was intentionally and purposefully engineered by the state.

(i) Shannon Roberts could not identify the shooter until prosecuting officials pointed out who they believed was the shooter, just prior to Roberts's testimony at trial. (Ex. 83 at 2096, ¶ 9.)

> As far as I knew, by the time I testified at Mr. Gay's trial, I had not seen the shooter since the day of the crime. Before I

> entered the courtroom to testify at Mr. Gay's trial, the detectives asked me if I could see Mr. Gay in the courtroom. I could not identify him, so they had to point him out to me, and they told me that he was the shooter. Later, while I was testifying, I was asked if I could point out the man I had seen. I pointed to the man the officers had shown me before I entered the courtroom. If it had not been for the detectives, I would not have identified Kenneth Gay as the shooter, because I was not sure what the shooter looked like. (*Id.*)

(ii) Robert Thompson offered several different versions of what he saw. He reported his original version, in which he identified Cummings as the sole shooter, to Detective Lindquist the night of the shooting and testified to the same version before the grand jury. His story changed several times, and became consistent with the prosecution's theory only after he "walked through" the state's scenario with police officers. (68 RT 7609-10.)

(3) Discussions among witnesses contaminated and altered the memory of those same witnesses. (Ex. 7 at 52.) Gail Beasley admitted that the eyewitnesses who assembled on Hoyt Street to wait for the police to take them to the line-up, on June 6, 1983, openly discussed their recollections of the event and who they believed shot the officer. (Ex. 75 at 2072, ¶ 6.)

(4) Eyewitnesses often unconsciously include someone they merely observed at the scene of the crime in their recollection of the actual commission of the crime. (Ex. 7 at 53.)

(a) Marsha Holt and Gail Beasley had an opportunity to see petitioner at the scene of the shooting, only after the

shooting had ended and he was retrieving a gun from near the officer's body.

(b) Particularly in light of Ms. Beasley's description of the shooter as wearing the clothing worn by Cummings and putting aside their motive to lie out of fear of Mary Cummings, seeing petitioner with a gun in his hand, and near the body of the fallen officer, provides an innocent explanation why the witnesses may have thought they saw petitioner shoot the officer. (*Id.*)

(5) Witnesses tend not to remember violent events as well as nonviolent events. "Violence tends to produce an amnesic effect." (Ex. 71 at 2037.) The killing of the police officer was unquestionably violent, but the jury was given no testimony that the event's very violence might have skewed the memories of those who witnessed it.

(a) Gail Beasley clearly experienced this "amnesic effect." Ms. Beasley recalls: "The noise of the gun startled and surprised me. When I looked out the window and saw a man shooting at the officer, it felt like my mind and my body froze. I could not believe what I was seeing... The night of the shooting, I spoke to a number of police officers and gave them a statement. I told the police that my memory was still foggy from the shock of what I had witnessed, but they wanted me to tell them what I had seen, anyway. I was still very shaken up, and when I gave them my statement, my memory was still blurry." (Ex. 75 at 2071, ¶¶ 2, 5.)

(b) Thereafter, under the coercive pressure of Mary Cummings, Ms. Beasley continually altered her purported recollections to falsely and unreliably implicate petitioner. (Ex. 47 at 1658.)

(6) Frequent drug use has a deleterious effect on the brain's ability to correctly code and recall information. That two of the prosecution's key witnesses were heavy, habitual drug users around the time of the shooting and would have been under the influence pursuant to their habit and custom at the time of the crime, casts grave doubt on the reliability of their testimony.

(a) Around the time of the crime, both Gail Beasley and Marsha Holt were well known in their neighborhood for their drug use. (Ex. 79 at 2084-85, ¶¶ 12-14.)

(b) Richard Delouth was well familiar with "Marsha's drug use because I was a drug dealer and sold drugs to her. We also did drugs together. I know she bought drugs from other people as well, because she often could be found hanging out around the Pierce Projects.... Marsha was living with my aunt when I went to jail on December 24, 1982. I sold drugs to Marsha Holt and smoked crack with her until the time I went to jail." (*Id.*, ¶¶ 13-14.)

(c) Mr. Delouth also knew "Gail Beasley since at least the mid 1970's. Like her friend Marsha Holt, Gail was a heavy drug user. Gail used PCP, crack, and sherm. As with Marsha, I sold drugs to Gail and sometimes got high with her. By the time I went to jail in December 1982, Gail had a reputation not only of being a crackhead, but a crackhead who was willing to have sex for drugs when she had no money. Gail's drug habit was so bad, she would bring her young daughter with her to buy crack." (*Id.*, ¶ 14.)

(d) As one of their drug dealers, Mr. Delouth knew that "[l]ike clockwork, both Marsha and Gail would be constantly

high beginning at the first of each month. Because both Marsha Holt and Gail Beasley had children, they received money from welfare around that time. I know that both Gail and Marsha claimed to have seen an officer shot to death in the beginning of June 1983. Since they would have had their welfare checks by then, it would have been very unusual if both of them were not either high or coming off a high when the officer was shot." (Ex. 79 at 2085-86, ¶ 16.)

(e) Ms. Holt and Ms. Beasley were clearly extended and heavy drug users around the time of the shooting. Whether they were under the direct influence of drugs at the time they witnessed the shooting, is a factor that goes only to the degree of their impaired ability to recall events. Their heavy drug use, in combination with the other factors that affected the reliability of their ability to reliably encode and recall what they had seen, is sufficient evidence to seriously call into question the reliability of their memories.

e. 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 Mr. Cummings after the shooting, and/or negated the *mens rea* necessary to prove the charges against petitioner.

f. 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.

(1) The authorized expert mental state evaluation was not commenced until the conclusion of the guilt phase, and was at all times contemplated and pursued with the working assumption that a death verdict was a foregone conclusion. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 795.)

(2) Shinn did not undertake any investigation of the social and medical history evidence necessary for a complete and reliable mental health evaluation, and did not give his investigator any specific instruction or supervision regarding any such investigation.

(3) No reasonably competent attorney representing a criminal defendant facing the death penalty would have imposed the limitations, both financial and otherwise, on an expert that Shinn imposed on the experts in petitioner's case. (Ex. 8 at 58, ¶¶ 9-10.)

(4) A professionally adequate investigation of potential guilt phase mental state defenses, based on the readily available evidence, would have produced substantial, reliable evidence that petitioner suffered from major mental illnesses and symptoms including, but not limited to, dissociation; PTSD (post-traumatic stress disorder); organic brain dysfunction, including but not limited to, an attention-concentration deficit and learning difficulties; mood disorders; a substance abuse disorder; as well as a seizure disorder originating in the temporal and limbic areas of his brain. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 803-04.)

(5) Consideration of such data by a minimally qualified forensic psychiatrist or other appropriate mental health professionals would have enabled any minimally competent attorney to present the guilt phase jury with credible, reliable and persuasive medical testimony that petitioner's mental impairments made him particularly susceptible to the influence of his co-defendant, Raynard Cummings, a highly aggressive, controlling individual, and that, under the circumstances surrounding the shooting of the decedent in this case, including the situation of grave danger, petitioner's impairments would likely overwhelm his tenuous ability to engage in rational decision-making. (*See, e.g.*, *In re Gay*, 19 Cal. 4th at 805.)

(6) More particularly, a reasonably competent mental state evaluation would have led to a reliable, credible, admissible and persuasive medical conclusion that at the time of the alleged offenses, in the company of Raynard Cummings, a person known for aggression and violence, petitioner would submit, without consciously choosing, to the explicit and implicit commands of the aggressor, and function without purposive, specific intent or awareness of the nature of his actions.

(7) Such reliable medical expert opinion evidence could have supported a reasonable doubt that petitioner harbored any requisite *mens rea* at the time of the shooting.

(8) Unconflicted counsel would have undertaken an investigation and consideration of such evidence as a prerequisite to making an informed and intelligent selection from among the reasonably available potentially meritorious defenses.

g. 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." (Exhibit 26, Direct Testimony of David Foster, M.D. at 426, ¶ 55a.)

(1) At the time of the offenses and the trial petitioner suffered "from dissociation, residual symptoms of PTSD (post-traumatic stress disorder), impairments due to organic brain dysfunction including, but not limited to, an attention-concentration deficit and learning difficulties, a mood disorder, and by history, psychoactive substance abuse disorder. Petitioner suffered from these impairments, the symptoms of which heightened and converged with devastating impact on his behavior and functioning, at the time of the crime for which he was convicted. (Ex. 26 at 404-29.)

(2) Petitioner presents symptoms of brain dysfunction, attentional and concentration deficits, clinical signs consistent with learning disorders, trauma, dissociation, and mood disturbance. These symptoms have been present over a long period of time and continue to affect petitioner's behavior and functioning. (*Id.*)

(a) Petitioner has long suffered from a dissociative disorder. The dissociate experiences occurred, not only when

petitioner was beaten by his father, but also when he witnessed similar frightening, traumatic events. (*Id.* at 417-18, ¶¶ 33-34.)

(b) His dissociative episodes are preceded by physical sensations including dizziness or lightheadedness, anxiety and weakness, tightness of the chest, shortness of breath, racing heart, nausea, and weakness of his limbs. These sensations are consistent with dissociation and anxiety disorders. (*Id.* at 418-19, ¶ 37.)

(c) Petitioner stated that he experienced the same sense of detachment and unreality during Cummings's commission of the homicide as he felt during beatings by his father. During the shooting, petitioner reported that he was almost in a dream state. (*Id.* at 419, ¶ 38.)

(3) Petitioner suffered extraordinary physical, and emotional, abuse during his formative developmental years. As a result of this abuse, petitioner manifests symptoms associated with, and diagnostic of, post-traumatic stress disorder as identified in the DSM-III, which was in use at the time of petitioner's offense and trial. (*Id.* at 426-30, ¶¶ 56-64.)

(a) In light of petitioner's abuse history, it is clinically significant that Raynard Cummings is a highly aggressive, threatening, and controlling individual. (Ex. 79 at 2084, ¶ 10; Ex. 74 at 2068-70, ¶¶ 5, 7.) The two men were an unlikely pair; one of petitioner's friends recalls that he was "surprised" to find that petitioner and Cummings were friends because of Cummings's "temper, his violence." (Ex. 19 at 198-99, ¶ 4.]

(4) Petitioner also suffers from the incapacitating effects of mood symptoms, also known as a major affective disorder. (Ex. 26 at 436-37, ¶ 88.)

(a) Petitioner's major affective mood disorder is characterized by periods of clinical depression, manic activity, or both, which significantly interfere with occupational or social functions, and are associated with lability of mood, delusions, anxiety, irritability, excessive concern with physical health, increased emotionality, and substance abuse. (*Id.*)

(b) Petitioner's mood disorder has a genetic link, as indicated by the presence of a similar disorder in petitioner's father and at least one sister. (*Id.*, ¶ 89.)

(5) Petitioner's multiple disabilities are the result of a previously undiagnosed disturbance in the functioning of his brain. Both family history and head injuries suffered by petitioner suggest the existence of an organic brain disorder. (Ex. 26 at 448, ¶ 111.)

(a) The location of the head injuries, in the "association areas," indicates damage that results in difficulty integrating experiences. (Ex. 26 at 452, ¶ 120.)

(b) Petitioner functioned very poorly under overwhelming stress and his judgment, decision-making ability, and cognitive abilities appeared to be seriously impaired. (*Id.*)

(c) Petitioner has a documented attention-concentration deficit, which is strongly indicative of damage in the frontal lobes of his brain. (Ex. 26 at 452-53, ¶ 121.)

(6) Petitioner also suffers from a seizure disorder originating in the temporal and limbic areas of his brain. (Ex. 26 at 453-55, ¶¶ 122-25.)

(7) The effects of psychoactive substance abuse also seriously affect petitioner, a problem reflected in a family history remarkable for extensive drug abuse in multiple generations and various branches of the family. (Ex. 26 at 456, ¶ 130.)

(a) The use of alcohol and marijuana during the developmental period can permanently alter the development of a child's brain, causing both neurological and psychological damage. (Ex. 26 at 457, ¶ 132.)

(b) Petitioner's use of drugs as a form of self-medication combined with his neuralgic defects and residual symptoms of post-traumatic stress disorder to cause unusually disordered behavior and functioning. (Ex. 26 at 460, ¶ 140.)

(8) Petitioner has consistently denied committing, or being a willing participant in, the capital crime for which he was convicted. Compelling psychiatric evidence exists that support his innocence and demonstrate that he was not a willing participant in the event. The series of events at issue in his capital trial occurred during a particularly disordered and impaired period of his life, and his relationship with Raynard Cummings was significant from a psychiatric standpoint. (Ex. 26 at 460-461, ¶ 141.)

(a) Between approximately March 13, 1983, when petitioner was released from prison, and June 4, 1983, when he was arrested for the capital crime, petitioner was beset by a series of unusually pressing and disorienting psychosocial stressors, which together made him much more vulnerable to manipulation and psychiatric decompensation than was the case at other times in his life. (*Id.*)

(b) As discussed above, petitioner has inherent impairments in the executive functions of his brain, which control his ability to plan, initiate, understand, inhibit and control his behavior. This dysfunction would be exacerbated by a variety of factors, including psychoactive substance abuse, symptoms of PTSD, depression and/or hypomania and severe psychosocial stressors. (*Id.*, ¶ 143.)

(c) Petitioner had gone to prison as a teenager, and emerged a 25-year-old man. He had few job skills, and the disadvantage of limited education and very poor academic skills. Petitioner was still suffering the effects of a job injury incurred before he went to prison. He lacked a means of support, and he lacked any meaningful opportunity for gaining employment and independence, both of which increased the stress of this enormous change in his life.

(d) Petitioner had been incarcerated during a time of life when most people are developing the skills that will allow them to become independently functioning adults. (*Id.*, ¶ 144.)

(e) Following his release from prison in 1983, and as a means of self-medication to ameliorate his psychiatric symptoms, petitioner began injecting large amounts of cocaine and heroin. Because the injected forms of these drugs immediately enter the bloodstream, they are much more powerful and addictive than when ingested other ways. (Ex. 26 at 462, ¶ 146.)

(f) In the weeks immediately preceding the shooting, petitioner was using a combination of cocaine and heroin. This combination was particularly devastating for petitioner - the cocaine

ensured that he would stay awake and active for long periods, while the heroin served to ameliorate the "crash" that might otherwise result after an extended period of cocaine use. (Ex. 26 at 462-63, ¶ 147.)

(g) Petitioner, like others who use both cocaine and heroin, did not suffer the physical effects that normally put a natural end to a "run" of drug use; thus, he was able to keep using the drugs. These drugs, however, still severely affected his behavior, mental functioning, and brain chemistry. (*Id.*)

(h) Users of cocaine and heroin suffer extremely impaired judgment, but they are unlikely to recognize that they are impaired, particularly since they often do not suffer the uncomfortable physical effects of heavy drug use until they stop using the drugs. As would be expected, after his arrest, petitioner experienced highly uncomfortable withdrawal symptoms, including nausea and fever-like complaints, and he felt somewhat mentally confused for weeks thereafter. (*Id.*) The heightened symptoms of petitioner's mood disorder during this period of time may have contributed to his substance abuse, which is often a means by which such patients attempt to self-medicate and relieve symptoms, particularly of depression and anxiety. There is clear evidence that petitioner was depressed and anxious in the months before the crime; his suicidal thoughts just two months before his arrest and suicide attempt are documented in a parole mental health evaluation.

(i) The anecdotal evidence also suggests an exacerbation of manic symptoms, including hyperactivity, decreased need for sleep, elevated mood, lack of judgment, impulsive actions, and excessive involvement in activities with a high potential for painful consequences.

Ironically, self-medication of mood symptoms with drugs such as those used by petitioner during the period around the capital offense may actually increase the severity of those symptoms. (Ex. 26 at 464, ¶ 151.)

(i) When a person whose brain functions abnormally uses drugs and alcohol, the brain experiences feedback distortion.

> Research available at the time of trial could have provided powerful evidence that, at the time of the murder, petitioner experienced severe, abnormalities in neurotransmitter systems inside his brain caused by drug and alcohol ingestion, withdrawal from cocaine, and the triggers of trauma he had experienced and was expecting. This imbalance in the brain chemicals that stimulate different parts of the brain were highly likely to leave him in a dream-like trance, unable consciously to control his behavior. The best evidence indicates that given petitioner's baseline physiology, depressed state, and use of marijuana (and perhaps alcohol and heroin), he would have chemical imbalances present, particularly in the levels of serotonin and glutamic acid in his brain. (Ex. 26 at 463-64, ¶¶ 148–49.)

(j) A person in such a state feels like he is acting within a dream. The person is likely to act like a robot that is programmed to act in response to primitive "fight or flight" or "going limp" programs. Under such circumstances, one's movements are largely dictated by the brain's programmed response. Under the influence of unrelenting symptoms, one has limited, if any, conscious ability to determine what is real danger and what is not. (*Id.*, ¶ 150.)

(k) Petitioner's residual symptoms of PTSD include a vulnerability to respond automatically to stressors. This in turn causes an unpremeditated "fight or flight" behavior or paralysis of action

and an increased susceptibility to follow the suggestions or commands of others. After having lived his entire life in a state of hyperalertness against danger, and then finding himself in a situation where another passenger in the car suddenly began shooting at a police officer, petitioner's brain was primed to respond with automatic aggressive, "go limp" or escape responses that were outside his conscious control. (Ex. 26 at 465, ¶ 153.)

(l) Thus, petitioner's present account of the crime is significant and is entirely consistent with these response mechanisms. He describes the events as unreal, seeming to occur in slow motion, and his internal experience during the crime was qualitatively "exactly" like when he experienced his father's severe beatings. In recounting these events, petitioner appears clinically to relive them, describing vividly such details as the unexpected concussion of the gun and his responses as the scene unfolded. His account is clinically consistent with the types of flashbacks that are experienced by trauma victims. (*Id.*, ¶ 154.)

(m) From a mental health standpoint, petitioner's conditioned passivity made it highly likely that in a situation of grave and sudden danger, in the company of a person known for aggression and violence, he would submit, without consciously choosing, to the commands of the aggressor. Petitioner's other impairments—the heightened symptoms of his mood disorder, the disorienting effects of trauma symptoms, his attention-concentration deficit, and the disabling effects of his psychoactive substance abuse disorder—likely overwhelmed his tenuous ability to engage in rational decision-making, even after the immediate stress of the moment had passed. (Ex. 26 at 465-66, ¶ 155.)

(9) Had Shinn consulted with a qualified mental health expert about petitioner's mental state at the time of the crime, the jury would have understood that petitioner's psychiatric profile seriously affected and controlled his behavior and functioning at the time of the crime and thereafter. (Ex. 26 at 466-67, ¶¶ 156-58.)

2. Trial counsel unreasonably and prejudicially failed to consult or arrange for a competent criminalist to conduct gun shot residue (GSR) analysis on the clothing worn by petitioner and his co-defendant at the time of the offense.

a. After virtually each of the six shots fired, the fired gun emitted a voluminous cloud of smoke, through which the shooter walked as he pursued the decedent. (*See, e.g.*, 3 CT 675; 69 RT 7710.)

b. Minimally competent counsel would have been aware, or would have sought consultation with a criminalist familiar with firearms comparison and identification to become reasonably informed that discharge of a handgun results in the emission of GSR particles, including antimony and signature components of primer mixture, from the chamber and firing mechanism of the firearm.

c. Counsel reasonably also should have known that detection and confirmation of the presence of unique GSR particles on clothing can be obtained by means of analysis with a scanning electron microscope (SEM).

d. Counsel further reasonably should have known that GSR particles are the size of a bacterium, and this microscopic size allows GSR particles to remain on clothing virtually indefinitely unless the clothing is laundered.

a. The gun used by the shooter in petitioner's case contained the elements that are normally tested to determine the presence of GSR.

(1) Deposits of GSR were detected in several areas in the car involved in the shooting. (Exhibit 73, Los Angeles Police Department, Property and Analyzed Evidence Report at 2058-61.)

(2) GSR deposits were also found on the decedent's jacket and shirt. (Exhibit 30, Report of Vincent P. Guinn, Ph.D., October 15, 1984 at 302.)

b. Shinn had, or should have had, available to him the clothing worn by petitioner and his co-defendant.

(1) Witness Eula Heights informed the police that after petitioner, Raynard Cummings and Pamela Cummings arrived at her home following the commission of the offense on June 2, 1983 petitioner left his shirt on the driveway in front of her home. (Ex. 47 at 1657.)

(2) The clothing worn by Raynard Cummings was collected by the police and entered as an exhibit at trial. (73 RT 8217.)

c. Timely testing of the clothing worn by petitioner and Cummings at the time of the shooting, for GSR deposits, would have determined that petitioner's clothing contained virtually no residue, which proved petitioner could not have been the shooter; and, that Cummings's clothing contained an amount of gunshot residue that was highly consistent with his having fired six shots from the gun.

d. The absence of gun shot residue on petitioner's clothes and the presence of gun shot residue on his co-defendant's clothing would

have conclusively demonstrated to the jury that petitioner could not have been the shooter.

e. Shinn's failure to acquire readily available definitive evidence of petitioner's innocence was prejudicially deficient.

f. Shinn's failure to employ scientific experts is inexcusable in light of the fact that such expert testimony would have exonerated petitioner. Expert analysis of the autopsy report would have revealed crucial inaccuracies. The jury should have heard, that once corrected, the autopsy report actually demonstrated that it was virtually physically impossible for petitioner to have committed the homicide. The jury should have learned that it was not possible for petitioner to exit the passenger side of the car and achieve a position of close proximity on the left side of the decedent in the time frame in which the shooting occurred. Such expert testimony was available; Shinn simply failed to consult with any guilt phase experts. Shinn's highly prejudicial failure allowed the jury to form the false impression that petitioner was guilty of capital murder.

(1) Had trial counsel consulted a doctor or medical examiner with an expertise in gun shot wounds, such as, William Sherry, M.D., Senior Deputy Medical Examiner for the Country of Los Angeles, he would have been able to present scientific evidence that strongly pointed to petitioner's innocence.

(a) Such an expert could have testified to the major error in Dr. Cogan's findings regarding the trajectory of bullet wound number 5.

(i) Contrary to Dr. Cogan's findings, the bullet that made wound number 5 could not have changed direction simply by bouncing off of a rib. (Retrial 25 RT 3273-74.)

(ii) Dr. Cogan describes the bullet as traveling through the chest wall and cavity and hitting a rib near the back of the body, then bouncing forward and passing through major arteries and vessels, as well as another bony structures before exiting, which is not what Dr. Sherry "ha[s] seen in my thousands of gunshot wound autopsies. If there is a -- if there is a marked change in direction, the bullet travels only a very short distance in tissue afterwards, and that is what I object to is the fact that he had entry wound no. 5 passing almost all the way through the body, then changing direction by hitting on a rib, and then coming back all the way through the body again and exiting in the right chest area, or partial exit." (Retrial 25 RT 3273-74.)

(iii) Dr. Sherry could have testified that the bullet entered on the left side of Officer Verna's body, but did not go through Officer Verna as Dr. Cogan had reported. "[U]pon closer examination you will see an eccentric or off-center abrasion or scrape on the left or lateral side of the wound and slightly upward, which would indicate the bullet was traveling from that direction; namely, it was going from left to right, and slightly downward as it was going into the body." (Retrial 25 RT at 3274-75.)

(b) An expert such as Dr. Sherry could have also testified that four of the six bullets struck Officer Verna as entry wounds in his back and that three of those four struck him from the left side of his body. (Retrial 25 RT at 3289.)

(2) The complete invalidity of the "pass-the-gun" theory could have been demonstrated to the jury through the testimony of a crime and accident reconstruction, human factors, and biomechanics expert, such as Dr. Kenneth Solomon. (Exhibit 17, Report of Kenneth Solomon, Ph.D., June 14, 2000 at 179.) An expert, such as Dr. Solomon, could have testified that not only was the prosecution's theory not feasible, but that petitioner could not have physically performed the shooting as described by any of the witnesses, including Pamela Cummings, Gail Beasley, Marsha Holt, or Shannon Roberts.

(a) An analysis of the scene, witness statements, the autopsy, crime scene photographs, and other relevant materials would have allowed such an expert to opine that a very conservative estimate of the time between the first and last shot is eight to ten seconds. (Ex. 17 at 177.)

(b) A human factors expert could have also testified that only the back seat passenger could have exited the vehicle in the short amount of time between the first shot and the second shot. (Ex. 17 at 179.)

(c) Such an expert could have informed the jury that taking into account all relevant materials, including testing data, the back seat passenger was the only individual who could have performed the shooting both inside and outside of the vehicle. (Ex. 17 at 179.)

3. Minimally competent trial counsel would or should have known to consult a qualified expert, such as Martin Fackler, M.D., whose area of practice and expertise is in wound ballistics and the study of the effect of projectiles on the living body. Had trial counsel done so, he would

have obtained readily available, credible expert evidence corroborating Dr. Sherry's findings, and demonstrating petitioner's innocence.

a. An expert such as Dr. Fackler would have confirmed Dr. Sherry's opinion that Dr. Cogan had made a critical error in describing the trajectory of bullet wound number five. Dr. Sherry's analysis, which reconfigured bullet wound no. 5 "has the shot, instead of entering basically predominantly as a front to back angle, of entering and being predominantly a left to right angle, and I agree with that." (Retrial 27 RT 3549.)

(1) Bullet wound number five displayed an "abraided" or "shored exit," which refers to an abrasion caused by a bullet unable to pierce the skin due to contact with a hard surface. (Retrial 27 RT 3549.)

(2) The abraided exit from wound number five was located on the right side wall of the victim's chest. Confirming Dr. Sherry's opinion and contradicting Dr. Cogan's opinion, the trajectory of the bullet that caused bullet wound number five was left to right, not front to back. (Retrial 27 RT 3560.)

b. An expert such as Dr. Fackler would have been able to demonstrate petitioner's inability to have exited the car quickly enough to shoot the victim. The sequence of the bullet wounds demonstrated that petitioner could not have been the shooter. If petitioner had been the shooter, by the time he exited the car and fired the second shot, the decedent would have had ample time to draw his gun and return fire; however, that did not happen, as verified by the eyewitnesses, who were unanimous on this point.

(1) The decedent received the six gunshot wounds in the following order using of the numbers arbitrarily assigned during the autopsy: six, one or three, two, four, then finally five.[2]

(a) The easiest shot to sequence was the shot to the upper right neck, labeled as coroner's bullet[3] wound number six. This was the first gunshot wound. (Retrial 27 RT 3561.)

(b) Bullet wound number two was received after bullet wound number six. This bullet wound cut the spinal cord at the sixth thoracic vertebrae level. Once the spinal cord was cut, the body lost all muscle function below the site of the cut, and the legs were unable to hold the body. As a result, the victim's knees buckled and he would have fallen to his knees. (Retrial 27 RT 3554.) This was the fourth gunshot wound. (*Id.*)

(c) Bullet wounds numbered four and five were received after bullet wound number two – after the decedent fell to his knees. Bullet wounds four and five had shored exits on the right side of the body and a left to right trajectory. (Retrial 27 RT 3552, 3560.) The shored exits indicated that the decedent's right side was against a hard surface, the ground, when he received those wounds. The left to right trajectory of the wound indicated that the decedent's left side was exposed to the shooter.

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[2] Exhibit 69, Firearms Evidence, Officer Verna's Uniform by Arleigh McCree at 2017 is a chart of the arbitrarily numbered bullet wounds.

[3] "Bullet" wound numbers refer to the numbers arbitrarily assigned at the autopsy. "Gunshot" wound numbers refer to the sequenced wound numbers as determined by Dr. Fackler.

(i) Bullet wound number four preceded bullet wound number five. Bullet wound number two caused the decedent to fall to his knees. After he fell to his knees he rolled onto his right side, exposing his left back, the site of gunshot wound number four. This was the fifth gunshot wound.

(ii) Due to the location of bullet wound number two, the severed spinal cord affected the decedent's legs, but not his arms. (Retrial 27 RT 3567.) After receiving bullet wound number four, the victim pushed himself onto his back. As he did so, while his right side was still in contact with the ground, he received bullet wound number five. (*Id.*) The victim after receiving the sixth and final gunshot wound, was now flat on his back, the way he was discovered by witnesses and medical personnel.

(d) Bullet wounds one and three were received after bullet wound number six – (to the right neck area) and before bullet wounds numbered two, four, and five. According to the gunshot residue analysis conducted by Dr. Vincent Guinn, the distance between the victim and the gun was more than double for bullet wounds numbered one and three, than for bullet wounds numbered two, four, and five. (Retrial 27 RT 3565.) The distance between the victim and the gun was approximately 2.13 feet and 2.44 feet for bullet wounds numbered one and three, respectively. (Retrial 27 RT 3563.) The distance between the victim and the gun for wounds numbered two, four, and five were all approximately one foot. (*Id.*) The victim was, therefore, moving away from the gun when he received bullet wounds numbered one and three. (Retrial 27 RT 3565.) These were the second and third gunshot wounds.

(2) The sequence of the bullet wounds demonstrated that although wounded, the decedent had not been disabled by the first shot, or even the next two. At least one eyewitness reported that the decedent reached for his gun just before he fell to the ground – immediately before he had been shot for a third time and received bullet wound number two. (1 Supp. CT 217.) That the decedent, a highly trained Los Angeles police officer, was unable to draw his weapon before he became incapacitated, illustrates the rapidity with which the first four gunshots were inflicted.

c. Testimony regarding the trajectory and sequencing of the bullets is especially significant when considered in conjunction with the evidence regarding the timing of the shooting and the proximity of the shooter. Witnesses reported that the shooting took only seconds. Dr. Kenneth Solomon, an expert in crime and accident reconstruction, human factors, and biomechanics, determined that a conservative estimate of the time between the first gunshot and the last was between eight to ten seconds (Ex. 17 at 177), and the maximum time between the first two shots was a mere two and a half seconds. (Ex. 17 at 174.) Taken together, it is clear had Mr. Shinn presented such testimony, any reasonable jury would have understood that it was nigh impossible for petitioner to have shot the victim.

4. Trial counsel failed to undertake even the most basic of trial preparation and to marshal and argue the available evidence to prove petitioner's innocence, including, but not limited to failure to use the material contained in the police reports and pre-trial transcripts to impeach prosecution witness, as a basis for moving to preclude any in-court identifications of petitioner, and to demonstrate how the evidence proffered

by both the state and petitioner's co-defendant, actually established petitioner's innocence.

a. Trial counsel failed to impeach prosecution witnesses with their many prior inconsistent statements by pointing out key factual discrepancies from statement to statement. Shinn failed to use readily available evidence to undermine the credibility of the state's most damaging witnesses -- Robert Thompson, Gail Beasley, Shannon Roberts, and Marsha Holt -- in a variety of ways that would have raised a reasonable doubt as to petitioner's guilt of the shooting including, but not limited to, the following:

(1) Robert Thompson's experienced on radical change in his "memory" of the shooting over time, contrary to the prosecution's argument that Mr. Thompson new memory was the obvious, direct result of Mr. Thompson looking at a photograph of the car while standing in the front yard where he witnessed the events. Mr. Thompson's new "memory" was wholly manufactured and vulnerable to successful impeachment based on the witness's prior inconsistent statements. (95 RT 10891.)

(a) Unlike a previously forgotten memory remembered, Mr. Thompson purportedly experienced a completely new and drastically different memory of the events; however, trial counsel failed to question Mr. Thompson as to why his testimony regarding the shooter changed so drastically from the grand jury to the preliminary hearing.

(b) Trial counsel's extensive failures in this area prevented the jury from hearing and considering any of several reasons to discount the prosecution's simplistic excusal of Mr. Thompson's conveniently changed memory including, but not limited to, the following:

(i) Mr. Thompson's initial recall of the events was amazingly lucid, detailed, and up to the preliminary hearing, consistent. Mr. Thompson's initial recall was so strong that he was able to give an incredibly detailed description and demonstration of the way in which the dark-skinned shooter emerged from the back seat of the car to continue shooting the decedent. (2 Supp. CT 1003-04.)

(ii) The completely new version of events that subsequently evolved after repeated rehearsals with the police, fully supported the state's version of the shooting. Although Mr. Thompson's police statements and his pretrial testimony never indicated he ever told the police that he could not recall the events, nevertheless with the assistance of the police, Mr. Thompson suddenly "remembered" the opposite of what he had first told the police and the grand jury.

(iii) Trial counsel unreasonably failed to question Mr. Thompson on key elements of his vastly differing accounts of the shooting. If counsel had done so, the jury would have understood that, contrary to the prosecutor's assertion, Mr. Thompson's initial version of events was far more reliable and accurate than his subsequent versions that supported the state's theory of the crime.

(iv) Mr. Thompson initially stated the back seat passenger, and only the back seat passenger, emerged from the car to shoot the decedent.

(v) Mr. Thompson unequivocally described the shooter and the clothing he was wearing: "male Negro, black hair, finger wave (short) 6-2/3, 150, (thin build) 25/30 years. Baggy jeans (possible blue) with brown short sleeve shirt with other unknown colors. Medium to dark complexion."

(Ex. 45 at 1641.) Because he did not see the front seat passenger out of the car, Mr. Thompson explained he was unable to describe his clothing. (*Id.*)

(vi) Mr. Thompson did not see, and was unable to fully describe, the front passenger's face. Mr. Thompson could only give details of the front seat passenger's left profile, which Mr. Thompson would have seen since he saw petitioner sitting in the car. (*Id.*)

(vii) Finally, trial counsel failed to reinforce that Mr. Thompson initially firmly believed that the shooter was a darker-skinned black man. During his interview with Officer Lindquist, Mr. Thompson emphasized that the person he saw stand over the victim shooting, was a black man. In his handwritten report, Officer Lindquist demonstrated Mr. Thompson's decisiveness by underlining "def. a black man" under the description of the shooter standing over the victim shooting. (Ex. 45 at 1644.) Trial counsel failed to convey this critical information to the jury through his questioning of Mr. Thompson or Officer Lindquist. Again, the jury was left with the erroneous impression that Mr. Thompson's initial identification of the darker skinned black man, as the sole shooter was weak and uncertain.

(viii) When he was first interviewed, Mr. Thompson gave the police a detailed description of the way the shooter continued shooting as he exited the back seat of the car through the driver's door. "Thompson says that susp was firing while he was exiting the vehicle. Also stated that susp had gun in his right hand and was forcing car door open with his left hand." (Ex. 45 at 1643.)

(ix) Thompson again gave this description of how the dark skinned back seat passenger exited the car during his testimony before the grand jury. Mr. Thompson's memory of the dark skinned man exiting the

back seat of the car while shooting was so clear that he was able to demonstrate it for the grand jury.

> (Mr. Berman) Q. And could you demonstrate the position of the hands for me now? Just do it.
>
> (Mr. Thompson) A. All right. From where I was -- if I was standing over there --
>
> Q. As if I was in the general area where you -- Okay, that's good.
>
> A. A11 right. I'm standing over there. What I see is this hand shooting, that's where I see the motorcycle, this hand is on something and one leg is out of the car.
>
> Q. A11 right. Now, I want you to just stop for a moment and let me say something, Mr. Thompson. May the record reflect that Mr. Thompson pivoted 90 degrees away from me so that I was getting his left profile, and then indicating as if he were the person with the gun in his right hand, Mr. Thompson himself turned around 180 degrees and aimed back around his left shoulder with his left hand out in front of him to his left, as though he were holding the door open. Is that right, Mr. Thompson?
>
> A. Yes. (2 Supp. CT 1003-04.)

(x) Trial counsel failed to question Mr. Thompson about his initial, consistent descriptions of how the dark skinned passenger emerged, shooting, from the back seat. Instead, the jury was left with the erroneous impression that either Mr. Thompson failed to ever describe how the shooter exited the car or, worse, that his initial description was consistent with his preliminary hearing and trial testimony.

(c) Trial counsel failed to impeach Mr. Thompson with these important prior inconsistent statements and argue,

that as Mr. Thompson himself reluctantly testified, his memory was better at the time of the shooting. (68 RT 7642.) Had he done so, the jury would have better understood that Mr. Thompson's new "memory" of the front seat passenger shooting the victim was highly unreliable and must be discounted.

(d) Shinn failed to demonstrate to the jury that each of the changes in Mr. Thompson's recall made his version of events a closer fit with the state's theory. His testimony at the first trial nailed down the prosecution's theory. By suddenly "remembering" that he saw petitioner, and not the darker skinned black man from the back seat, outside the car shooting, Mr. Thompson joined the other mistaken witnesses who thought they saw petitioner shoot the victim. Mr. Thompson is also the only witness who testified that petitioner slid across the front seat and exited through the driver's door. (68 RT 7569.)

(e) Shinn inexcusably and inexplicably failed to present to the jury the highly suspect nature of the changes in Mr. Thompson's testimony. The defense theory was that petitioner was not the shooter; therefore, there could be no tactical reason for failing to demonstrate the inherent unreliability in Mr. Thompson's suspicious and convenient post-grand jury memory.

(2) Trial counsel failed to investigate and introduce the prior inconsistencies that would have discredited Shannon Roberts, who was only eleven years old when he witnessed the shooting, and failed to select petitioner as the shooter until he testified at the trial. (*See* Ex. 40 at 1616; 2 Supp. CT 533-34; 1 CT 1700, 1704; 69 RT 7783.)

(a) Shinn ineffectively cross-examined Mr. Roberts on his newfound ability to identify petitioner as the person he saw shoot the victim. Shinn's cross-examination failed to elicit that prior to his testimony at the trial, he was unsure what the shooter looked like. Mr. Roberts's description of the shooter ranged from Mexican or bi-racial (White and Black) (Ex. 40 at 1615), to light black skin (2 Supp. CT 500-502), to white (1 CT 1683-84, 1686). By the time of the trial Mr. Roberts did not know the race of the shooter, only that petitioner was that person. (69 RT 7782-83.)

(b) More importantly, Shinn failed to impeach Mr. Roberts's in-court identification of petitioner with his preliminary hearing testimony. At the preliminary hearing, Mr. Roberts frankly admitted that he did not really know what the shooter looked like. (1 CT 1700.) Petitioner's jury never heard this critical and exculpatory admission.

(c) Trial counsel's failures allowed the jury to consider and weigh Mr. Roberts's testimony without also knowing that Mr. Roberts himself conceded that his version of events was not reliable. Mr. Shinn's inexplicable failure to alert the jury that, despite his confidence at trial, Mr. Roberts admitted that his memory of the shooting was highly suspect falls well below the standard of care for a capital trial.

(3) Trial counsel failed to investigate and introduce the serious inconsistencies among Gail Beasley's various statements, which would have discredited her testimony at trial upon which the prosecutor heavily relied to prove that petitioner shot the victim. At trial, Ms. Beasley was initially deemed an unavailable witness, and the prosecutor was

allowed to have her preliminary hearing testimony read to the jury. (74 RT 8272-73.) Before the close of the state's case, Ms. Beasley was brought to court and trial counsel was given the opportunity to cross-examine her. Despite the wealth of exculpatory evidence he could have obtained, he refused the opportunity and allowed her highly prejudicial preliminary hearing testimony to stand uncontested. (79 RT 8950.) Had trial counsel adequately cross-examined Ms. Beasley, the jury would have understood that the inaccuracies and changes in her story made her recall of the shooting highly unreliable, and not worthy of serious consideration during deliberations.

(a) Ms. Beasley did not know how much of the shooting she witnessed.

(i) Ms. Beasley saw something on the day Officer Verna was shot, but it was unclear, even to her. Ms. Beasley believed that she saw the shooting take place; however, she cannot consistently recall how much of the shooting she saw.

(ii) She first told the police that she saw the first shot through the last shot. (Ex. 12 at 156.)

(iii) By the time she testified at the preliminary hearing, she was unable to determine exactly how much of the shooting she saw. She first testified that she saw all but the first two shots. (1 CT 1824, 1827.) By the time she was cross-examined by counsel for petitioner's co-defendant, she admitted to seeing all but the first four shots. (1 CT 1847-48.) Ms. Beasley then testified on redirect that she saw all but the first shot. (1 CT 1861.)

(iv) Trial counsel unreasonably failed to cross-examine Ms. Beasley on any of these substantial and glaring inconsistencies. Given

the importance placed on this witness by the state, Mr. Shinn had an obligation to discredit her testimony in his closing argument by pointing out that she was unable to consistently remember what she saw for the short time she was on the witness stand.

(b) Ms. Beasley did not know how many people she saw outside of the car.

(i) Among the most material of discrepancies and inconsistencies was Ms. Beasley's testimony refuting significant facts in her first statements to the police. She initially reported that she saw a black man "jump out and back in the car" during the shooting. (Ex. 12 at 156.) She said this man was black, about 5'8", 165 lbs., 26 years old, wearing a "jheri" curl hair style, a gray tank top, and gray gym shorts with white piping on the side. (Ex. 12 at 157.)

(ii) Despite this very detailed description, including the color of the piping on the man's gym shorts, by the time she testified at the grand jury Ms. Beasley was unable to recall seeing anyone besides the shooter and the driver outside of the car. (1 Supp. CT 191-92.) The most she claimed was seeing the head of a black man in the back seat of the car. (*Id.*)

(iii) Even this memory faded significantly. By the time she testified at the preliminary hearing, she could only "vaguely" recall seeing someone of an unknown race and gender in the back seat of the car. (1 CT 1810.)

(iv) Shinn failed to cross-examine Ms. Beasley regarding this third person she initially described in minute detail, as also being outside of the car. Mr. Shinn asked no questions about how Ms. Beasley could give such a detailed description of someone she only "vaguely" recalled seeing, and

only then in the back seat of the car. There was no tactical advantage for Shinn to fail to point out to the jury how Ms. Beasley's memory of the third person being outside the car conveniently faded so that her version of events fit the state's theory that the back seat passenger did not leave the car. Nor was there a tactical advantage to fail to point out that her fading memory served the interest of Raynard Cummings and, thus, her mother's friend, Mary Cummings.

(c) Ms. Beasley did not know whether she saw the car drive away.

(i) Hours after the shooting, Ms. Beasley reported to the police that she saw the car involved in the shooting drive away east bound on Hoyt Street. (Ex. 12 at 156.)

(ii) By the time she testified before the grand jury, she no longer recalled seeing the car drive away. (1 Supp. CT 192.)

(iii) Minimally competent counsel would have recognized the significance of this inconsistency within the context of the evidence as a whole. Trial counsel failed to demonstrate that Ms. Beasley's failure of memory was again highly convenient for the prosecution. When Ms. Beasley was interviewed by the police she did not report seeing anyone pick up something by the fallen officer or see the car stop directly in front of he house, as did several other witnesses. (*See, e.g.*, Ex. 40 at 1615; Ex. 42 at 1621-22.) Had Ms. Beasley continued to remember seeing the car take off but not stop to retrieve something by the officer's body – same as if she continued to remember seeing a third man outside the car – her recollection would directly conflict with the prosecution's theory.

(iv) Petitioner's jury was never made aware of Ms. Beasley's convenient, false and manufactured memory lapses. If they had been, they would have had ample reason to give little, if any, weight to her testimony, including her in-court identification of petitioner.

(4) Minimally prepared counsel would or should have known that Marsha Holt, as with Ms. Beasley, was the source of an ever-changing story. Shinn's failure to impeach Ms. Holt prevented the jury from knowing that her alleged observations were wholly unreliable.

(a) There was no reliable indication Ms. Holt ever saw the shooter approach the victim before shots were fired.

(i) Ms. Holt repeatedly altered her statement to say she did see the shooter approach the victim before the shooting began (Ex. 42 at 1621.); did not see the shooter approach the victim prior to the shooting (1 CT 1842; 68 RT 7529-32); did see the shooter approach the victim (68 RT 7580).

(ii) Ms. Holt's recall was so unreliable that she was incapable of consistently remembering whether she saw the shooter approach the victim throughout the duration of her trial testimony. (*See* 68 RT 7529; 68 RT 7580.)

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

(b) Ms. Holt claimed that she heard and saw the entire shooting; however, she could not consistently state how many shots she allegedly heard or saw.

(i) Immediately after the shooting she reported that she heard the first shot, turned to look out the window and saw five more shots. (Ex. 42 at 1622.)

(ii) Less than four hours later, her story changed. Now she reported that she heard the first shot, may have seen the next two shots, and saw the last two shots. (Ex. 42 at 1621.)

(iii) By the time she testified at the grand jury, she recalled seeing and hearing a total of only two to three shots. (1 Supp. CT 203-04.)

(iv) Trial counsel had no tactical reason for failing to impeach Ms. Holt on her highly impaired ability to accurately recall the event she claimed to have both seen and heard. Ms. Holt was a key prosecution witness, one whom the prosecution strongly urged the jury to rely upon in determining petitioner's guilt. (95 RT 10896-97.) Trial counsel, on the other hand, essentially remained mute on the subject of Ms. Holt's seriously faulty and unreliable memory.

5. Trial counsel unreasonably failed to litigate the admissibility of the tainted eyewitness identifications of petitioner, which the prosecution manufactured and introduced as the only means of corroborating the testimony of the only other person who placed petitioner at the scene of the shooting, his co-defendant, Pamela Cummings. Minimally competent investigation and litigation of the issue would have resulted in the suppression and/or otherwise successful challenge to the admissibility

and/or credibility of the eyewitness identification on grounds including, but not limited to the following:

(1) The highly suggestive line-up irrevocably tainted any future eyewitness identification of petitioner.

(a) The eyewitnesses to the shooting attended a live line-up on June 6, 1983. This line-up was tainted from the moment the witnesses gathered on Hoyt Street to wait for the police bus to take them to the police station. The taint thickened to the point of irreversibility, once the witnesses actually viewed petitioner in line-up number seven.

(b) The state intentionally ensured that the eyewitnesses would come to some agreement on the identity of the shooter by forcing the witnesses to gather together to wait for a ride to the police station to view the line-ups. (*See, e.g.*, Exhibit 76, Declaration of Shequita Chamberlain at 2075, ¶ 9; Ex. 75 at 2072, ¶ 6.) As predicted, the gathered witnesses compared what each had seen and who they saw do it: "We waited on the street for awhile before the bus arrived and talked to each other while we waited about the shooting and what each of us had seen." (Ex. 75 at 2072, ¶ 6.)

(c) Once at the line-up, the police indicated to the witnesses which suspect the police believed was involved in the shooting. Petitioner, and petitioner alone, appeared to the witnesses as if he had just been severely beaten. The witnesses could not help but notice the bruising and blood on petitioner's, and only petitioner's, face:

(d) "In the line-up, Mr. Gay looked like he had just been beaten up, his face was cut and his face was smeared with

what looked to be dried blood. He was the only one in the line-ups I saw who looked like he had just been beaten and it suggested to me that he must be the man the police wanted us to identify." (Ex. 75 at 2072, ¶ 7.)

(e) "The first line-up with light skinned men included a man who was beaten up very badly. His face was bruised and the skin on his cheek was cut and scabbed. It was obvious that this was the man that the police thought had committed the crime because he was the only person in all of the line-ups with any injuries[.] " (Ex. 76 at 2075, ¶ 10.)

(f) "We saw several different line-ups. In one group, there was a light skinned black man who was very badly beaten up. He appeared to have several bruises on his face and two black eyes. It was obvious to me that the police thought this man was involved in the officer's shooting, because he was the only person in all of the line-ups who clearly had been beaten-up." (Ex. 81 at 2091, ¶ 3.)

(g) During petitioner's line-up, another witness openly discussed within earshot of all those present her opinion that petitioner was probably the suspect. (*Id.*, ¶ 4.) Despite this serious breach of line-up protocol the witnesses were not admonished to disregard this verbal selection of petitioner.

(2) Delayed Identifications of Petitioner

Not surprisingly, since petitioner did not shoot the victim, no eyewitness selected him during the live line-ups. The building taint of the pre-lineup discussion, the suggestive line-up, and the verbal identification of petitioner by a witness unassociated with the shooting began to set in more quickly for some than others.

(a) Ms. Holt was able to identify petitioner only after she was shown additional photos of him, in an unrecorded police interview that took place immediately after the line-up and recognized his photograph as being someone she had seen in the lineup. (*E.g.*, 68 RT 7568.)

(b) Ms. Beasley also failed to identify anyone during the line-up; however, like her friend, Ms. Holt, during an undocumented police interview immediately after the line-up, she was suddenly able to identify a photograph of petitioner. (Ex. 12 at 159; 1 CT 1869.) Despite this identification, Ms. Beasley, who admitted to seeing the shooter for only two seconds (1 CT 1874-77) could not make a positive identification at either the grand jury or the preliminary hearing – each time she could only say that petitioner resembled the shooter. (1 Supp. CT 194-95; 1 CT 1820-21, 1828.)

(c) When first interviewed by the police, Mr. Thompson described the shooter as a darker skinned black man who sat in the back seat of the car. Mr. Thompson explained to the police sketch artist that he could only describe the fair skinned front passenger's left profile since that was all he saw. (Ex. 45 at 1641.) Robert Thompson did not identify petitioner as the shooter until he testified at the preliminary hearing, after the police had coached and helped him to remember a different version of events and then, only after he had been told that petitioner was in the courtroom. (1 CT 692.)

> [By Mr. Shinn] Q: And the fact that Mr. Gay was sitting in the court today that helped you identify him, didn't it?
>
> A: Yes. (1 CT 707.)

(d) Eleven-year-old Shannon Roberts was never able to honestly identify petitioner as the shooter (Ex. 23 at 243, ¶ 9; Ex. 83 at 2096, ¶ 9); however, he did identify him as such for the first time during his testimony at trial. (69 RT 7783.) The only reason he did so was because either a police officer or someone from the district attorney's office pointed to petitioner as he sat in the courtroom and told Roberts that petitioner was the shooter (86 RT 9827-28):

> As far as I knew, by the time I testified at Mr. Gay's trial, I had not seen the shooter since the day of the crime. Before I entered the courtroom to testify at Mr. Gay's trial, the detectives asked me if I could see Mr. Gay in the courtroom. I could not identify him, so they had to point him out to me, and they told me that he was the shooter. Later, while I was testifying, I was asked if I could point out the man I had seen. I pointed to the man the officers had shown me before I entered the courtroom. If it had not been for the detectives, I would not have identified Kenneth Gay as the shooter, because I was not sure what the shooter looked like. (Ex. 83 at 2096, ¶ 9.)

Had it not been for this blatant state misconduct, Mr. Roberts would not have identified petitioner as the shooter before the jury.

(3) Each of the eyewitnesses to the shooting were given many opportunities to see petitioner, his photograph, or a likeness of him prior to testifying at trial. The television and newspaper media were saturated with petitioner's likeness or photograph. The media saturation was so intense that several witness testified that seeing his photograph in the news media influenced their identification of petitioner. (1 CT 689; 7 CT 1869-70.) In addition to the voluminous and prominent publications of

petitioner's photograph (Ex. 70 at 2018) or likeness, the witnesses also were exposed to his photograph during their testimony before the grand jury. Such repeated exposures to petitioner's photograph, unfairly and irreparably influenced the witnesses' false, misleading and unreliable selection of petitioner.

6. 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.

a. By reasonably addressing the admissible evidence, Shinn could have pointed out the serious flaws and inconsistencies in the evidence and the prosecution's theory of the shooting, including but not limited to, the following:

(1) The prosecution primarily relied on the testimony of four witnesses to convict petitioner: Robert Thompson, Marsha Holt, Gail Beasley, and Shannon Roberts, but only Robert Thompson's manufactured testimony at trial, squarely fits the prosecution's theory.

(i) Mr. Thompson's first version of events, and the one closest in time to his actually witnessing the events in question is also the most inconsistent with the prosecution's theory. Mr. Thompson reported to the police and testified at the grand jury as to what actually happened that day: a darker skinned black man fired a gun at the victim from the back seat of a car, pushed the driver's seat up, and emerged from the car continuing to

shoot. (Ex. 45 at 1643-44.) This version of events could not convict petitioner of first-degree murder.

(ii) A second, dramatically different version of events was given at the preliminary hearing, after the state had developed a two-shooter theory. At the preliminary hearing, Mr. Thompson testified that he saw the light skinned front seat passenger shoot the victim from the front seat of the car, exit the car from the driver's door, and continue shooting. (1 CT 669; Ex. 51 at 1688.) This version of events lays the basis for a first-degree murder conviction for petitioner, but now exonerates his co-defendant.

(iii) Mr. Thompson's story fully evolved to completely fit the state's theory by the time he testified at the trial. By then, Mr. Thompson recalled seeing a dark hand with a gun emerge from the back seat of the car shoot the victim, prior to seeing the front seat passenger exit the front driver's side of the car to continue shooting the victim. (68 RT 7590, 7627.) Mr. Thompson suddenly recalled that he briefly looked away to find a place to hide after seeing the dark hand with the gun, and when he looked again he saw the front seat passenger sliding out of the car with a gun. Mr. Thompson's conveniently altered recall allowed the prosecution to argue that the gun was passed from the back seat passenger to the front seat passenger during the time Mr. Thompson looked away. This version of events, tailored to fit the prosecution's theory, allowed for first-degree murder convictions for both the petitioner and his co-defendant. Trial counsel unreasonably failed to apprise the jury of the incredible and radical, if convenient, changes in Mr. Thompson's memory.

(b) Absent Mr. Thompson's implausibly evolving trial testimony, the other prosecution witnesses

statements and testimony did not support essential elements of the State's theory of the shooting.

(i) Not one of the prosecution's key eyewitnesses saw the victim leaning into the car when he was first shot. In fact, of those who describe the first shot, they recalled the victim standing on the driver's side of the car either near the front or towards the rear of the car. (Ex. 42 at 1621; Ex. 40 at 1615; Ex. 12 at 156.)

(ii) None of the key prosecution witnesses saw a gun being passed from the back seat to the front seat of the car.

(iii) None of the key prosecution witnesses saw two shooters. In fact, all witnesses – including Mr. Thompson's report to the police and his grand jury and preliminary hearing testimony – reported seeing only a single shooter. (Ex. 45 at 1641-42; 2 Supp. CT 1006-07.)

(iv) No one saw the front seat passenger slide across the front seat to exit the car to shoot the victim. Ms. Holt, Ms. Beasley, and Shannon Roberts all reported that the shooter walked around the car from the passenger side just prior to the shooting. The other witness, who saw the front seat passenger out of the car, placed him on the passenger's side of the car, not the driver's side. (70 RT 7836.)

(2) The eyewitnesses describe a series of quick gunshots, with virtually no time between shots. (Ex. 17 at 173.) The prosecution even argued that the time between the first and last shot was "just seconds." (58 RT 6212.) This unanimity that the shooting occurred very quickly seriously undermined the prosecution's theory that the front seat passenger had enough time to grab a gun that had just been fired, slide across the front seat of a car, get out, and shoot the victim.

(a) During a demonstration, the jury had a chance to view the car in question. The front seat is composed of two bucket seats with an armrest in between. (73 RT 8217.) Also, the driver, Pamela Cummings, who is significantly shorter than petitioner, had the driver's seat pushed close to the steering wheel. Trial counsel failed to underscore for the jury that it would have been virtually impossible for petitioner, who is over 6'0" (Ex. 26 at 408, ¶ 12) to quickly slide across two bucket seats, while navigating the arm rest and the small space between the driver's seat and the steering wheel.

(b) Furthermore, the DA argued that the driver's seat was pushed up as a result of the back seat passenger's attempt to exit the car. (58 RT 6291.) Add in the time it takes for a 6'0" front seat passenger to grab a gun that was just fired, push the driver's seat back into place, slide across two bucket seats while avoiding the middle arm rest, and exit the car in the small space provided between the driver's seat and the steering wheel, and any reasonable jury would find the prosecution's theory suspect.

(c) These factors conclusively demonstrate that it would take a tall front seat passenger much too long to exit the front driver's side door, to continue shooting as quickly as the witnesses reported. Had these factors been pointed out, any reasonable jury would understand the impossibility of the prosecution's theory, and would thus, have voted to acquit petitioner of the first-degree murder charge.

(3) Prosecution witnesses contradicted each other on key elements of the prosecution's theory and the forensic evidence. The state's theory was that the back seat passenger shot the victim while he was

leaning into the car. The back seat passenger then gave the gun to the front seat passenger who slid across the front seat, exited the car, and continued shooting. The forensic evidence demonstrated that the victim was shot at least twice after he had fallen to the ground. (Retrial 27 RT 3558-59.)

(a) The most significant contradiction comes from petitioner's co-defendants. Both Raynard and Pamela Cummings admitted to others that Raynard was the sole shooter. Raynard confessed to numerous inmates and sheriff deputies. (*See*, *infra*, Claim Three, A.1.(9).) Pamela explained to her sister, Debra Cantu, that the dark skinned man who looked like Raynard and was sitting in the back seat was alone responsible for the victim's death. (Retrial 28 RT 3747-52.) Pamela similarly told Robin Gay and her roommate, Debbie Warren, that Raynard was solely responsible for shooting the victim. (3 Supp. CT 663.)

(b) Most of the witnesses denied seeing the decedent shot after he fell. (1 CT 1778; Ex. 43 at 1628.) The medical evidence confirmed that the victim was shot at least twice after he fell and hit the ground. (Retrial 27 RT 3552, 3560.)

(c) Since the key prosecution witnesses claimed to have witnessed most, if not all, of the shooting their failure to report shots to the victim's back presented a glaring inconsistency with the forensic evidence.

(4) The only consistent witnesses were those who categorically denied seeing petitioner – or anyone who looked like petitioner – shoot the decedent. With the exception of Mr. Thompson, witnesses who reported either seeing a darker skinned black man shoot the victim, or did not see the actual shooting, were highly consistent in their

recall of vital facts. Unlike prosecution witnesses Marsha Holt, Gail Beasley, Shannon Roberts, and Robert Thompson the initial reports of Shequita Chamberlain, Rosa Perez, Rose Martin, and Martina Jimenez vary very little through the pre-trial hearings and the trial. The prosecution argued that the jury should ignore the highly consistent recall of Oscar Martin and Shequita Chamberlain as it pertained to seeing a darker skinned black man outside the car shooting the victim (95 RT 10887), and to instead fully credit the highly questionable recall of Gail Beasley, Marsha Holt, Shannon Roberts, and Robert Thompson. (95 RT 10897, 10895, 10898, 10890, respectively.) Trial counsel did not even attempt to show the jury that the most reliable witnesses were those who recalled seeing a darker skinned man shoot the officer. If he had done so, he would have decisively answered the prosecution's argument and revealed to the jury the shell game with which the prosecution attempted to divert their attention away from important exculpatory facts.

b. Trial counsel failed to argue that the testimony of Dr. Vincent Guinn, a witness called by petitioner's co-defendant, was strong evidence of petitioner's innocence.

(1) Dr. Guinn testified regarding his analysis of the gun shot residue deposited in the car. Dr. Guinn testified that five of the six bullets that entered Officer Verna's body were fired at very close range - from approximately 1 foot to 2.44 feet. The sixth bullet, which was actually the first one shot, was fired from a significantly greater distance. (81 RT 9313; *see also* Ex. 30 at 504.)

(2) Dr. Guinn's testimony conclusively demonstrated that the proximity of the shooter to the victim became

increasingly closer after the first shot. This factual finding highlighted the impossibility that petitioner committed the homicide: petitioner could not have exited the car quickly enough to achieve a position of such proximity to the victim. Petitioner simply could not have either 1) grabbed a gun that was just fired, push the driver's seat back into place, slide across two bucket seats while avoiding the middle arm rest, and exit the car in the small space provided between the driver's seat and the steering wheel, or 2) grabbed a recently fired gun, exit the passenger door, and circle one half the distance of the vehicle quickly enough to be responsible for firing five shots into the victim at a very close range within the eight to ten second time frame in which the homicide occurred. (Ex. 17 at 177, ¶ 7.)

c. The prosecution and petitioner's co-defendant gave Shinn valuable evidence with which to demonstrate petitioner's innocence. Both the prosecution and his co-defendant did their best to obfuscate, ignore, and "spin" this evidence, that conclusively pointed to petitioner's innocence. Much to petitioner's prejudice so did Shinn. No tactical reason existed for Shinn's utter failure to demonstrate his client's innocence. Had the jury been able to clearly see how the evidence truly fit together, and not just the misshapen picture given them by the prosecution and petitioner's co-defendant, petitioner would not have been convicted of Officer Verna's murder.

7. Trial counsel unreasonably failed to litigate the state's misconduct, of which counsel was, or should have been, aware including but not limited, to the failure to fully comply with its discovery obligations under both California statutory law and the state and federal constitutions;

and knowing presentation and argument of false evidence. Said misconduct included, but was not limited to, the following:

a. The police had numerous, undocumented contacts with witnesses (68 RT 7557; 68 RT 7609; Ex. 85 at 2100, ¶ 3; Ex. 75 at 2072, ¶ 6) which reasonably should have been a source of concern for trial counsel for reasons including, but not limited to, the fact that after such contacts, the witness's recall changed to favor the prosecution's theory of the shooting.

(1) Immediately after the June 6, 1983 line-ups, several witnesses were interviewed by the police regarding their failure to identify a suspect. It was at these interviews that Marsha Holt and Gail Beasley were shown additional photographs of petitioner and were suddenly able to select him as the shooter. (1 CT 1869; Ex. 81 at 2091-2092, ¶ 5.) Neither reports of these interviews, nor documentation of the photographs used, were turned over to petitioner.

(2) Robert Thompson's recall of events changed drastically from the exculpatory statements in his initial – and only – police statement and his grand jury testimony. His preliminary hearing testimony suddenly became wholly inculpatory. Although the police constantly interviewed him and assisted him with "memorizing" his statement, no reports were written documenting Mr. Thompson's sudden memory change.

(3) Not until Mr. Thompson testified at trial did counsel learn that at least some of his newfound recall was the result of assistance from Detective Holder in 1984. Detective Holder testified that he wrote a report about Mr. Thompson's recovered memory; however, since the change in Mr. Thompson's trial testimony took co-defendant's well-

prepared and competent counsel by surprise, it is unlikely that Detective Holder's report, if written, was ever given to trial counsel.

b. Petitioner did not receive vital impeachment materials on the prosecution's testifying witnesses. For example, despite information regarding serious drug use and several drug arrests, petitioner never received RAP sheets, arrest reports or other impeachment materials for Gail Beasley or Marsha Holt. (*See*, *e.g.*, Ex. 20 at 202-36.) In fact, no impeachment materials were given to petitioner for any of the prosecution's witnesses.

8. Trial counsel unreasonably failed to request a mistrial or other appropriate sanctions for the prosecution's knowing presentation of perjured testimony and false argument including, but not limited to, the following:

a. During his questioning of eleven-year-old Shannon Roberts, the prosecutor asked whether or not Mr. Roberts had identified petitioner's photograph at an earlier pretrial hearing. (69 RT 7783.) Mr. Roberts answered that he had identified the photograph of petitioner as the shooter at a prior hearing. DA Watson knew that Mr. Roberts's testimony was patently false – that Mr. Roberts had never identified Mr. Gay's photograph as that of the shooter, and the only photograph he had ever identified belonged to Raynard Cummings. (2 Supp. CT 533-34; 1 CT 1703-04.)

(1) Even though he did not present the case to the grand jury, the prosecutor made available to him the grand jury transcripts. Even if he had not read the grand jury transcripts, he was present at the

preliminary hearing when Mr. Roberts admitted that he was unable to identify petitioner at the grand jury. (2 Supp. CT 533-34.)

(2) Despite knowing that his witness had committed perjury, DA Watson took no action to correct the falsehood or to bring the perjury to the attention of the court and defense counsel. Instead, DA Watson continued his questioning, and used Mr. Roberts's perjured statement in his closing argument. (95 RT 10897-98.)

b. In addition to failing to correct perjured testimony, DA Watson falsely argued that the eyewitness identifications of petitioner were reliable. (95 RT 10897 [Gail Beasley], 10895 [Marsha Holt], 10898 [Shannon Roberts], 10890 [Robert Thompson].) This was clearly not the case with any of the witness identifications, as none of the witnesses could identify petitioner at the line-up.

(1) The first identifications did not come until after Ms. Holt and Ms. Beasley had seen petitioner in a highly suggestive line-up and were shown his photograph. (Ex. 12 at 159; 1 CT 1869; Ex. 42 at 1625; 68 RT 7587.)

(2) Mr. Thompson was unable to identify petitioner until two months later when he testified at the preliminary hearing. (1 CT 692.)

(3) Shannon Roberts was unable to identify petitioner until he testified at trial, and then only after state actors expressly pointed out petitioner to him. (Ex. 83 at 2096, ¶ 9.)

(4) The prosecution's argument that the eyewitness had all strongly identified petitioner strayed far beyond a conclusory argument into the realm of patent falsehood.

c. No tactical reason existed, or can exist, for trial counsel's failure to ensure that the state turned over all discoverable materials. Likewise, allowing the prosecution to admit and argue patently false evidence that exculpates one's client does not constitute sound, competent, or ethical representation of a capitally charged defendant. Mr. Shinn's apathy toward holding the state to its burden of proof was evident in his disinterest in the state's prejudicial misconduct. The state took unfair advantage of Mr. Shinn's blatant indifference to providing petitioner with adequate representation, to ensure that petitioner was unjustly convicted.

9. Shinn failed to defend petitioner from the state's false charge of murder. Trial counsel's failings included but were not limited to the following:

a. Despite literally being handed a long list of exculpatory and impeachment witnesses, Shinn failed to not only interview these witnesses, he also failed to use their previous statements and prior testimony to support petitioner's innocence.

b. Despite the obvious need for expert testimony, Mr. Shinn consulted no experts.

c. Counsel unreasonably failed to seek remedies for either blatant discovery violations or the state's knowing use of false exculpatory evidence.

10. Counsel's failings individually and cumulative deprived petitioner of his state and federal constitutional rights to the effective assistance of counsel and a fair and reliable determination of guilt and

penalty. But for counsel's unprofessional failings the result of the guilt phase would have been different.

D. CLAIM FOUR: THE PROSECUTION VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS BY COMMITTING EGREGIOUS ACTS OF MISCONDUCT.

The conviction was rendered in violation of petitioner's rights to a fair, reliable, and rational determination of guilt based on the jury's consideration and weighing only of materially accurate, nonprejudicial, relevant record evidence presented during the trial and as to which petitioner had notice and a fair opportunity to test and refute, to a trial free of materially false and misleading evidence, to have the jury give full effect to all evidence in mitigation of penalty, to the privilege against self-incrimination, to confrontation and compulsory process, to a jury trial by a fair and impartial jury, to conviction based solely on the beyond a reasonable doubt standard of proof, and to the effective assistance of counsel as guaranteed by the First, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law because the prosecutor engaged in a pervasive, purposeful, intentionally improper, and consistent pattern of misconduct, including but not limited to the presentation of false and misleading evidence and/or the failure to correct misleading impressions created by the state's witnesses, that was designed to and did in fact prejudicially deprive petitioner of the above constitutional rights.

In support of this claim, petitioner alleges the following facts, among others to be presented after full discovery, investigation, adequate funding, access to this Court's subpoena power, and an evidentiary hearing:

1. Those facts set forth in Claims One, Two, and Three are hereby incorporated by reference as if fully set forth herein.

2. Petitioner's conviction is largely based on the false eyewitness identifications of him as the shooter. These false identifications were the product of the unconstitutionally suggestive identification procedures employed by the state. Had the state not employed unduly suggestive identification procedures, witnesses would have had no reason to falsely select petitioner, as the shooter, and petitioner would not have been wrongly convicted of capital murder. The unduly suggestive identification procedures employed by the state included, but were not limited to, the following:

a. The state required petitioner to stand in a live line-up, soon after the police had injured his face leaving it marked with dried blood and scabs.

b. Several witnesses interpreted petitioner's unique appearance among those in the line-ups as a strong signal that the police believed he was the shooter. (Ex. 75 at 2072, ¶7; Ex. 76 at 2075, ¶ 10; Ex. 81 at 2091, ¶ 3; Ex. 85 at 2100, ¶ 2.)

c. Despite his appearance, no witness stated that she recognized petitioner as the shooter.

d. Immediately after the line-up, the detectives conducted several unreported interviews, during which they showed the witnesses additional photographs of petitioner for the purpose and with the effect of

causing the witnesses to make suggestive, false and unreliable identifications of petitioner as a suspect. (*See*, *e.g.*, 7 CT 1875; 68 RT 7550.)

e. Only after having their attention drawn to petitioner, who significantly stood out in the line-up, and were again presented with his photograph, did several of these witness select his photograph as that of the shooter. (*Id.*)

3. Much of the prosecution's case rested on whether the jury believed that the state's witnesses actually saw the shooter. The witnesses' identifications were generally shaky and not highly credible. The prosecution also knowingly presented false evidence that made petitioner appear more culpable than the prosecution believed him to be. Were it not for the prosecution's presentation, and argument of, false evidence the result of the trial would have been different. The knowing false evidence presented by the state included, but was not limited to, the following:

a. The prosecution knowingly allowed a witness to perjure himself by falsely testifying that he had previously selected petitioner's photograph as that of the shooter.

(1) At trial, Shannon Roberts falsely testified that he had identified petitioner's photograph as that of the shooter, at an earlier pretrial hearing. (69 RT 7783.)

(2) The prosecution was fully aware that Shannon Roberts had thereby perjured himself.

(a) During his testimony at the grand jury, Shannon Roberts failed to recognize a photograph of petitioner. (1 Supp. CT 533-34.) The only photograph that he did identify as belonging to

someone involved in the shooting, belonged to the actual shooter, Raynard Cummings. (*Id.*)

(b) DA Watson presented the prosecution's case at the preliminary hearing, at which time Mr. Roberts again testified that he was unable to recognize petitioner's photograph during his grand jury testimony. (6 CT 1703-04.)

(3) Mr. Roberts was only able to select petitioner as the shooter because someone from the district attorney's office or the police department had pointed petitioner out to Mr. Roberts, as petitioner sat in the courtroom before the start of trial, and informed Mr. Roberts that petitioner was the shooter. (Ex. 83 at 2096, ¶ 9.)

(4) The prosecution's failure to correct Mr. Robert's false testimony or inform the court or petitioner that his witness had perjured himself, allowed the jury to consider this highly material and prejudicial false evidence in their guilt deliberations.

b. The prosecution allowed one of its key witnesses to commit perjury at trial. The prosecution, fully aware that the witness's testimony was false, allowed the jury to base petitioner's fate on knowingly false testimony.

(1) Pamela Cummings testified on behalf of the prosecution pursuant to a plea agreement: in exchange for her truthful testimony she would avoid a prison sentence. (Exhibit 22, Letter from John Watson to Commissioner Irwin H. Garfunkel at 241-42.)

(2) Ms. Cummings testified on behalf of the state; however, she did so untruthfully. She lied in an attempt to make her

husband, Raynard Cummings, appear to be not responsible for shooting the victim. (*Id.* at 241.)

(3) The prosecution was immediately aware that her testimony was false; however, the prosecution failed to inform petitioner or the court that his witness had committed perjury on several material subjects. Instead, the prosecution allowed the jury to consider Ms. Cummings perjured testimony in their deliberations of petitioner's fate.

(4) Petitioner's conviction was achieved through the knowing, deliberate, and patently unconstitutional use of perjured testimony.

4. The prosecution knowingly allowed the jury to consider perjured testimony, and in fact invited them to do so by arguing the truth of the perjured statement as well as facts that were never presented to the jury. By doing so, the prosecution knowingly allowed the jury to render a guilt verdict that was based on false and unreliable evidence. The knowing false evidence argued to the jury included, but was not limited to the following:

a. Much of the prosecution's argument focused on the reliability of the eyewitness testimony and the in-court identification of petitioner as the shooter. (*See, e.g.*, 95 RT 10895-98.)

b. The prosecution urged the jury to give full consideration to Mr. Robert's perjured testimony, as a basis for conviction. "He identified Petitioner in court before you. Pointed him out. Said that's the man." (*Id.* at 10898.)

c. The prosecutor dishonestly bolstered the testimony of the other eyewitnesses by arguing that their selection of petitioner as the shooter had been virtually immediate and wholly steadfast.

d. The identifications of petitioner by the state's witnesses were neither immediate nor steadfast.

(1) Most of the witnesses falsely selected petitioner as the shooter only after several months of police contact following the shooting. (*See*, *e.g.*, 1 CT 670 [Robert Thompson]; 69 RT 7783 [Shannon Roberts].)

(2) At least three witnesses, Mr. Robert Thompson, Ms. Gail Beasley, and Ms. Marsha Holt admitted at pretrial hearings that the media saturation of petitioner's photograph had affected their recall of the description of the actual shooter. (2 Supp. CT 438 [Robert Thompson]; 1 CT 1789 [Marsha Holt]; 1 CT 1870 [Gail Beasley].)

(3) Prior to his testimony, Mr. Roberts did not know what the shooter looked like. He was only able to testify that petitioner was the shooter because a state actor pointed out petitioner to Mr. Roberts and told him that petitioner was the shooter. (Ex. 83 at 2096, ¶ 9.)

e. The prosecution's patently false argument regarding the reliability and trustworthiness of the state's witnesses' selection of petitioner as the shooter was highly prejudicial. By both allowing the jury to consider false evidence, and urging them to consider material false evidence, the prosecution violated petitioner's right and obtained the conviction of an innocent man.

5. The state constantly engaged in discovery violations. Police interviews with witnesses were either not recorded or not given to petitioner. The most important police reports, those that should have documented a sudden and drastic change in the witness's recollection were

routinely not given to petitioner. The discovery violations committed by the state included but was not limited to the following:

a. The police had numerous, undocumented contacts with important prosecution witnesses. These police contacts often resulted in changes in the witness's recollection that supported the prosecution's theory. (68 RT 7609 [Robert Thompson]; Ex. 83 at 2095, ¶ 4; Ex. 85 at 2101, ¶ 3.)

(1) Immediately after the June 6, 1983 line-ups the police interviewed several witnesses regarding their failure to identify a suspect at the line-up. It was at these interviews, that after being shown additional photographs of petitioner, several witnesses were suddenly able to select petitioner as the shooter. (1 CT 1875; 68 RT 7550.) Neither reports of these interviews, nor documentation of the photographs used, were turned over to petitioner.

(2) Robert Thompson's recall of events changed drastically from his police interview and grand jury testimony, in which he stated that the shooter was a darker skinned man who sat in the back seat of the car. By the time he testified at the preliminary hearing he suddenly recalled that the shooter was fair skinned and had sat on the passenger side of the car. It was not until Mr. Thompson testified at trial that counsel learn that of his newfound recall was substantially the result of assistance from Detective Holder in 1984. (68 RT 7609.) Petitioner received no report regarding this contact between Detective Holder and Mr. Thompson.

(3) Several key prosecution witnesses complained that after the shooting, they were constantly contacted by the police regarding their statements. No reports of these witness contacts were turned

over to petitioner. (68 RT 7557 [Marsha Holt]; 68 RT 7609 [Robert Thompson]; Ex. 83 at 2095, ¶ 4; Ex. 85 at 2101, ¶ 3.)

6. The prosecution failed to disclose or preserve physical evidence that law enforcement authorities were reasonably aware had materially exculpatory value to petitioner's defense. Said evidence included, but was not limited to, clothing worn by petitioner at the time of the offense and laboratory analysis including but not limited to gun shot residue testing and comparison that demonstrated that petitioner did not fire a gun at the time of the alleged offense.

7. The prosecutor's pattern of gross misconduct deprived petitioner of a fair trial. The effect of the misconduct prejudiced petitioner and had a substantial and injurious influence or effect on the jury's guilt phase verdict of petitioner's trial. But for the State's misconduct, the result of the guilt phase would have been different.

E. CLAIM FIVE: UNCONSTITUTIONAL AND PREJUDICIAL JUROR MISCONDUCT OCCURRED DURING TRIAL.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice by the individual and cumulative impact of several instances of juror misconduct that occurred in the course of the proceedings below.

1. The individual species of juror misconduct included, but were not limited to, premature discussion, deliberation and decisions in the case prior to the commencement of formal deliberations; the presence of alternate jurors in the jury room during deliberations who were not first substituted for a sitting juror; deliberate inattention and absence during the presentation of evidence, jury instructions, argument by counsel and deliberation by the remaining jurors; and disregard of the law and the court's instructions defining the substantive, controlling law as well as the duties and obligations of the jurors.

2. Such acts of misconduct individually and cumulatively prevented the jurors in petitioner's case from fulfilling their obligations as jurors including, but not limited to, the obligations (1) fairly and impartially to engage in deliberation; (2) to follow the court's instructions and deliberate using only the evidence which could properly be considered in making their decisions, (3) to avoid prejudging the case before the presentation of all evidence, and (4) to avoid consideration of evidence extraneous to that presented at trial in making their determinations.

3. The facts, in addition to those to be presented in an evidentiary hearing after petitioner's counsel are afforded a reasonable opportunity for full factual investigation and development through access to a complete and accurate appellate record, an opportunity to discuss potentially meritorious claims with trial counsel, and access to this Court's processes including subpoena power and other means of discovery, include but are not limited to the following:

a. Juror Charles Maxfield consistently, habitually and improperly slept throughout petitioner's capital trial, effectively absenting

himself from the proceedings. (Exhibit 77, Declaration of Jay Marc Cochetti at 2077-78, ¶ 4; Exhibit 84, Declaration of Margaret Stichweh at 2098, ¶ 4; Exhibit 78, Declaration of Linda Comerford at 2080, ¶ 5.)

b. Both seated and alternate jurors conducted substantive discussions, deliberated and decided the question of petitioner's guilt prior to the start of deliberations, adopting the rigid position that the petitioner was, indeed guilty, and refusing to engage in meaningful deliberations. Said alternate and seated jurors just went "through the motions" of the deliberation process, rendering formal deliberations a hollow, pretextual ritual prior to the return of the guilt phase verdict. (Ex. 77 at 2078, ¶¶ 5-7; Ex. 84 at 2098, ¶ 5.)

c. Several jurors openly and substantively discussed their opinions about the evidence and the petitioner's guilt throughout the trial, well before the beginning of the deliberation process. (Ex. 77 at 2077, ¶ 3; Ex. 78 at 2080, ¶ 5.)

d. Juror Jay Marc Cochetti, in knowing violation of his oath and responsibilities as a juror, engaged in extraneous third party discussions with his parents that were reasonably likely to, and which did in fact, influence and prejudge his decisions on the questions of petitioner's guilt and appropriate penalty. (Ex. 77 at 2077, ¶ 2.)

2. The foregoing instances of juror misconduct individually and cumulatively raise a presumption of prejudice, did in fact have a substantial and injurious influence and effect on the determination of the verdicts at the guilt and penalty phases of petitioner's trial, and deprived petitioner of a fair and reliable determination of guilt and penalty.

F. CLAIM SIX: THE TRIAL COURT'S EIGHT-DAY ADJOURNMENT IMMEDIATELY PRIOR TO JURY DELIBERATIONS VIOLATED PETITIONER'S RIGHTS TO A FAIR TRIAL.

The judgment of conviction was rendered in violation of petitioner's rights to a fair trial, a fair and impartial jury, a reliable determination of guilt and penalty, including a reliable determination of the special circumstance allegation, due process and equal protection as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution by the eight-day adjournment prior to deliberations.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. Petitioner incorporates by reference all related claims in this petition.

3. On May 20, 1985, all counsel rested at the guilt phase. (8 CT 2064; 90 RT 10270.)

4. Although Cummings's jury heard closing argument on May 21 and was instructed on May 24, 1985, the trial court, without explanation, excused Petitioner's jury for a period of eight days, until May 28, 1985. (90 RT 10243.) On that day, the jury returned, heard argument, was instructed, and thereafter began deliberations. (95 RT 10788; 8 CT 2079.)

5. Although the adjournment occurred prior to deliberations in this case, there was no good cause for the trial court's decision to excuse the jury, and the risk of substantial prejudice was not diminished. The trial

court's failure to require the jury to begin deliberations nearer to the close of evidence exposed the jurors to the threat of publicity and other outside influences and increased the probability that their memories would fade and thus interfere with their ability to deliberate effectively and impartially.

6. The fact that the jury requested a re-reading of the testimony of certain witnesses during deliberations evidenced a fading of the jurors' memories. (96 RT 11019A, 11019B; 8 CT 2080, 2085, 2094.)

7. The trial court's decision was an abuse of discretion and involved such a strong likelihood of resulting prejudice that it should be considered presumptively prejudicial, and requires reversal of the guilt verdict.

G. CLAIM SEVEN: THE GRATUITOUS PRESENCE OF UNIFORMED OFFICERS IMPOSED UNDUE AND PREJUDICIAL INFLUENCE ON THE JURY.

The judgment of conviction was rendered in violation of petitioner's rights to a fair trial, an impartial jury, a reliable guilt determination equal protection of the law, and due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution by virtue of spectator misconduct including, but not limited to the presence of uniformed officers in and immediately around the courtroom.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. The appearance in the courtroom at critical points during the trial of officers dressed in full uniform, including motorcycle officers

dressed like the deceased officer at the time of his death, produced a coercive atmosphere and prevented petitioner from receiving a fair trial.

a. Numerous police motorcycles were lined up in front of the courthouse in full view of the jurors as they arrived and left court. As with the officers in the courtroom dressed the same as the victim, the motorcycles were the same as the models they had been driving at the time of his death. The police motorcycles were a reminder to the jurors of the deceased.

b. During the trial, the court permitted uniformed, off duty police officers to attend all proceedings.

c. Cummings's defense counsel objected to this practice as causing unfair pro-prosecution influence on the jury. (69 RT 7729-30.) At the time of the objection, during the testimony of purported eyewitnesses to the killing, three uniformed motorcycle policeman were seated in the front row of the courtroom.

d. Noting that between six and eight officers had previously been present (69 RT 7730); the trial court denied the motion, finding no undue influence (69 RT 7731-33).

e. The court made a feeble effort to discourage the officers from returning in full uniform, which had no effect. (69 RT 7734-35.) Uniformed officers were present as the jurors deliberated and at the time of the rendering of the guilt-phase verdict. (107 RT 11944-45.)

f. The trial court has a duty to ensure a fair and impartial trial for the defendant, and has the authority to take whatever steps are necessary to effect these goals.

g. The trial court failed in this duty. It permitted the jury and the court itself to be exposed to undue influence by permitting these uniformed officers, dressed precisely like the victim at the time of his death, to appear in the courtroom in full view of all in attendance.

h. The presence of the officers in the presence of the jurors in full dress uniform was prejudicial. This created an intimidating and coercive atmosphere during the proceedings and injected improper elements into the deliberation of the jurors.

i. The prejudice resulting from the overwhelming presence of the officers was compounded by defense counsel's unreasonable decision to offer into evidence a photograph of the victim in full dress uniform.

j. In view of the contradictory evidence at the murder trial, it is reasonably likely that a more favorable result would have been reached if the court properly exercised its discretion and excluded the officers from attending the trial in dress uniform.

3. Because of the trial court's abuse of discretion and the resulting prejudice, petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his federal constitutional rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

H. CLAIM EIGHT: INTRODUCTION OF MISLEADING AND GRATUITOUS PHYSICAL SIMULATIONS OF THE CIRCUMSTANCES OF THE KILLING PREJUDICED THE JURY.

The judgment of conviction was rendered in violation of petitioner's rights to a fair trial, an impartial and fair jury, a reliable guilt and special circumstance determination, equal protection of the law, and due process of

law, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution by the prosecution's reliance on misleading, irrelevant and inflammatory simulations of the purported circumstances of the crime.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. On April 10, 1985, the trial court permitted the prosecutor to place before the jury a mannequin that supposedly represented the body of Officer Verna. The key scientific witness for the prosecution, coroner Joseph Cogan, referred to this mannequin throughout his testimony and placed dowels in it in an effort to lend a scientific basis to the two-shooter theory of the case. The court permitted use of the mannequin even though the defense received no notice of the prosecution's intent to use a mannequin and the mannequin was a generic one that did not precisely correspond to Officer Verna's size or body form. (70 RT 7892.)

b. Later in the trial, on April 15, 1985, in his effort to prove his two-shooter theory by demonstrating the alleged trajectory of the bullets, the prosecutor gained the judge's permission to bring the entire jury to the basement garage (the "sally port") of the courthouse. Here, the prosecutor arranged the mannequin in front of a car to replicate the supposed position of Officer Verna and the defendants at the time of the killing. (72 RT 8112-14.)

c. Cummings's counsel objected to this procedure on the grounds that, given the plethora of positions in which the seats and parties

could be placed and the huge discrepancy in the defense and prosecution theories of the facts, there was no proper foundation for any particular arrangement. (72 RT 8105.)

d. Nevertheless, the trial court permitted a procedure whereby the jurors were allowed to enter the car and to adjust the seat to check their own observations and inferences.

e. The jurors also took turns sitting passively in the back of the car while the lawyers manipulated the mannequin to demonstrate their respective theories of the shooting. (72 RT 8120-21.)

f. The proceedings were photographed. (72 RT 8114.)

g. Several weeks later, another effort at simulation was arranged by the prosecution in the sally port of the courthouse. At this simulation, without the jury present, Mr. Watson required petitioner and Cummings to reenact the positions they had allegedly assumed on the day of the killing. Simultaneously, Officer Gary Clark, a sheriff's deputy who had become the bailiff to the jury when Officer La Casella stepped out of that role, played the role of Officer Verna.

h. Petitioner was prejudiced by the wholly gratuitous sight of the courtroom bailiff standing in as the victim. (88 RT 9959.) The prosecution had already exploited the credulity of the jury by placing the then bailiff, Officer La Casella, on the witness stand to testify to admissions made by Cummings. The use of the bailiff in these photographs associated the bailiff figure in the jury's mind not merely with the prosecution case in the abstract, but with the decedent himself. The prosecution offered several feeble excuses for using the bailiff in this exercise, each accepted by the trial court: that security problems made it infeasible to use non-police

persons; that Deputy Clark, conveniently, just happened to be of a size similar to Officer Verna; and that, even if other non-bailiff officers were available, the vagaries of rotation made it likely that any of them might have ended up as a bailiff later anyway. (88 RT 9975.) These weak rationalizations cannot undermine the gratuitous nature of this exercise, especially where, as the record showed, there were always between six and ten non-bailiff policemen available in the basement to stand in for Officer Verna. (88 RT 9967.) It could hardly have been difficult for the trial court to require that the role of the victim be played by either (1) a non-police employee of the courthouse; or (2) a policeman in plainclothes; or (3) a uniformed policeman who was not and would not become a courtroom bailiff. Thus, Cummings's counsel argued, "the photographs had in them the bailiff who is currently presiding over this jury and will preside over them during the course of their deliberations, so what we have is the defendant with the gun in his hand and the car that was used, pointing the gun at the bailiff who is going to preside over the jury during their deliberations while he wears a uniform similar to the uniform of the officer who was killed." (88 RT 9963.)

i. The prosecution took numerous photographs of this demonstration.

j. On May 14, 1985, the prosecution sought to introduce these photographs to the jury. (88 RT 9956.) The prosecution's purpose in using the photographs and demonstration was to establish that the prosecution's theory of the crime was plausible.

k. Thereafter, a prosecution witness was presented with certain of the photographs. (88 RT 10059 et. seq.; People's (Trial) Exhibits 76, 83, 84, 91.)

l. The judge instructed the jury that the photographs were purportedly "in no way reflective of any issues in this case, but they were designed to be more illustrative of some of the factual material in regard to this case." (88 RT 10061.)

m. The subject demonstrations were prejudicial. Indeed, the key prosecution forensic witness, Dr. Cogan, himself conceded that this demonstration had essentially no probative value. Dr. Cogan also conceded that because of his earlier miscalculations, the angles that he had previously demonstrated to the jury did not accurately reflect the actual trajectories of the bullets. Dr. Cogan further admitted that, even if his measured angles were correct, the sally port simulation did not accurately reflect his measured angles. (88 RT 9964-65.)

n. Moreover, the generic mannequin used in the demonstration had no head, so that when the top of the mannequin, the neck, was placed even with the top of the car, it wholly mischaracterized the position of Officer Verna. (88 RT 9965.) The various uses of the mannequin and the sally port demonstration gave the prosecution a vital means of persuading the jurors of the two-shooter theory.

o. Furthermore, permitting the jurors to see photographs of petitioner positioned with a gun in his hand is inherently prejudicial and effectively violated petitioner's right against self-incrimination.

p. Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed because the prosecutor's

reliance on misleading and gratuitous physical simulations of the circumstances of the killing prejudiced the jury with irrelevant and inflammatory matter.

I. CLAIM NINE: PETITIONER WAS DENIED A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY.

The judgment of conviction violated petitioner's rights to a fair trial, an impartial jury, equal protection of the law, reliable guilt and special circumstance determination and due process of law, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 and the California Constitution because he denied a jury drawn from a fair cross-section of the community.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. Petitioner's constitutional right to a jury comprised of a representative cross-section of the community was violated.

b. A defendant seeking to make a prima facie showing of a violation of the fair cross-section requirement must meet the three-prong test adopted in *Duren v. Missouri* (1979) 439 U.S. 364, which requires that a defendant show: (1) the excluded group is a distinctive group within the community; (2) the representation of that group in jury panels or venires is not fair and reasonable in relation to the number of people in that group in the community, with community defined as the composition of the judicial district within the county served by the Superior Court; and (3) the under representation is due to systematic exclusion in the jury selection process.

c. Petitioner is bi-racial. His mother is white and his father African-American. The co-defendant is African-American. The victim was white.

d. Petitioner was tried in the North Valley District of Los Angeles County, San Fernando.

e. At trial the defendants moved to quash the jury panel and offered evidence that the racial composition of the jury did not represent a fair cross-section of the community. (1 RT 61 et. seq.)

f. The trial court held an evidentiary hearing. Petitioner called two witnesses to establish the prima facie violation of his rights.

g. Defendants argued that the community for fair cross-section analysis was either Los Angeles County as a whole or the 20-mile radius from which the jury was selected.

h. Petitioner introduced evidence of the racial and ethnic characteristics of both and demonstrated an unconstitutional disparity using both measures.

i. The trial court found that petitioner made a prima facie showing that the pool from which his jury was drawn was not representative of the community. (18 RT 1790.)

j. Ultimately, the trial court denied the motion to quash the jury panel after erroneously concluding that the prosecution successfully rebutted defendants' prima facie showing. (11 RT 876; 18 RT 1784-94.)

k. The court erred in its conclusion that the prima facie showing was rebutted.

l. The court also failed to evaluate the appropriate community for purposes of establishing the failure to provide jurors from a fair cross-section of the community.

m. The appropriate community for fair cross-section purposes is the judicial district. However, no evidence or arguments were offered, or findings made, with respect to the racial and ethnic composition of the North Valley Judicial District.

n. In addition, there was no suggestion at the time that the proper definition of community is the Judicial district.

o. Thus, petitioner has never had the opportunity to use the correct definition of community, as defined in *Duren*, to establish a prima facie case that African Americans and Hispanics were systematically excluded from the panels from which his jury was drawn.

p. Petitioner is now able to make such a showing with regard to the unconstitutional systematic exclusion of African Americans and Hispanics from juries in the North Valley Judicial District.

q. The figures underlying this claim were compiled by Dr. Edward W. Butler, professor at the University of California, Riverside, from lists obtained from Raymond C. Arce, Senior Director of Special Operations for the Los Angeles County Clerk and Executive of the Superior Court's office.

r. Dr. Butler's findings show a significant disparity in the number of African Americans and Hispanics in petitioner's petit jury compared to the population of African Americans and Hispanics in the judicial district.

s. Using data provided by Mr. Arce, Dr. Butler calculated the absolute and comparative disparities between the number of Black and Hispanic people in the North Valley Superior Court District, where Petitioner was tried, and the number of Black and Hispanic people who were included in the panels called to the North Valley Courthouse near the time petitioner's jury was being chosen.

t. The numbers show a comparative disparity of greater than 50% between the percentage of African Americans on jury panels in North Valley Superior Court at about the time petitioner was tried and the percentage of African Americans in the court district.

u. There is a similar comparative disparity of 20% for Hispanic people.

v. Petitioner is easily able to satisfy the first part of the *Duren* test because the two groups that were systematically excluded from panels at about the time his trial was beginning, African Americans and Hispanics, are undeniably distinctive and cognizable groups in the community.

w. The results of Dr. Butler's comparative analysis demonstrates that the second prong of the *Duren* test is satisfied.

x. It is clear that these groups were not present on jury venires in sufficient number to be fair and reasonable given the number of Black and Hispanic people in the judicial district.

y. Dr. Butler examined the 114 census tracks from the 1980 census to identify the number of Blacks and Hispanics in the judicial district over 18 years of age. The census itself based its estimates of minority populations on self-identification. Dr. Butler compared these

population figures against impanelment lists: the people who are summoned to the courthouse for jury duty. He examined thirty-three jury panels at the North Valley Superior Court between the dates of August 8, 1983 and August 27, 1984, statistics from over a year directly preceding the trial of Petitioner. The findings revealed that the adult population of the North Valley Superior Court district is 4.5% Black and 17.7% Hispanic. Yet, the percentage of black people on the thirty-three panels called to the North Valley Courthouse between August 1983 and August 1984 was just 2.2%.

z. The above results in an absolute disparity of 2.3% and a comparative disparity of 51%. (Exhibit 72, Declaration of Edgar W. Butler at 2056, ¶ B.) Just 14.1% of the people on those same thirty-three panels were Hispanic, for an absolute disparity of 3.6% and a comparative disparity of 20%. (*Id.*) The comparative disparity standard measures the percentage by which the probability of serving on a jury is reduced for people in a particular category or cognizable group. As previously shown, 4.5% of the jury-eligible adult population within the district served by the San Fernando Courthouse may be assumed to be Black. Contrasting this with the actual participation of 2.2% Black persons on the thirty-three panels during the relevant period, results in a comparative disparity of 51%. This means that during the period of the thirty-three empanelment analyzed by Dr. Butler, a black person residing within the judicial district had a 51% lesser chance of serving duty at this particular courthouse than a non-Black person in the same area.

aa. Based on the same method of calculation, a 20 percent comparative disparity of Hispanics was revealed.

bb. In testimony implicitly accepted by the trial court when it found that petitioner had established his prima facie case, Dr. Butler noted that the recommended acceptable range for the comparative disparity index is plus or minus 15%. (3 RT 286.) That is, within a range of plus or minus 15%, the population category examined for the jury venire is assumed to be representative of the community population.

cc. The higher the disparity percentage levels, the clearer and more justified becomes a claim of systematic exclusion.

dd. The absolute-disparity test measures the disparity as a percent of total population. For example, if Blacks constitute 8% of county population, and all are excluded, this is "only" an 8%, not a 100%, exclusion.

ee. It is the most restrictive of the competing tests, and in practical effect its use renders it impossible for a defendant to present a prima facie showing on behalf of a minority group which comprises less than 10% or so of the community. Reliance on the absolute disparity standard where a less than 10% disparity is held to be insignificant means that no group constituting less than 10% of the population of a given district can ever be underrepresented on a jury panel.

ff. The dilemma is illustrated in this case. With a Black population in the judicial district of merely 4.5%, the absolute disparity standard makes it appear that the shortage of African Americans on the panels was statistically insignificant: 2.3%. Despite its superficial appearance of insignificance, this statistic demonstrates that fewer than half the Blacks who might have been expected to appear in panels representing a fair cross-section of the community were actually called to jury duty at the

North Valley courthouse during the period of this survey. Regardless, if not one Black person had been called to jury duty at the North Valley courthouse during the nearly 13 months of these empanelments, Petitioner would still be able to show only a 4.5% disparity using the absolute measure.

gg. A truer measure of the lack of representation on these thirty-three panels is the comparative disparity measure of 51% for African Americans and 20% for Hispanics.

hh. Accordingly, there is no question that these comparative disparities demonstrate a significant and disturbing under representation of African Americans and Hispanics on the jury panels at the North Valley Courthouse at the time of petitioner's trial.

ii. These disparities are neither fair nor reasonable given the population of the respective groups within the community.

jj. Petitioner is able to meet the third prong of the *Duren* test because the lack of representation of African American and Hispanic people in the North Valley District has resulted from systematic exclusion.

kk. The small number of Blacks and Hispanics on North Valley jury panels for more than a year can be traced directly to the system in Los Angeles County for allocating jurors to the busiest courthouse. The system skews the percentages of minorities who may be called to jury duty at the suburban courthouses that surround central Los Angeles.

ll. At the time of petitioner's trial, jurors in Los Angeles County were assigned to Superior Court and Municipal Court jury panels throughout the County according to a computer program which implemented what was known as the "bull's eye system." Jurors could

legally be assigned to any courthouse within 20 miles of their residence. The 20-mile exemption was apparently intended to provide a limitation on jurors' travel distance in the face of the shift to a countywide draw. Because of the large number of courthouses in Los Angeles County, many of the 20-mile regions overlap portions of adjacent 20-mile regions. If two courthouses are within 40 miles of each other, their respective 20-mile surrounding circles will necessarily have at least some overlap. Hence, a juror who lives within the overlapping portion of two or more circular regions lives within 20 miles of two or more courthouses and is therefore eligible to be called to two or more courthouses. The result is "competition" among the courthouses for those jurors who live within 20 miles of two or more courthouses.

mm. As a result of competition among courthouses with overlapping 20-mile radii, jurors tended to be called to the courthouses located closest to their home. Under this system, the plotting on a map of the residences of prospective jurors summoned to a particular courthouse would resemble a bulls eye centered around that court. In practice, though, the courthouses with high demand for jurors, such as the Central District, commonly met their requirements for jurors by drawing upon jurors who resided in nearby districts, but within 20 miles of the courthouse to which they were called. This method of juror selection prevents the jury panels in Los Angeles County from being drawn from a fair cross-section of the community.

nn. In order to meet the goal, each potential juror residing within 20 miles of a particular courthouse must have an equal chance of being assigned to jury duty at that particular courthouse.

oo. This, however, is not the case in Los Angeles County. In assigning jurors to particular courthouses, the jury commissioner's office attempts to satisfy the demand for jurors at each courthouse while simultaneously minimizing the distance traveled by jurors by sending a juror to the closest courthouse with an opening.

pp. The result is an uneven distribution of jurors. For example, if a particular juror is called for jury duty, and he resides within 5 miles of one courthouse and within 15 miles of another courthouse, he is far more likely to be sent to the closer courthouse even if both courthouses have identical needs. Hence, each potential juror residing within 20 miles of a particular courthouse does not have an equal chance of being assigned to that particular courthouse.

qq. Compounding this problem is the situation of the Central District in Los Angeles. The considerable demand for jurors to the Central District Court coupled with the fact that jurors are assigned to the courthouse located nearest to their residence results in jurors residing in the central part of Los Angeles being far more likely to be called to jury duty at the Central District Courthouse than at any of the other courthouses within 20 miles of their homes.

rr. Furthermore a high percentage of minorities in Los Angeles live in the central part of the city or its surroundings.

ss. As a result, the Central District Courthouse takes a great portion of minority-group jurors for its juries, leaving the surrounding courthouses with a disproportionately low number of minorities to serve on their juries.

tt. The North Valley courthouse, where petitioner was convicted, is a prime example of one of these surrounding courthouses. The North Valley Courthouse lies on the northern edge of Los Angeles in a predominantly white suburb. Because of its location, most of the jurors who live to the north of the courthouse do not live within 20 miles of any other courthouse (with the exception, for some, of the Antelope courthouse.)

uu. By contrast, jurors who live for example, to the south or southeast of San Fernando, and who are thus closer to central Los Angeles, live within 20 miles of several other courthouses.

vv. In short, the San Fernando courthouse does not constitute the same composition for jurors in its northern hemisphere as it does in its southern hemisphere.

ww. As a result, a disproportionate number of jurors, largely Caucasian jurors, come from the northern part of the circle surrounding the San Fernando courthouse.

xx. From the 33 consecutive empanelment or summons lists for the North Valley Superior Court District on Aug. 8, 1983 through Jan. 30, 1984, which include the census tract number of the summoned juror's residence, Dr. Butler plotted on a map the area from which the summoned jurors actually appeared. He discovered a gross geographical disparity in the supposed random juror assignment.

yy. The map clearly showed that jurors were not randomly assigned from all census tracts within the 20-mile region surrounding the San Fernando Courthouse. (E. Butler and H. Fukurai, *An Evaluation of Jury Panel Selection Procedures: The North Valley District Superior Court,*

Los Angeles County, University of California at Riverside, page 18, Defendant's [Motion] Exhibit N, "Butler Report".) Instead, they consistently came from a much more restricted area, a very narrow section of that region.

zz. There is a significant difference among census tracts insofar as the number of times each is represented on the 33 different panels. The Butler Report, Table 2, p. 17, presents the distribution of tracts on the 33 panels. Exactly half of the tracts are included on all of the 33 panels. Map 2 shows only the North Valley District Superior Court portion of Los Angeles County (that is, the area within a 20-mile radius of that courthouse). It clearly illustrates that the tracts represented multiple times the San Fernando Valley. Dr. Butler explained that the imbalance results from the county's failure to compensate for three factors: (1) the relatively heavy need for jurors in the Central District of the Los Angeles Superior Court system; (2) the situation of overlapping 20-mile regions from which prospective jurors are drawn under the 20-mile rule; and (3) the policy of assigning each potential juror to the courthouse nearest his residence, among those courthouses needing jurors.

aaa. The Central District courthouse, because of its heavy trial calendar, draws a huge share of jurors countywide, approximately 40% as testified to by Mr. Arce. (7 RT 630.) And because a large percentage of the minorities in Los Angeles live within the 20-mile region surrounding the Central District courthouse, that courthouse draws a high percentage of the city's minorities for its jury panels. This strips other courthouses, whose peripheral regions overlap with the periphery of the Central District's 20-

mile region, of the opportunity to fairly or randomly draw minorities for their jury panels.

bbb. Accordingly, when the North Valley court's need for jurors comes up on the computer, a disproportionate number of the remaining jurors who are "closest" to and "available for draw" for the San Fernando courthouse are those jurors who reside north of the courthouse.

ccc. These disparities represent a systematic and non-accidental exclusion of African-Americans and Hispanics from the jury pool at the North Valley courthouse. Both African-Americans and Hispanics are distinctive groups within the community under established constitutional principles.

ddd. This systematic under representation of Blacks and Hispanics on jury venires for the San Fernando courthouse cannot be justified by any significant state interest.

eee. At all relevant times, petitioner objected to the under-representation of African-Americans and Hispanics on the North Valley jury panels.

J. CLAIM TEN: THE TRIAL COURT ERRED WHEN IT DENIED PETITIONER'S MOTION FOR A CHANGE OF VENUE.

The judgment of conviction was rendered in violation of petitioner's rights to due process equal protection of the law, reliable guilt and special circumstance determinations, the effective assistance of counsel, and to an impartial jury as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendment to The United States Constitution, And Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution by virtue of the trial court's ruling denying petitioner's motion for a change of venue.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. Petitioner incorporates by reference all related claims in this petition.

3. Prior to death qualification of the jury, petitioner moved for a change of venue to another county or to the Central Judicial District within Los Angeles County.

a. Evidence in support of the motion was introduced during a hearing held in open court and by written declaration. (5 CT 1176; 1 RT 26-59.)

b. Petitioner's counsel submitted a cryptic written motion for change of venue based upon excessive pre-trial publicity, but failed to attach any newspaper articles or other evidence as exhibits to the motion. (4 CT 1103-12.)

(1) In his written motion, petitioner's counsel did not specify to where he wished the case transferred.

(2) Instead, petitioner's counsel joined in co-defendant Cummings's motion requesting transfer to another county or another district. (5 CT 1174.)

(3) Counsel for Cummings posed all of the questions during the hearing on the change of venue motion.

c. Other than joining in the motion, petitioner's counsel did not participate in the proceedings.

4. Richard Krieg, the Administrative Manager for the Circulation Division of the Los Angeles *Daily News,* testified at the

hearing. He was responsible for overseeing the collection of circulation data for the newspaper and testified that he was familiar with the geographic area in which the *Daily News* was circulated. (1 RT 28-30.)

a. According to Mr. Krieg, the primary market for the *Daily News* was the San Fernando Valley, an area that corresponded roughly to the 20-mile radius from which the San Fernando jurors were drawn. (1 RT 35; Defendant's Exhibit A; Defendant's Exhibit B.)

b. Total daily circulation for the *Daily News* for the spring and summer of 1983 was 134,301.

(1) Of this total, 80%, or 107,942 newspapers, were sold to subscribers or other purchasers in the San Fernando Valley. (1 RT 35-36, 58.)

(2) Approximately 24% of the households in the San Fernando Valley subscribed to the *Daily News* and, in Mr. Krieg's experience, a household subscribed to only one newspaper. (1 RT 35, 45, 58.)

(3) The *Daily News* emphasizes coverage of news local to the San Fernando Valley. Accordingly, the witness believed that the *Daily News* would have devoted more coverage to the murder of Paul Verna than the city-wide newspapers, such as the Los Angeles *Times*. (1 RT 52.)

(4) The *Daily News* covered the murder case repeatedly during the first weeks in June 1983, periodically in July 1983, heavily in August 1983, during the preliminary hearing, and periodically thereafter. (5 CT 1186.)

(5) The *Daily News* printed a total of 27 articles about the case between June 1983 and May 1984, when the venue motion was heard.

5. The other major newspapers also provided extensive coverage.

a. Both the Los Angeles *Herald Examiner* and the Los Angeles *Times* provided heavy coverage of the crime in early June 1983, and periodic coverage thereafter. (5 CT 1224, 1245.)

b. Together the *Times* and the *Herald Examiner* printed a total of 24 articles about the crime and its aftermath between the beginning June 1983 and March 1984.

6. Evidence from two television stations heavily covered the homicide in June and moderately covered the event in August 1983. (5 CT 1262, 1265.) Between the two stations, 24 separate reports were aired about the crime and its investigation.

7. The newspaper coverage followed the crime and its investigation closely, and focused heavily upon the victim and the reactions of his family and friends to the murder.

a. The newspaper articles repeatedly referred to the fact that Paul Verna had received a Medal of Valor for saving two mentally challenged boys from a burning building. (5 CT 1248.)

b. The articles also evoked sympathy for Verna through repeated quotations from family, friends, and colleagues in the police department, attesting to his exemplary character. (5 CT 1238.)

c. The news reporting emphasized that 6000 people attended Verna's funeral. Among the 6000 were local dignitaries such as Mayor Thomas Bradley.

d. Flags were flown at half-mast in the victim's honor. (5 CT 1194, 1238.)

e. The media also stressed that the police department established a Paul Verna Memorial Trophy for a local sporting event.

f. Likewise, a fund had been set up for his children, which had collected more than $50,000. (5 CT 1204, 1222.)

8. In contrast to the sympathetic reports regarding Officer Verna and his family, the newspaper coverage was slanted against petitioner.

a. Headlines proclaimed the killing a "Cold-blooded Assassination" (5 CT 1234) and the reporting focused upon the massive manhunt undertaken by the police to locate the defendants.

b. The media reported in detail the developing facts and theory of the killing advanced by the prosecution, including false allegations that petitioner had said "Here's my identification" and shot the officer from inside the car. (5 CT 1209, 1260.)

c. Petitioner's criminal record was reported and the more sensational and bizarre aspects of the case were highlighted. These included petitioner's alleged suicide attempt, Cummings's plans to escape and poison petitioner, and the enhanced security at the preliminary hearing. (5 CT 1195, 1207, 1211.)

d. The reporting also emphasized the purported threat to the community and perceived social breakdown represented by the killing.

(1) According to the coverage, thousands of individuals attended Paul Verna's funeral because he "symbolized law and order in a society increasingly turning violent." (5 CT 1200.)

(2) Newspaper reports quoted police officers who admitted that they were frightened on the streets and feared for their lives. (5 CT 1190-91, 1197.)

(3) Other articles stressed that the killing chilled neighbors in the area.

(4) One article quoted a police officer who stated, "Anyone who would gun down an armed officer in broad daylight wouldn't hesitate to gun down an unarmed citizen." (5 CT 1233.)

(5) Most emphatically of all, a *Daily News* column in May, 1984, stated that the killing "hit the community hard because of its cold-bloodedness and because, until the very end, the 14-year officer was being a good cop." The columnist flatly labeled petitioner and his co-defendants "murderers," and Verna and other officers were portrayed as noble defenders "dedicated to keeping sane society separated from the crazies and murderers who care nothing about human life." (5 CT 1222.)

9. The trial court erred in refusing to grant a change of venue.

a. The nature and gravity of the offenses weighed heavily in favor of a change of venue.

(1) Unquestionably, capital murder is a crime of utmost gravity, which because of the inevitable media and public interest, must weigh heavily on a change of venue motion.

(2) That Paul Verna was a police officer renders the nature and gravity of the offense an even weightier factor on the venue

motion because the killing of a police officer is believed to be especially heinous.

(3) In addition to the capital murder of a police officer, petitioner and his co-defendant were charged with numerous robberies and attempted robberies.

(a) Armed robbery is alone a serious crime, but the crimes charged in this case included several in which the victims were brutally beaten.

(b) The robberies and the killing occurred in the San Fernando Valley, in and around the area from which the jury was drawn and the area with the most concentrated media coverage of the crime.

(c) Indeed, during his closing argument, the prosecutor reminded the jurors that many of the robberies had been committed "in the Valley." (95 RT 10885.)

b. Paul Verna was a respected and prominent member of the community, a factor strongly supporting a venue change.

(1) The media trumpeted Paul Verna's special status in the community, not simply as a police officer, but as a Medal of Valor winner who had performed a noteworthy act of bravery by saving two handicapped children from a burning building.

(a) Indeed, the first headline in the *Daily News* about the killing proclaimed, "LAPD Valor Winner Slain." (5 CT 1188.)

(b) Many of the newspaper stories thereafter re-emphasized Verna's "considerable reputation for bravery" and his status as a Medal of Valor winner.

(c) Numerous other articles detailed the events leading up to his receipt of the award. (5 CT 1194, 1229, 1246, 1256.)

(2) Other articles noted that Verna had grown up in the very area of Los Angeles in which he was killed. (5 CT 1191.)

(3) In addition to his notoriety and prominence prior to the killing, the murder itself made Verna even more prominent and sympathetic to the community.

(a) Articles repeatedly referred to Verna as a "good cop" and an exemplary individual struck down in his prime. (5 CT 1222, 1226-27.)

(b) The reports noted that a fund had been set up for his children and that more than $50,000 had been collected; one newspaper account publicly reported Mrs. Verna's thanks for the outpouring of community support and sympathy. (5 CT 1204.)

(c) The newspapers closely followed Verna's funeral, stressing that more than 6,000 people attended, including local political leaders, such as the Mayor of Los Angeles and other dignitaries.

(i) The papers carried detailed reports of the funeral procession, the number of officers attending and the bagpipe troupe that played at the funeral.

(ii) Articles and accompanying photographs focused on the family's grief at the funeral, paying particular attention to Verna's children and their reaction to the bewildering and enormous change wrought in their lives by the murder. (5 CT 1199-1200, 1238, 1252-56.)

(iii) The media reported that flags were flown at half-mast throughout the city in commemoration of Verna's death. (5 CT 1194.)

(d) Months after the killing, still other reports told of the Paul Verna Memorial Trophy established by fellow police officers as the prize in a local sporting event. (5 CT 1222.)

c. Petitioner's status in the community weighed in favor of a change of venue.

(1) In contrast to the sympathetic portrayal of Paul Verna in the media, petitioner was portrayed in particularly, unsympathetic terms.

(2) The press noted his status as an ex-convict on parole and pointed out that he had been imprisoned for a fire-bombing and for robbery. (5 CT 1257.)

(3) Although two reports stated that petitioner grew up in the vicinity of the crime, another article quoted an eyewitness as stating that no one in the neighborhood knew him. (5 CT 1229.)

(4) There were racial overtones to the case as well since petitioner, a bi-racial man, and his co-defendant, an African American man, were accused of killing a white police officer.

(5) Perhaps most important, the newspaper reports expressly or by implication painted a picture of petitioner as a "cold-blooded assassin[]," a "murderer[]" and "craz[y]." (5 CT 1234.)

d. The extent of the news coverage, particularly in the San Fernando Valley area, weighed in favor of a change of venue.

(1) The media coverage closely followed developments in the murder investigation, including prejudicial facts concerning petitioner.

(2) The press stressed that in the hours immediately after the killing "an intensive, non-stop police manhunt for the murderers" had begun. (5 CT 1233.)

(3) After the defendants were apprehended, the press reported each aspect of the police department's developing theory of the murder. For example, the news reports not only emphasized that the suspects were charged with multiple crimes, but dutifully echoed the prosecution's theory that "Killing of Police Officer [was] Tied to Suspects' Fear" of being apprehended for armed robbery. (5 CT 1257.)

(4) The press reported each instance of inclupatory speculation by the prosecution about the killing, even though the facts developed at trial did not support such speculation. For example, one story began with the following:

> "Here's my identification," Kenneth Gay reportedly told Los Angeles motorcycle Officer Paul Verna as the policeman walked up to the car in which Gay was seated in Lakeview Terrace. Gay then pulled a handgun and shot the officer, said Deputy Dist. Atty. John Watson. (5 CT 1260.)

(5) In fact, at trial the prosecution sought to show that Cummings, not petitioner, shot the officer while seated in the automobile.

(a) The version reported in the newspaper was that which Pamela and Cummings asserted in their defense.

(b) Similarly, the prosecutor was also quoted to the effect "that there is evidence that all three [petitioner, Raynard and Pamela Cummings] had planned acts in which 'one of the likely things would be that someone would die -- and someone did.'" (5 CT 1249.)

(6) In addition to reporting incorrect, and prejudicial versions of the events, as discussed above, the press emphasized the sensational aspects of the case. (5 CT 1195, 1242-43.)

(a) The newspapers also reported that "Security [was] tight" at the preliminary hearing and illustrated the point with photographs of shotgun-toting police officers. (5 CT 1243.)

(7) As discussed above, media coverage was particularly extensive in the San Fernando Valley area from which the *jury was chosen.* (1 RT 35-36, 45, 58; Def. Ex. A; Def. Ex. B.)

(8) In addition to the sheer numbers of people exposed to the news coverage, the extent of coverage in the San Fernando Valley press was significant.

(a) More than half of all the news articles published about the crime between June 1983 and May 1984 in the three Los Angeles papers were published in the *Daily News.*

(b) The evidence showed that the *Daily News* stressed coverage of area events more so than the metropolitan papers. (1 RT 52.)

(c) It was also in the *Daily News* that the most emotional news coverage could be found.

(d) Thus, the population from which the jury was chosen received the most concentrated and extensive coverage of the crime and its investigation.

e. The record establishes that numerous jurors were familiar with petitioner's case.

(1) The twelve jurors who sat at petitioner's trial admitted to having been aware of the murder prior to the beginning of trial. (12 RT 1027-28; 20 RT 2019; 39 RT 3791-92; 40 RT 3983; 46 RT 4706, 4809.)

(2) Six of the jurors indicated that they learned of the crime through the media. (12 RT 1027-28; 20 RT 2019; 39 RT 3791-92; 40 RT 3983; 46 RT 4706, 4809.)

(a) While each of such jurors professed to remember little of the crime, or claimed it would not affect their judgment, that so many jurors had heard of the case is testament to the widespread coverage the crime received.

(b) Moreover, it is impossible to determine the subtle impressions about the case that the news coverage may have left in the jurors' minds and that may have biased them against petitioner.

(3) The size of the community is at least a neutral factor and does not weigh against a venue change.

10. Upon balancing the factors, the motion for change of venue, at least to another judicial district in Los Angeles County, should clearly have been granted.

11. Even if the trial court did not err in denying a change of venue to another county, it should have ordered a transfer to the Central Judicial

District as requested by the defendants. Petitioner in this case has made a substantial and convincing showing that a change of venue to another county should have been ordered.

12. Resolving all doubts in favor of petitioner, it is apparent that it was prejudicial error for the trial court to deny the motion to change venue to another county or to the Central District within Los Angeles County.

13. Thus, the trial court's failure to grant the venue change violated petitioner's Fifth, Sixth and Fourteenth Amendment rights to due process and to an impartial jury and thus, requires reversal of his conviction.

K. CLAIM ELEVEN: THE TRIAL COURT ERRED BY PERMITTING INTRODUCTION OF PETITIONER'S TAPE-RECORDED STATEMENTS ADMITTING THE ROBBERIES.

The judgment of conviction was rendered in violation of petitioner's constitutional rights to due process, equal protection, a fair trial, a reliable guilt an special circumstance determination based on admissible relevant evidence, and self incrimination as guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 and the California Constitution relevant statutory law by virtue of the trial court's admission of petitioner's purported confession to the robbery changes, which was obtained as a result of the ineffective assistance of counsel and which was otherwise inadmissible as involuntary and/or as statements made during pleas negotiations that the prosecutor should have been estopped from using against petitioner.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. Petitioner's decision to confess was based upon his counsel's advice.

a. In March 1984, on the advice of his counsel, petitioner offered to confess to certain of the non-capital counts and to testify on behalf of the State at the murder trial against Cummings, in return for leniency from the prosecutor. (58 RT 6264, 6274.)

b. Petitioner's counsel told him that he should give the statements, and assured petitioner that even if no deal was brokered if he did not testify, his admissions would not be used against him at trial. (58 RT 6266.)

c. According to petitioner's counsel, the prosecution had agreed not to introduce any such statements into evidence. (58 RT 6274-75.)

d. Petitioner's counsel "sought to arrange for a polygraph examination of petitioner to be administered by the People's expert examiner" test to establish his truthfulness when he admitted certain robberies and denied participation in the murder. (*People v. Cummings*, 4 Cal.4th at 1315; *see also* 58 RT 6274.)

(1) Before agreeing to the polygraph examination, the prosecutor demanded that petitioner be interviewed concerning the crimes and that the interview be tape-recorded. (58 RT 6274; 75 RT 8260 [People's Exhibit 1].)

(2) Ken Scarce, who was to administer the polygraph, never arrived and thus no polygraph was ever taken.

e. There was no dispute that the parties were in the process of "negotiating" a "deal" pursuant to which petitioner might testify for the State. (*E.g.*, 85 RT 9736-38.)

f. For several days prior to the interview, petitioner and his counsel reviewed the evidence on the robberies, in an attempt to enhance petitioner's credibility. (58 RT 6278.)

g. As recognized by this court, "Shinn induced petitioner to confess to the charged and uncharged robberies." (*In re Gay,* 19 Cal.4th at 791.)

h. The court further found:

Shinn advised petitioner that it would be in his own best interest to cooperate with the prosecution and that he might be able to work out a favorable disposition of his case as a result. Petitioner was told by Shinn that the statement could not be used against him if the prosecutors decided not to use him as a witness.

3. The circumstances surrounding the tape-recorded session demonstrate that it was error for the trial court to admit the confessions.

a. Petitioner and his counsel attended the interview.

b. The prosecutor and two police officers were also present.

c. Petitioner was read his *Miranda* rights.

(1) Under questioning by the prosecutor, petitioner admitted participating in the Kenn Cleaners, Salads Plus, Recreational Vehicle Repair Shop and Pizza Man robberies (Counts 1-6 and 12-14).

(2) With the exception of Count 6 (RV Repair Shop), there was no direct or circumstantial evidence to connect petitioner to the crimes to which he confessed.

(3) During the taped session, petitioner denied any complicity in the Design Florist attempted robbery (Count 7) or the Poehlmann robbery (Count 15).

(4) Although the Artistic Bath Shop robbery (Counts 8 and 9) was mentioned during the interview, it was not directly addressed and petitioner did not admit participation in it. (*See* People's Ex. 1.)

(5) Petitioner also confessed to a robbery of the Valley Plaza Vacuum Cleaner store. (97 RT 11274-75.) Petitioner was not charged with this robbery.

d. Although trial counsel was given an opportunity to speak, he did not clarify on the tape that an agreement was made not to use petitioner's statements if he did not testify.

e. Counsel for petitioner requested that the prosecutor contact him after reviewing petitioner's statements in order to alert counsel as to whether petitioner would be given the polygraph or whether his testimony would be needed. (85 RT 9745.)

f. The prosecution never contacted petitioner's counsel and never gave petitioner a polygraph test. (85 RT 9746.)

4. During pre-trial proceedings, neither the prosecutor nor petitioner's counsel ever mentioned the tape-recording.

a. In fact, the prosecutor failed to mention the tape on two occasions when he was specifically requested to explain the evidence he intended to rely upon at trial. (31 RT 3143-47.)

b. Nevertheless, on the first day of trial, the prosecutor sought to introduce petitioner's tape-recorded confessions as his first piece of evidence on the non-capital counts. (58 RT 6253.)

c. Demonstrably surprised, counsel for petitioner moved to suppress the evidence and a hearing was held out of the presence of the jury. (58 RT 6274-84.)

(1) At the hearing, petitioner testified that he confessed based on his counsel's advice that the statements would not be used against him at trial if he did not testify for the prosecution.

(2) Petitioner's trial counsel corroborated this testimony and further testified in essence that he had a "tacit understanding" (95 RT 10983) with the prosecution that the statements would not be used if petitioner was not made a state's witness. (58 RT 6275-76.)

(3) The prosecutor and a police investigator testified that no such agreement was ever reached. (58 RT 6256-57.) Instead, John Helvin, the police investigator, stated that the prosecutor believed petitioner when he admitted responsibility for the robberies, but disbelieved him when he denied the murder. (58 RT 6255.)

d. The trial court found that the statements were voluntarily made and admitted the tape recording into evidence.

e. During petitioner's case-in-chief, counsel called Detective Holder to the stand.

(1) The trial court cautioned counsel about eliciting an opinion as to petitioner's truthfulness from the detective.

(2) After stating he "did not care" what the officer said, counsel elicited uncontradicted testimony that there was no agreement not to use petitioner's statements and that, in the officer's opinion, petitioner was being truthful when he admitted participation in the robberies. (85 RT 9742-44; *People v. Cummings,* 4 Cal.4th. at 1269.)

f. With the exception of Count 15, which was dismissed by the trial court, petitioner was found guilty on all the non-capital counts and the capital count for which evidence of the robberies was used in order to provide a motive to kill.

5. Trial counsel rendered ineffective assistance in advising petitioner to confess to the robberies and by his conduct at trial with respect to petitioner's statements.

a. Trial counsel rendered ineffective assistance when he induced petitioner to confess, without seeking adequate assurances that the tape-recording would not be used against petitioner.

(1) In advising petitioner to confess to a string of robberies for which there was little corroborative evidence and that were used to establish a motive for murder, without adequate assurances that the confessions would be used only if petitioner testified for the prosecution, fell far below any "objective standard of reasonableness."

(a) Where as here, counsel claimed that an agreement exists which would preclude use of the statements at trial despite the *Miranda* warnings, common sense alone dictates that such an agreement be made explicit.

(b) Reliance on purported "tacit" understandings was simply insufficient.

(c) Counsel's failure to make any such agreement explicit is all the more astonishing because he was asked by the prosecutor whether he had more to add before questioning began.

> Mr. Watson: So we may ask you some questions on other subjects but, um, we want to talk about the murder first. And I think it should be clear, but in an abundance of caution I want to make it even more clear nothing has been promised to you in any way, shape or form, a promise hinted at or anything else, in order to, uh, convince you to take this examination or to convince you to -- to participate in this interview?
>
> Isn't that right?
>
> Petitioner: That's right.
>
> Mr. Watson: All right. *Is that right, Mr. Shinn?*
>
> Mr. Shinn: *That's correct.* (People's Ex. 1, at 6 (emphasis added).)

(d) Here, the uncontradicted evidence at the suppression hearing showed that petitioner believed that the tape-recording would not be used as evidence. Petitioner gave the statements only on the advice of his counsel that they would not be used.

(e) In the face of the *Miranda* warnings and the intent to defend on the basis of insufficient evidence of petitioner's participation in the robberies, counsel's failure to obtain an express agreement not to use the confessions fell far outside the range of professional competence, even liberally construed.

(f) Counsel's unreasonable advice to petitioner that he confess without adequate assurances from the prosecution that the statements would not be used, together with counsel's unsubstantiated and unreasonable belief in the existence of an agreement with the prosecution, are plainly outside the acceptable range of professional competence.

(2) The right to effective assistance of counsel is denied if trial counsel makes a critical tactical decision that would not be made by diligent, ordinarily prudent lawyers in criminal cases.

(a) Mr. Shinn's conduct clearly rendered him ineffective and no tactical consideration can justify his egregious breach of his professional duty.

(b) Unquestionably, tactical reasons existed for seeking a negotiated agreement with the State.

(c) However, a simple procedure existed to obtain such a result that would have protected petitioner from the adverse consequences suffered.

(3) Discussion could have ensued, without tape-recording or *Miranda* warnings, and with the explicit understanding that the statements were protected plea negotiations.

(4) At the very least, counsel could have referred to the agreement not to use the statements at the time of the tape recording.

(5) Stripped of such protection, however, petitioner was left with all the disadvantages of a confession, but none of the advantages he was promised.

(6) Similarly, advising petitioner to confess might have made tactical sense if petitioner had not intended to defend against the charges or if trial counsel was convinced petitioner would be found guilty in any event.

(a) But petitioner and his counsel did intend to defend.

(b) As the evidence shows, absent petitioner's statements (and excluding other improperly admitted evidence) acquittal was a near-certainty on all, or substantially all, of the counts to which petitioner confessed.

(7) In view of that virtually complete defense, there was no possible tactical reason to advise petitioner to waive his rights and voluntarily confess without clear assurances that petitioner would receive something in return.

(8) Without such assurances, therefore, trial counsel's conduct amounted to the withdrawal of petitioner's defense to substantially all of the non-capital counts, and the counts used to demonstrate a motive to kill, a textbook case of ineffective assistance of counsel.

(9) This Court confirmed that trial counsel's inducement of petitioner to confess to a string of robberies was ineffective.

(a) This court stated that

> [i]t is possible, therefore, that but for Shinn's incompetence in inducing Petitioner to confess the robberies to the officers investigating the murder, he would not have been convicted of several of the robberies. Moreover, the question of Petitioner's guilt might not have been put to the jury at all, if,

> as did occur on one count, the trial court granted a motion for acquittal. (*In re Gay,* 4 Cal.4th at 793.)
>
> (b) It was further held
>
> Shinn not only acted as a second prosecutor by creating the evidence that led to Petitioner's conviction of the robberies, his conduct permitted the prosecutor to portray Petitioner as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies. (*Id.* at 793-94.)

b. Trial counsel compounded his ineffective assistance in connection with petitioner's confession by his professionally unreasonable conduct during trial before the jury.

c. To the extent the jury harbored any lingering doubts about the veracity of petitioner's statements, counsel undermined even that as a last line of defense.

(1) Counsel elicited testimony from Detective Holder that no agreement not to use petitioner's statements had been reached. (85 RT 9738-39.)

(2) He also caused the detective to testify that he (Holder) believed petitioner was truthful in confessing. (85 RT 9743-44.)

(a) Trial counsel elicited this testimony after stating that he did not "care" what the testimony would show. (*Id.* at 9743.)

(b) In fact, he knew what the testimony would show because the terms of the arrangement were that the prosecutor would listen to the tapes and decide whether he believed petitioner, and another investigator, Helvin, had already testified to his belief in petitioner's truthfulness at the suppression hearing outside the presence of the jury. (58 RT 6255-56; 85 RT 9738, 9742.)

(3) By eliciting the detective's testimony, trial counsel placed himself and his client in the untenable position of either resting upon an uncontradicted record before the jury that the tape-recorded statements were voluntary and truthful or requiring that either he or petitioner testify to dispute the investigator.

(a) Counsel could not be a witness, and thereby put his own credibility in issue, without violating his ethical duties.

(b) Petitioner could not be a witness without risking waiver of his privilege against self-incrimination.

(c) Having knowingly painted himself into this corner, trial counsel chose to accept the detective's damning and uncontradicted testimony.

d. Not only did counsel engineer the circumstances whereby the confessions were ultimately admitted into evidence, but he elicited testimony before the jury which served only to enhance the veracity of those confessions.

e. Trial counsel's conduct fell far below even a lax standard of professional reasonableness and effectively assured petitioner's conviction.

f. Petitioner was prejudiced by introduction of his confessions into evidence.

6. The incriminating statements were inadmissible statements made during protected plea negotiations.

a. Petitioner's tape-recorded confession to the robberies in this case was tantamount to a guilty plea, since other than Pamela Cummings's accomplice testimony, no physical evidence or eyewitness

testimony linked him to the crimes charged in, at least, counts 1-5 and 12-14.

b. As the prosecutor told the jury:

> He confessed so that is really all you need. If you have evidence on there that proves a crime is committed and a confession, that's really all you need. (95 RT 10871.)

c. The offer to confess to the robberies in return for testifying for the state in the murder case must, therefore, be seen for what it was: an attempt to engage in bona fide negotiations for a settlement with the prosecutor.

d. Nor is there any dispute that such negotiations were under way.

(1) At trial, Detective Holder, who was present during the taped session, admitted that the purpose underlying the discussions was "negotiation" directed at working out a "deal" pursuant to which petitioner would testify for the State. (85 RT 9736-38.)

(2) This testimony was fully consistent with the understanding of petitioner and his trial counsel expressed during the suppression hearing that the statements would not be used because the parties were attempting to negotiate a settlement. (58 RT 6266, 6276, 6279-80.)

(3) That the parties were unable to reach agreement or that no formal offer to plead guilty was involved is irrelevant.

(a) Both parties understood that they were negotiating toward such an agreement.

(b) In such circumstances the parties must be able to speak frankly in the interest of resolving criminal matters.

e. It is clear that petitioner's statements were inadmissible plea negotiations. Petitioner's "subjective intent at the meeting, whether or not clearly manifested, was to negotiate with the [prosecutor] in the hope of securing a concession." (*United States v. Washington* (E.D. Pa. 1985) 614 F.Supp. 144, 149.)

(1) Petitioner and his counsel requested the meeting with the prosecution at which the statements were made. (People's Ex. 1.)

(2) That petitioner "attend[ed] the . . . meeting with his attorney evidence[s] a belief that he would benefit from the meeting . . . and that his rights would be adequately protected." (*United States v. Washington,* 614 F.Supp. at 149.)

(3) Petitioner and his counsel testified that he gave the statements on the advice of counsel, with the intent of convincing the prosecution to use him as a state's witness in the murder case.

> [Shinn] Q: What was your understanding that the statement would not be used if you were not given a polygraph test?
>
> [Gay] A. If I was not allowed to become a State's witness then the interview was *useless. It was not good, and* that was it.
>
> Q. Was it your understanding that they could not use the recording of your statements that you made?
>
> A. That was my impression.
>
> Q. Did we discuss that -- you and I discuss that?
>
> A. *Yes.* Prior to going over there, yes. (58 RT 6266 (emphasis added); *see also* 58 RT 6279-80.)

(4) Shinn corroborated petitioner's uncontested testimony. He told petitioner, that

> in the event you [Gay] are not given a polygraph test or not made a witness for the State, any statements you make will not be used against you. I told Mr. Gay that, and based upon my representations I think Mr. Gay gave the statements. Based upon my representations Mr. Gay gave the statements. (58 RT 6276.)

(5) Petitioner also testified further that he rehearsed the evidence on the robberies "for three days" to insure that he would be considered truthful and trustworthy. (58 RT 6278.)

f. Petitioner's belief that his statements would not be used against him was reasonable under the circumstances.

(1) Petitioner's request for a polygraph to prove his truthfulness suggests more than a mere desire to confess.

(2) The need to prove truthfulness was designed to induce the prosecutor to offer something in return for petitioner's testimony.

(3) The prosecutor's insistence on recording the statements prefatory to the polygraph also demonstrated his desire to be assured of petitioner's truthfulness before offering leniency.

(a) The prosecutor sought to lull petitioner into a false sense of security by telling him that his questioning was essentially a preface to the polygraph. (People's Ex. 1.)

(b) Indeed, the entire polygraph procedure would have been pointless had petitioner intended the statements to be

offered and received only as a confession. (*See United States v. Washington*, 614 F.Supp. at 149 (conduct of examination suggests reasonableness of belief in non-admissibility).)

(4) Furthermore, the evidence against petitioner was extremely scant.

(a) Without the confession, the chances were great indeed that petitioner would have been acquitted in at least Counts 1-5 and 12-14.

(b) Petitioner had no reason simply to offer to confess to the crimes without a reasonable belief either that he would receive a benefit or the statements would not be used, regardless.

(5) The reasonableness of his belief that the statements would not be used is further suggested by the prosecutor's own conduct prior to trial.

(a) The prosecutor twice failed during pretrial proceedings to mention petitioner's statements as evidence he intended to introduce, despite the opportunity to disclose that evidence.

(6) During the hearing on the severance motions the prosecutor stated that "[t]he testimony hinging [sic] [Petitioner] to most of these robberies is *going to come in the form of accomplice testimony* if [sic] somebody who drove the car and didn't even go inside." (31 RT 3143 (emphasis added).)

(7) The prosecutor did not mention that the most damaging evidence he intended to introduce were petitioner's own words.

(8) Later, during the same argument, trial counsel for petitioner specifically asked:

> Mr. Shinn: How is he [the prosecutor] going to get in the prejudicial evidence that petitioner was involved in these robberies?
>
> How are you going to do that, Mr. Watson? *He hasn't pled guilty.* He hasn't been tried yet.
>
> Mr. Watson: Mr. Shinn, there must be a little bit of evidence indicating he was involved or he wouldn't have been indicted.
>
> He wouldn't be held to answer.
>
> There is evidence connecting them to these robberies. (31 RT 3147 (emphasis added).)

(9) Although specifically asked what his proof would be, the prosecutor once again failed to mention the first -- and most damaging -- piece of evidence he introduced in the robbery phase of the trial: the tape-recording of petitioner admitting his participation in the crimes.

(10) The evidence also showed that following the interview with petitioner the district attorney agreed to contact trial counsel regarding whether petitioner would be a state's witness. Trial counsel was never contacted. (85 RT 9745.)

(a) In failing to mention the tape recording prior to trial and in failing to contact petitioner following the taped statements, the prosecutor permitted petitioner, trial counsel and the trial court to believe that the only evidence which the state intended to introduce against petitioner was the testimony of the preliminary hearing witnesses and Pamela Cummings.

(b) If petitioner and his trial counsel expected the statements to be introduced, then there is no explanation for

why petitioner and his counsel went to trial on those counts. Petitioner's statements made conviction almost inevitable on those counts to which he confessed. (*See also* Sealed RT, 2/27/85, 2-5.)

(c) Under all the circumstances, petitioner manifested a reasonable belief that the statements would not be used.

g. Inasmuch as the statements in this case were tantamount to a guilty plea, they should have been suppressed as made in furtherance of plea negotiations.

(1) The introduction of the statements violated petitioner's right to due process guaranteed by the United States and California Constitutions.

(2) The uncontradicted evidence showed that petitioner confessed only because of a mistaken belief that his attorney and the prosecutor had a previous agreement regarding use of the tape recording.

h. Accordingly, the confessions were involuntary and inadmissible.

7. Even if petitioner's confessions are not found to have been made during protected plea negotiations, the trial court nevertheless erred in finding the statements voluntary and admissible.

a. The prosecution was required to prove by a preponderance of the evidence at the suppression hearing that petitioner's confession was voluntary.

b. The uncontradicted evidence at that hearing demonstrates, contrary to the trial court's finding, that petitioner did not voluntarily confess to the robberies.

c. In the instant case the coercion was a result of a person in authority, petitioner's counsel, who advised him to make statements to the prosecutor as part of a plan to gain leniency.

(1) Thus, the guilty plea was induced by the false promises and inadequate advice of counsel and were not knowingly and voluntarily made.

(2) Petitioner testified that his "impression," based on what his counsel had told him, was that "[i]f I was not allowed to become a State's witness then the interview was useless. It was not good, and that was it." (58 RT 6266.) Petitioner's counsel confirmed that he gave the advice. (58 RT 6274-75.)

(3) That petitioner did not believe the evidence would be introduced is shown by the demonstrable surprise his trial counsel exhibited when the prosecution sought to introduce the evidence. (58 RT 6271, 6272-73, 6283; *see also* 31 RT 3147.)

d. The evidence and the inferences to be drawn from it establish that petitioner confessed under the misapprehension that his attorney and the prosecutor had an agreement that would have precluded the use of his statements.

e. As such, the confessions were involuntary and should not have been admitted.

8. The prosecutor's conduct with respect to the tape-recording sufficiently lacked good faith and denied petitioner the fair trial guaranteed by the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the California Constitution analogs.

a. Besides conducting apparent negotiations, the prosecutor first insisted that a tape-recorded statement be made before a polygraph, for the polygrapher's benefit. (People's Ex. 1.)

b. The prosecutor arrogated to himself the responsibility of determining petitioner's truthfulness before giving the polygraph. (85 RT 9742.)

c. Further, the prosecutor decided that petitioner was truthful in part and false in part in the manner most beneficial to the prosecution.

d. In addition, the prosecutor failed to contact petitioner's counsel further about their discussions, thus obviating any "deal." (85 RT 9745.)

e. Moreover, the prosecutor twice failed during pre-trial proceedings, despite the specific opportunity and request to do so, to disclose that he intended to use the statements. (31 RT 3143, 3147.)

f. Finally, the prosecution introduced into evidence those portions of the statement it considered truthful.

g. The prosecutor effectively manipulated the situation to his own advantage without disclosing his intentions, while permitting petitioner to operate under the misapprehension that the statements would not be used.

9. The introduction of the confessions was erroneous because the court shifted the burden of proof to petitioner to show that the confessions were *involuntary*.

a. In one of several rulings on the motion to suppress, the trial court stated: "I haven't found any testimony to *assure* the Court that

you [Shinn] were lulled or that the defendant was lulled into [confessing]." (58 RT 6273 (emphasis added).)

(1) The trial court went further and stated that it had heard "no evidence" to support petitioner's claim that he had been "lulled" into confessing. (58 RT 6275.)

(2) Settled principles required, however, that the trial court be assured by the prosecution that the confession was indeed voluntary, not assured by the defense that it was involuntary.

(3) The trial court not only erroneously placed the burden of production and proof on petitioner, but in seeking assurances of involuntariness, it ignored the uncontested testimony of both petitioner and his counsel that they believed an agreement not to use the statements existed.

10. The introduction of petitioner's incriminating statements was demonstrably prejudicial.

a. Tested by any measure, the erroneous admission of petitioner's confessions was prejudicial.

b. The trial court acquitted petitioner of one count to which he did not confess (Count 15) and which had a similar lack of corroborating evidence, as did all the other counts.[4].

c. However, in addition to prejudicing petitioner with respect to the non-capital counts, the confessions added critical support to the remainder of the prosecutor's case.

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[4] Ultimately, this Court reversed all the robbery convictions based on an instructional error. (*People v. Cummings*, 4 Cal.4th 1233.)

(1) The robberies formed the basis for the prosecutor's speculative argument that petitioner had a purported motive for murder and had premeditated and deliberated before killing. (*See* 8 RT 740; 9 RT 774-75; 95 RT 10874-81.)

(2) Petitioner's apparent acknowledgment that he and Cummings had committed the non-capital crimes necessarily added substantial force to the prosecutor's claim that petitioner had a reason, desire, and capacity to kill.

(a) As discussed below, the jury was also erroneously permitted to hear and consider evidence that Cummings had entered a plea of guilty to each of the robbery counts and also heard repeated references to Cummings's desire to kill police.

(b) The prosecutor clearly attempted to draw a connection in the jury's mind between the killing, Cummings's expressed desire to kill the police, and that both men had admitted to robberies.

(c) During closing argument he said:

> It is important to understand why somebody would commit a senseless murder such as we have here. They have to have a very compelling reason, very strong reason to do it.
>
> *These men* planned it for weeks ahead of time, although *they* didn't know who they were going to kill and they didn't know where, but they planned it to the extent if we are stopped we are going to shoot our way out.
>
> * * *
>
> 'What are we going to do if we run into the police?' Because now *they were committing some* [ ] and the reason they have to discuss it is logical.
>
> . . . .

> *Two people doing these robberies.* If one of them is going to violently resist the police and shoot his way out the other one has to be willing to do the same thing. . . .
>
> *They have to coordinate.* (95 RT 10874-81 (emphasis added).)

d. The prosecutor's speculative motive theory was critical to the murder case because the murder evidence was so deeply contradictory.

(1) In the face of Cummings's numerous admissions to the murder, and the conflicts in the eyewitness testimony, the jury could reasonably have believed that only Cummings was the killer.

(2) But because the jury had been erroneously informed that petitioner had confessed to the non-capital crimes, the prosecutor's motive theory was assisted immeasurably.

e. Finally, petitioner's acknowledged participation in the non-capital crimes added a crucial psychological component to the prosecutor's murder case.

(1) The prosecutor belabored the brutality of the robberies during his guilt phase closing argument, repeatedly drawing the jury's attention to the serious injuries of the victims. (*E.g.*, 95 RT 10866-67 (describing injuries to victims in Counts 6, 7).)

(2) Thus, petitioner's acknowledged participation with Cummings in the series of violent crimes prior to the murder, crimes to which Cummings himself pleaded guilty, underscored the prosecutor's theme that the men had jointly planned to kill and must have tipped the scales against petitioner on the murder charge.

f. As recognized by this Court, "Shinn's incompetence in persuading petitioner to make the statement to the investigating officers led directly to petitioner's conviction on all of the robbery counts except the repair shop, Designer Florist, and artistic bath counts." (*In re Gay,* 19 Cal. 4th at 827.)

(1) This Court only attributed significant prejudice to the penalty phase of petitioner's case based on his trial counsel's inducement to confess to the robberies.

> It would be difficult to conclude that the jury's consideration of this number of robberies committed shortly before the murder did not weight heavily in the penalty decision. This is particularly so because the prosecution argued that Officer Verna was killed to prevent the arrest and return of Cummings and Gay to prison, and the prosecutor reviewed the robberies . . . (*Id.*)

(2) In light of this Court's astonishment of the level of ineffectiveness that led petitioner's trial counsel to induce him to confess to a string of robberies, it is stunning that the court only found prejudice with regard to the penalty phase.

(3) This is especially true since this Court recognized the importance of the robberies in establishing the existence of a motive to kill the officer in order to avoid arrest.

(a) This Court stated:

> The prejudicial impact at the penalty phase of the admission of petitioner's statement confessing to the robberies cannot be overstated. Shinn not only acted as a second prosecutor by creating the evidence that led to petitioner's conviction of the robberies, his conduct permitted the prosecutor to portray

> petitioner as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies. (*Id.* at 793.)

(b) This Court earlier noted:

> The time frame within which [the robberies] were committed is relevant inasmuch as the People theorized that fear of arrest for the robberies was a motive for murder. (*People v. Cummings,* 4 Cal.4th at 1257.)

11. Based upon the number and seriousness of the non-capital crimes, reversal of the robbery convictions necessarily requires reversal of the murder conviction.

L. CLAIM TWELVE: THE TRIAL COURT DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT TO REPRESENT HIMSELF.

The judgment of conviction was rendered in violation of petitioner's rights of self-representation, to a fair trial, a reliable guilt and special circumstance determination, reasonable access to the courts, equal protection of the law, and due process of law, guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 and the California Constitution by the trial court's erroneous, arbitrary, capricious and unconstitutional denial of his right to represent himself.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. Petitioner made his request for self-representation only moments after discovering the circumstances giving rise to the request, and thus his request was timely.

b. There was no dispute that petitioner's request was voluntary and intelligent.

c. The trial court failed to conduct the required inquiry into all relevant factors and utterly failed to find that the request was made for any unjustifiable purpose, such as to delay or disrupt the proceedings.

d. At the conclusion of the Evidence Code § 405 hearing to determine the voluntariness of his tape-recorded confession to the robberies, petitioner demanded that he be relieved of the services of his trial counsel.

e. Petitioner asked to be permitted to proceed in propria persona ("pro per"), because he believed that his lawyer had deceptively induced him to confess to the robberies. (58 RT 6279, 6284.)

f. Trial counsel himself stated on the record that he believed that a conflict then existed between him and petitioner. (58 RT 6282.)

g. Although the judge first denied petitioner's pro per motion, the next morning she held a hearing on the issue. In attendance were petitioner, trial counsel, and a defense investigator.

h. Petitioner once again asked to be relieved of counsel, to be permitted to proceed pro per and to be granted a continuance to prepare. (Sealed RT, 2/27/1985, 7-8.)

i. Petitioner stated the following reasons for his request:

> The revelations made in this court yesterday leads me to believe that Mr. Shinn has not acted in my best interest. At this point it is irrelevant whether Mr. Watson deceived Mr. Shinn or whether Mr. Shinn deceived me. What becomes overwhelmingly relevant at this point is that the defendant -- myself -- must bear the sole consequences of this deception. I can see no way possible to protect myself from past, present or future deceptions except to eliminate anyone who may have been a party to this deception. . . . [I]n ruling upon this motion I would ask you to consider four factors. One, I was totally -- I was caught totally off guard by the prosecution's presentation of this tape. I was regardless of whether my attorneys were, and I have a right to participate in my defense and be knowledgeable of what evidence the prosecutor has to use. Two, I was totally unaware of any private negotiations which Mr. Shinn claims to have had with Mr. Watson. He didn't share it with me. If he did, I was deceived. Three, I was misled by my attorney. Not only have I been misled, but I am being ineffectively represented to this day. . . Another issue comes to mind, and that is this slide that Mr. Watson presented yesterday. In my way of thinking this slide should have never been admitted into evidence... Number four, my final point. This is a capital case in which my life -- not a number of years in prison, not some probation; my life -- is at stake. Deceit by any of the parties involved should not be tolerated by this court. . . . (Sealed RT, 2/27/1985, 7-10, emphasis added.)

(a) Petitioner thus indicated dissatisfaction not only with Shinn's performance in connection with his confessions, but with Shinn's apparent unwillingness to object to prejudicial material presented to the jury during opening statement.

(b) The trial court asked no questions of petitioner. Instead, the court merely asked if Shinn had anything to add.

Upon his negative reply, the trial court made no further inquiries. (Sealed RT, 2/27/1985, 10.)

(c) Petitioner then requested a ruling on his motion before the jury returned. The trial court stated: "You don't need a ruling before. I have to know what the conflict is." (Sealed RT, 2/27/1985, 10.) Despite this statement, the trial court asked no questions of petitioner or Shinn.

(d) Petitioner then sought to make a motion for a mistrial based upon the events of the previous day and the trial court refused because the *pro per* motion had not been granted. The trial court then denied petitioner's motion to represent himself. (59 RT 6341.)

(e) Petitioner's request was timely and thus, entitled him to exercise his right to represent himself.

(f) Petitioner made his request at the earliest possible opportunity. Petitioner plainly made his request within a "reasonable time" before trial actually began, and immediately upon learning that his counsel had misled him.

(g) The trial court, which never questioned the voluntariness or intelligence of petitioner's request, was required to grant the request.

(h) When, as here, petitioner's earliest opportunity to bring a *pro per* motion does not arise until midway through the prosecutor's opening statement, his constitutional right to proceed free of counsel should not be impaired, especially when he has demonstrated reasonable cause for waiting until then to make the motion.

(i) The prosecutor here made no showing of an improper purpose, the record contains no such evidence, and the trial court made no such finding.

(j) The trial court in fact did not clearly state that the request was untimely.

(k) Even if petitioner's motion was untimely, the trial court abused its discretion by depriving him of his constitutional right to represent himself without considering all relevant factors and without giving a reasoned treatment of the factors that it did consider.

(l) When a defendant requests the right to proceed *pro per* after the expiration of the time period during which he enjoys an presumption unconditional right to self-representation, the trial court must exercise its informed discretion in determining whether to grant the request. Failure to do so constitutes an abuse of discretion and amounts to per se reversible error.

(m) The court must consider at least the following five factors: the quality of counsel's representation of the defendant; the defendant's prior proclivity to substitute counsel; the reasons for the request; the length and stage of the proceedings; and the disruption or delay which might reasonably be expected to result from the granting of such a motion.

(n) Not only must the court consider these factors but it must also establish that it has adequately done so on the record.

(o) After establishing a record showing that it considered the relevant factors, the trial court must then exercise its discretion and rule on the defendant's request.

(p) As demonstrated below, the court failed to consider all the mandated factors and those factors the trial court did consider actually supported petitioner's request.

(q) The trial court abused its discretion by denying the request without even considering the extent of the disruption or delay the request would cause. A grant of the request would have resulted, in fact, in relatively little disruption or delay. Petitioner did not specify the amount of additional time he needed to prepare his defense or whether he absolutely required empanelment of a new jury. The prosecution failed to show that a continuance would prejudice its case or unduly disrupt the trial court's calendar. The impropriety of assigning much significance to any delay is especially acute when no prejudice to the prosecution has been shown.

(r) The trial court utterly failed to balance the weighty interests of a capital defendant seeking in good faith to defend himself against the interests in the efficient administration of justice. The denial of a proper request for a continuance to prepare a defense constitutes an abuse of discretion and a denial of due process. The trial date was continued several times before trial commenced and jury selection had taken several months. Any additional delay would have been *de minimus* in view of the seriousness of the case.

(s) In fact, the trial was delayed for approximately one month in the middle of the proceedings because of

surgery performed on one of Cummings's lawyers. (Sealed RT, 3/7/1985, 13.) No one suggested that such delay, even coming as late in the proceedings as it did, prejudiced any of the parties.

(t) The trial court did not inquire adequately into the quality of Shinn's representation. Its "inquiry" consisted merely of a conclusory statement that Shinn's representation "ha[d] been proper." The trial court failed to explain its conclusion that the serious errors committed by Shinn (which the prosecutor himself did not deny) did not create a conflict sufficient to justify allowing petitioner to exercise his constitutional right to represent himself. (59 RT 6341.)

(u) Similarly, the trial court neglected to inquire into petitioner's dissatisfaction with Shinn's failure to object to apparently prejudicial material, such as the prosecutor's slide show, which had been presented to the jury. Petitioner's request for self-representation cried out for inquiry by the trial court into whether the attorney-client relationship had irreparably broken down.

(v) Moreover, for the reasons discussed at length above, it should have been apparent to the trial court that trial counsel's representation in connection with the confessions had been wholly inadequate. But, without any such inquiry, the trial court simply concluded that Shinn performed properly.

(w) With respect to the factor regarding petitioner's prior proclivity to substitute counsel, the trial court was forced to admit that petitioner had never previously requested to represent himself. (59 RT 6341.) In inquiring into the reasons for petitioner's request for self-representation, the trial court did no more than state that the factors leading

to the request were clearly set forth in the previous day's hearing, and that all parties knew that the confessions were on the tape. (59 RT 6341.)

(x) With respect to the trial court's inquiry into the length and stage of the proceedings, petitioner acknowledged that the request for self-representation came four months into the proceedings. Nonetheless, the trial court did not find, and the evidence does not suggest, that petitioner would have had any reason or opportunity to make his request any earlier. The request was made at the earliest stage of the trial before the prosecutor completed his opening statement; and, before any testimony was heard or evidence admitted. Accordingly, the trial court's mere incantation that the request was made four months into trial does not constitute a reasoned treatment of this factor.

(y) It was clear that Shinn and petitioner had arrived at a situation in which they no longer could work together successfully as advocate and client. Shinn was not acting in the best interests of his client when he induced him to confess to a string of robberies, which also provided the prosecutor with a theory of motive for first-degree murder of the police officer. As noted by the California Supreme Court, Shinn not only acted as a second prosecutor by creating the evidence that led to petitioner's conviction of the robberies, his conduct 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 793-94.)

(z) Shinn himself recognized the development of a severe conflict of interest between him and petitioner. Before the court's third finding of voluntariness and ultimate denial of the

motion to exclude petitioner's taped statement, Shinn stated that he would have to confer with his client and that a conflict then existed between him and his client. (*People v. Cummings*, 4 Cal. 4th at 1318.)

(aa) The erroneous denial of petitioner's timely request for self-representation is reversible error per se.

(bb) Alternatively, even if petitioner did not make a timely request, the per se error standard still applies to the trial court's abuse of discretion in denying the motion. Once it is determined that the trial court improperly denied a request to proceed *pro per*, whether because that right was unconditional or because the trial court should have recognized the right in the exercise of its discretion, the only means of preserving the individual defendant's constitutional freedom of choice is to apply the per se error standard.

M. CLAIM THIRTEEN: THE TRIAL COURT UNFAIRLY PERMITTED INTRODUCTION OF THE CO-DEFENDANTS' GUILTY PLEAS AND CONVICTIONS AS SUBSTANTIVE PROOF OF PETITIONER'S GUILT.

The judgment of conviction was rendered in violation of petitioner's rights to confrontation, self incrimation reliable guilt and special circumstance verdicts based on admissible, relevant evidence, the effective assistance of counsel due process and equal protection of the laws guaranteed by the Sixth, Eight, and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 9, 12-17, 24, 27-28 of the California Constitution as a result of the trial court's introduction of the co-defendant's guilty pleas and convictions as substantive proof of petitioner's guilt.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. Twice during the trial, the jury was permitted to learn that co-defendant Cummings had pleaded guilty to the non-capital counts in the indictment and that Robin Gay had been convicted after trial of three non-capital counts (8, 9 and 15) and of being an accessory to the murder.

b. At the close of the prosecutor's case-in-chief in the non-capital phase of the trial, and immediately prior to the beginning of the joint trial for murder, the prosecutor sought to introduce evidence that Raynard Cummings had pleaded guilty to each count of robbery, attempted robbery and conspiracy to commit robbery in which he and petitioner were jointly charged (Counts 19, 12-16), as well as certain counts in which petitioner was not charged (Counts 10, 11 and 18). (61 RT 6709-16.)

c. The prosecutor also sought to introduce into evidence that petitioner's wife, Robin Gay, had been tried and convicted of robbery in the crimes charged in counts 8, 9 and 15 of the indictment and that she had been convicted of being an accessory to the murder of Paul Verna. (61 RT 6714.)

d. Shinn objected to the admission of Cummings's guilty pleas on grounds of relevancy and hearsay, and to Robin Gay's convictions on grounds of relevancy, hearsay and prejudice. (61 RT 6712.)

e. Without any consideration of the prejudice to petitioner, the trial court overruled the objections, stating that the pleas and convictions (1) were "highly relevant," (2) corroborated Pamela

Cummings's testimony against petitioner, and (3) tended to prove the crime of conspiracy. (61 RT 6711, 6714.)

f. The trial court then took judicial notice of the guilty pleas and convictions and permitted the prosecutor to read to the jury Cummings's plea to all counts and his admission to the truth of the allegations of the indictment, as well as the judgment of conviction in Robin Gay's case. (61 RT 6712-17.) Near the end of the capital phase, the trial court again took judicial notice in open court of the pleas and convictions. (78 RT 8884.)

g. Cummings's guilty pleas should have been found inadmissible. Cummings's case had not been fully severed and he had not yet been sentenced. Because of his privilege against self-incrimination, Cummings was unavailable to testify or to be cross-examined about his pleas of guilty. Further, in pleading guilty to the crimes in which petitioner and Cummings had been jointly charged and in admitting the essential truth of the allegations of the indictment, Cummings effectively made an implied statement that implicated petitioner in those crimes. Indeed, the trial court expressly received the guilty pleas as substantive proof of petitioner 's guilt, i.e., as corroboration of Pamela Cummings's testimony. (61 RT 6711.)

h. The guilty pleas and convictions were either irrelevant to any fact in issue or their relevance was far outweighed by the potential for extreme prejudice to petitioner.

(1) At the outset, no conceivable relevance can be found to justify the introduction of Cummings's guilty pleas to counts 10, 11 and 18. Petitioner was not charged with those crimes. Accordingly,

proof of the pleas on those crimes did not tend to prove any fact in issue in petitioner 's case and should have been excluded.

(2) Equally important, Cummings's guilty pleas and Robin Gay's convictions should have been excluded on the grounds that the marginal relevance of the evidence was substantially outweighed by the potential prejudice to petitioner. Although the trial court opined that the evidence was relevant, it gave no indication that it had in fact weighed the probative value of the evidence against its prejudicial effect. Its failure to do so was error. No legitimate evidentiary purpose for the pleas and convictions existed nor was such a legitimate purpose even suggested by the prosecution.

i. Because the prosecutor introduced the evidence without explanation, at the close of his case in the non-capital phase of the trial, and then later during the capital phase, the "legitimate presumption is that the evidentiary purpose was the general one of demonstrating [the defendant's] guilt of the offenses for which he was on trial." (*United States v. Harrell* (5th Cir. 1970) 436 F.2d at 606, 614, *cert. denied* (1972) 409 U.S. 846.) Indeed, the trial court expressly stated that the evidence was being received as substantive proof of petitioner's guilt on the conspiracy charge and as "corroboration" of Pamela Cummings in the remaining counts. (61 RT 6713-14.) A closely related purpose for the evidence was thus to impermissibly invite an inference of guilt by association.

j. The trial court's formalistic approach to introduction of this evidence cannot alter the fact that the jury heard that Cummings admitted the truth of all the allegations of the counts of the indictment in which he and petitioner were jointly charged and that a court had already

found Robin Gay guilty for the robberies in which she and petitioner were jointly charged. Such evidence, introduced twice by the prosecutor, was designed not only to suggest impermissibly that petitioner was guilty of the underlying offenses but also to suggest to the jury that petitioner was a dangerous criminal who consorted with other dangerous criminals. The potential prejudice was thus extreme and the evidence should have been excluded. Evidence of guilty pleas and convictions of other defendants as substantive proof of petitioner's guilt was clearly inadmissible.

k. This Court held that the evidence of Robin Gay's conviction and evidence of Cummings's guilty pleas were both inadmissible at petitioner's murder trial. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1321-22.) With regard to Robin Gay's convictions the court stated:

> [Petitioner] argues, with merit, that the evidence was not relevant to any issue, and that if it was introduced as evidence of his guilt, it was inadmissible hearsay. We agree that the evidence was irrelevant. The people suggest only that the conviction of Robin as an accessory to murder and as a robber tended to show that Pamela's testimony had a basis in fact. If the evidence was admitted for that purpose it was also hearsay, however (*People v. Wheeler* (1992) 4 Cal.4th 284, 300, 14 Cal.Rptr.2d 418, 841 P.2d 938), and lacked relevance for purposes of corroboration. The conviction reflected only the view of a judge or jury that evidence presented in a different case established that Robin had assisted the defendants or either of them after the murder. It did not come within any exception to the hearsay rule applicable to judgments. (*See* Evid. Code, § 788, 1300 et seq.) Furthermore, although Gay objected to introduction of the evidence on grounds of hearsay (Evid. Code, § 1200), relevance (Evid. Code, § 210), and prejudice (Evid. Code, § 352), the trial court did not rule on the objection that the evidence was more prejudicial than probative. It clearly was.

> Although Robin's assistance to either her husband or Cummings could have been the basis for the conviction, it is inconceivable that the jury would not understand the evidence to reflect guilt of aiding her husband who, by necessary implication, had committed a murder. (*Id.* at 1295-96.)

l. As to Cummings's guilty pleas the court confirmed that they were more prejudicial than probative: "Here, however, the guilty pleas of Cummings, while admissible against Cummings as a declaration against his own penal interest, or as a confession or admission, say nothing about Gay. The inference, if any, to be drawn from the pleas bears none of the indicia of reliability which justify exceptions to the hearsay rule and, in turn, to the right of confrontation and cross- examination. The reasoning of *People v. Morales* (1989) 48 Cal.3d 527, 257 Cal. Rptr. 64, 770 P.2d 244, is simply inapplicable. We conclude therefore that the evidence of Cummings's guilty pleas was inadmissible." (*Id.* at 1321-22.)

m. Petitioner was severely prejudiced by introduction of the guilty pleas and convictions. In counts 1-5 and 12-14, excluding petitioner's erroneously introduced confessions and other erroneously introduced evidence, the only properly admissible evidence of guilt was the testimony of Pamela Cummings. Without corroboration of her testimony, petitioner could not have been convicted of those crimes. Evidence of guilt of those crimes was the only means the prosecution had of demonstrating a motive for the killing. After twice introducing the pleas and convictions, the prosecutor then reminded petitioner's jury during his closing argument that Cummings had "pled guilty" to all the robberies with which petitioner was charged. (95 RT 10861.) The improperly admitted guilty pleas and convictions thus served, as the trial court acknowledged, as corroborating

evidence of Pamela Cummings' testimony and were essential to establishing petitioner's guilt. Stripped to its essence, the jury heard improperly admitted evidence from both defendants that they had indeed committed the very crimes with which they had been jointly charged.

n. In addition to prejudicing petitioner with respect to the non-capital counts themselves, the confessions added critical support to the remainder of the prosecutor's case. The robberies formed the basis for the prosecutor's speculative argument that petitioner had a purported motive for murder and had premeditated and deliberated before the homicide. (*See* 8 RT 740; 9 RT 774-75; 95 RT 10874-81.) Thus, the introduction of Cummings's statements and evidence of Robin Gay's conviction with regard to the robberies necessarily added substantial force to the prosecutor's claim that petitioner had a reason to kill.

o. The jury was erroneously permitted to hear and consider evidence that Cummings had entered a plea of guilty to each of the robbery counts and also heard repeated references to Cummings's desire to kill police. The prosecutor clearly attempted to draw a connection in the jury's mind between the killing, Cummings's expressed desire to kill the police, and the fact that both men had admitted to robberies. During closing argument the prosecutor said:

> it is important to understand why somebody would commit a senseless murder such as we have here. They have to have a very compelling reason, very strong reason to do it. These men planned it for weeks ahead of time, although they didn't know who they were going to kill and they didn't know where, but they planned it to the extent if we are stopped we are going to shoot our way out. '[W]hat are we going to do if we run into the police?' because now they were committing

> some [ ] and the reason they have to discuss it is logical. Two people doing these robberies. If one of them is going to violently resist the police and shoot his way out the other one has to be willing to do the same thing. . . .they have to coordinate. (95 RT 10874-81.)

p. The prosecutor's speculative motive theory was critical to the murder case because the murder evidence was so deeply contradictory. Without such evidence it is plain that a different result would have been reached at trial.

N. CLAIM FOURTEEN: THE TRIAL COURT ERRED IN FAILING TO SEVER THE NON-CAPITAL COUNTS FROM THE CAPITAL COUNTS.

Petitioner's convictions, death sentence, and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice due to the trial court's erroneous, arbitrary and capricious failure to sever the non-capital charges from the capital charges.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. On October 11, 1984, petitioner moved for severance and separate trial of the non-capital counts and the capital counts. (8 RT 737-41.)

a. Co-defendant Cummings's counsel submitted a written motion to sever the capital and non-capital counts and argued the motion to the trial court.

b. Petitioner's trial counsel made no arguments, but merely joined in the motion on the date of the hearing. (8 RT 739.)

3. Ultimately, the trial court required petitioner to be tried first on the non-capital counts and then later on the capital counts before the same jury.

4. Because the non-capital and capital counts shared almost no testimonial and physical evidence they were tried in two phases before the same jury.

5. The failure fully to sever the counts was plainly prejudicial and violated petitioner's right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

6. There was virtually no cross-admissibility of evidence between the non-capital counts and the capital counts.

a. Virtually no testimonial and physical evidence from the non-capital counts overlapped with the capital counts.

b. Prior to trial, the prosecutor admitted that bringing out the gory details involved in the robbery counts would be "inadmissible. That is proof of violent conduct on one incident to prove violent conduct on another incident, and it is inadmissible." (31 RT 3152.)

c. The evidence on the robberies and murder was so easily separated that ultimately the robbery evidence was presented in its entirety against petitioner before any evidence on the murder was presented. However, all the evidence was presented to the same jury.

(1) The charged robberies and attempted robberies occurred over a two-month period beginning in April 1983 and ending May 31, 1983. The murder occurred three days after the last charged robbery.

(2) Only a single piece of material physical evidence was common to the non-capital and the capital counts: the Oldsmobile Cutlass automobile in which the defendants rode on the day of the murder.

(a) Even the automobile, however, was taken in the Linda Smith robbery (Counts 10 and 11), a robbery in which it was undisputed that petitioner was not involved and for which he was not charged.

(b) The automobile arguably played a role only in the robbery involving Christopher Poehlmann (Count 15) and thus figured in only *one* non-capital count out of 15 which petitioner was charged; that count was ultimately dismissed against petitioner for lack of evidence.

(3) One other piece of physical evidence arguably related to both cases -- People's Exhibit. 6, the knife taken from petitioner after the killing. (59 CT 6428, 74 CT 8415.)

(a) Richard Hallberg claimed that it was his knife.

(b) It was that knife which the prosecution claimed petitioner used to inflict a wound upon himself.

(c) It was fortuitous that the knife had any role in the murder case and then only on a collateral issue.

(d) Exhibit 6 did not tend to establish petitioner's liability for the murder.

(4) The witnesses on the non-capital and capital counts were entirely different.

(a) The only witness common to the two cases at trial, other than police investigators, was Pamela Cummings, but even her trial testimony was clearly separable into robbery testimony and murder testimony.

(b) The trial court sharply limited cross-examination of Pamela Cumming during the robbery phase that in any way involved the murder. (60 RT 6337-42.)

(c) In restricting cross-examination solely to the non-capital counts, the trial court stated that the robbery counts had essentially been "severed" from the capital counts. (60 RT 6538.) The trial court told petitioner's counsel that cross-examination of Pamela Cummings which involved the murder would be permitted only if counsel was able to make an offer of proof as to how the murder and subsequent events were "relevant" to the robbery counts. (60 RT 6539.) Otherwise, he was required to wait until the murder trial ensued to cross-examine her with respect to that crime.

7. The robbery evidence did not tend to establish any issue in dispute in the murder case.

a. Confronted with virtually complete evidentiary separation between the robbery and murder counts, the prosecutor argued that the robbery evidence generally was admissible in the murder case purportedly to establish a "motive" for the killing of the police officer.

b. The prosecutor stated at the hearing on the severance motion:

> So, the burden on the prosecution -- and I think it is a very, very important burden -- is to show motive to commit one of the worst possible crimes anyone would ever commit.
>
> Motive is they are robbers. They have been robbers up and down the San Fernando Valley for the previous six weeks at a prodigious rate.
>
> The motive is that they are ex-convicts in possession of a gun, so all that evidence has to come before the murder jury so that they can understand why it is in the prosecution's view that this terrible crime occurred. . . . (8 RT 740; *see also* 9 RT 774-75.)

8. The trial court accepted the prosecutor's argument and denied the motion to sever the capital from the non-capital counts, stating:

> I think that the crimes -- alleged crimes -- took place, the robbery spree is so intertwined with the alleged murder of Officer Verna by these defendants that I deny the motion to sever the non-capital counts. (9 RT 778.)

9. Although the prosecutor's argument may have superficial appeal, it evaporates upon closer analysis.

a. The prosecutor's conception of an allegedly admissible purpose for the evidence is not a sufficient basis upon which to admit the evidence.

b. The robbery evidence was wholly irrelevant to any issue in dispute in the murder case against petitioner.

(1) Motive is not an element of murder and the jury was so instructed in the language of CALJIC 2.51. (95 RT 10805.)

(a) The prosecutor therefore had no "burden" to prove motive, despite his comments to the contrary.

(b) Nor did defendants place motive in issue by contending that they lacked a motive to kill Paul Verna.

(2) Similarly, there was no evidence in the record at the time of the hearing that suggested that either or both defendants lacked the requisite *mens rea* for first-degree murder. Instead, the evidence, if believed, showed only that the officer was killed deliberately and with premeditation.

c. The theory of motive was either cumulative or speculative and without evidentiary support.

(1) As the prosecutor ultimately argued to the jury (95 RT 10874-81), the other crimes evidence was used to support a theory of premeditation and deliberation.

(a) Insofar as the "motive" evidence was merely introduced to show premeditation and deliberation, it was cumulative.

(b) The lapse of time between the initial stop by Officer Verna and the killing, and the evidence suggesting that the killing itself was carried out as an "execution", were more than sufficient to establish premeditation and deliberation. (*See, e.g.*, 95 RT 10880.)

(2) The "motive" theory was utterly speculative whether viewed from the pre-trial or trial record.

(a) There was no evidence introduced at any time that petitioner had expressed any fear of being apprehended for his participation in any of the alleged crimes.

(b) There was no evidence that arrest warrants were outstanding for petitioner.

(c) There was no evidence that either petitioner or Cummings was a suspect in any robbery.

(d) There was no evidence that Paul Verna had begun to run a "make" on the car, its license plate or the people in the car.

(3) The prosecutor actually underscored the lack of evidence on these points during his closing argument at trial.

(a) The prosecutor speculated, and requested that the jury speculate, about what the defendants were thinking prior to the killing.

(4) He said, "We don't have evidence of what they were talking about [in the car], but you can imagine what they are going to do. 'We are going to kill,' that kind of thing." (95 RT 10877.)

d. Even assuming the "motive" theory had merit, the robberies and murder were not required to be tried in all their explicit detail before the same jury.

(1) Petitioner could have been tried first on the robberies and any convictions could then have been introduced at a separate murder trial before a different jury as evidence of motive.

(2) In view of this procedural alternative, it becomes clear that, despite the prosecutor's protestation that he was required to show "why . . . this terrible crime occurred . . ." the real purpose behind trying the capital and non-capital cases together was to inflame the jury and assure a murder conviction.

10. The robbery evidence was highly inflammatory and had potential for great prejudice to petitioner.

a. Even if the robbery evidence was otherwise admissible, it should have been excluded under Evidence Code § 352 because of its potentially prejudicial effect on the jury.

b. Other crimes evidence is inherently suspect because it impermissibly suggests the accused has acted in conformance with a criminal character trait.

c. Evidence of other crimes is by its nature prejudicial to the defendant and may create in the mind of the jurors the impermissible inference that the defendant is an evil person deserving of, otherwise unjust, punishment.

d. In particular where, as here, the argument is that a violent crime has been committed to avoid apprehension for a series of other violent crimes, it is an extremely short step for the jury to take to conclude that the defendants were indeed acting in conformity with a character trait for violence.

e. The non-capital crimes at issue had a highly inflammatory effect on the jury.

(1) The 11 counts of robbery and two counts of attempted robbery involved crimes which occurred over a two-month period.

(2) The evidence showed that the perpetrators were particularly violent and infliction of great bodily injury was charged as an enhancement in numerous counts.

(a) The victims were not only threatened with weapons, but in several instances were also beaten on the head and hands with a gun, sometimes while they lay prone on the floor.

(b) The pistol whippings were administered in an apparently wanton manner and several of the victims were quite seriously injured.

f. The evidence at the preliminary hearing and at trial on the non-capital counts was quite similar and emphasized the gory nature of the non-capital crimes.

(1) At trial, the prosecutor introduced photographs with respect to Count 7 showing pools of blood throughout the florist shop and introduced evidence that the men threatened to "shoot [Ms. Rodriguez] in the face." (95 RT 10867-68.)

(2) During closing argument, the prosecutor returned repeatedly to the florist shop crime, referring again and again to the blood throughout the shop and the "savage" beating that was inflicted upon the victim. (95 RT 10863, 10867, 10870, 10873.)

(3) Photographs pertaining to Count 6 showed Richard Hallberg bandaged, swollen and bruised. Mr. Hallberg testified

that he had been beaten so hard with the gun that it broke into pieces. (59 RT 6409.)

(4) The evidence pertaining to Counts 8 and 9 showed, as the prosecutor characterized it, that the men "threatened to slit Corey Glick's throat." (95 RT 10869.)

(5) Two doctors were called to testify to the severity of injuries received by Mr. Somunjian (Count 2) and Mr. Hallberg, respectively. (59 RT 6429-33; 60 RT 6467-68.)

g. In view of the minimal probative value of the robberies as "motive" evidence, the potential prejudice to petitioner from that evidence mandated complete severance. The fact that the jury was instructed to consider the robbery evidence only as to motive (95 RT 10805) is not determinative.

h. The trial court should not have ignored potential prejudice from trying the robberies and the murder before the same jury.

11. The evidence was weak and joinder made conviction in both cases more likely.

a. The record before the trial court at the time of the severance motion demonstrated that the robbery case was extremely weak. While the murder case against petitioner was relatively stronger, that case was based upon fundamentally contradictory testimony and conviction was far from certain.

b. The evidence at the preliminary hearing demonstrated that the robbery case against petitioner was extremely weak.

(1) At the preliminary hearing, none of the witnesses called to testify with respect to the Kenn Cleaners (Counts 1-3),

Salads Plus (Counts 4-5), Pizza Man (Counts 12-14) and Poehlmann (Count 15) robberies identified petitioner as a participant.

(2) In the Kenn Cleaners robbery, the victims identified only Cummings (1 CT 16); in the Salads Plus robbery, the witnesses stated only (2 CT 62, 66); that two unidentified "black" men committed the crime; the witnesses to the Pizza Man robbery conclusively testified that only *one* man, Raynard Cummings, committed that crime (3 CT 280); and Christopher Poehlmann likewise stated that he did not recognize petitioner. (2 CT 198.)

(3) Billy Sims, a participant in another robbery with defendant Cummings, testified that he heard Cummings and petitioner discussing a robbery of a "pizza" restaurant and saw them splitting money from it. (4 CT 370-72.)

(a) Mr. Sims's credibility is open to serious question.

(b) Mr. Sims's was originally charged for his participation in the Ward robbery (Counts 12 and 13), and his recollection as to the purported conversation had to be refreshed. (4 CT 372-75.)

(c) Significantly, the prosecution did not call Mr. Sims to testify at trial regarding the robberies.

(4) Of the four remaining counts (6-9), petitioner was identified with any degree of certainty only in Count 6. (2 CT 69; *cf.* 1 CT 95, 104, 145, 162, 171; 3 CT 257.)

(5) As a result of the weak evidence, the prosecutor argued that the only basis for holding petitioner to account for the crimes in which he was not identified was their modus operandi. (8 RT 699-702.)

(a) As a matter of law, the crimes in this case did not share sufficient unique characteristics to be considered pursuant to a *modus operandi*.

(b) The only "common characteristics" were that the crimes were armed robberies, often committed by two men.

(6) At the time of the severance motion, therefore, acquittal on Counts 1-5 and 12-15 was highly likely. Indeed, the trial court later dismissed the Poehlmann robbery (Count 15) for lack of evidence.

(7) While the evidence in the remaining counts (i.e., 6-9) was admittedly stronger, still only very weak identification testimony linked petitioner to the crimes charged in Counts 7 through 9.

(8) The robbery evidence before the trial court on the severance motion was extremely weak.

(9) Although the prosecution indicated during the severance motion that Pamela Cummings would testify, she had not testified at the preliminary hearing and what she would say was, as yet, uncertain. Moreover, as an accomplice, her testimony was required to be corroborated (Penal Code § 1111) and nothing before the trial court on the severance motion would have corroborated her testimony with respect to the counts in which petitioner was not identified.

(10) Petitioner's purported confession to the robberies was not before the trial court.

(a) No mention was made of the confession during the hearing.

(b) Accordingly, it must be disregarded on review of this motion.

c. The murder count was based upon irreconcilable and contradictory evidence.

(1) The prosecutor's case against petitioner for the murder, while admittedly stronger than the robbery case generally, was nevertheless based upon preliminary hearing testimony which was deeply, even irreconcilably, contradictory.

(2) Some witnesses clearly identified a dark man, or Raynard Cummings, as the killer. (3 CT 632, 850-51.)

(3) Others identified a light-skinned man or petitioner. (2 CT 335, 530, 532.)

(4) Some witnesses recalled that they saw petitioner standing on the driver's side of the car (2 CT 327); another placed him near the front bumper (3 CT 714); still another placed him on the passenger side near the rear (2 CT 598).

(5) Some witnesses testified that the man in the street got in the car which then drove away (3 CT 631, 717); another testified that he remained in the street and the car turned around and picked him up (2 CT 332, 442-43).

(6) Obviously troubled by the significant conflicts in the murder testimony, the prosecutor argued that it could be reconciled only if a jury believed that Cummings fired the first one or two shots from inside the car, and the remainder were fired by petitioner while standing outside of the car. (4 CT 910-11.)

(a) No evidence was before the trial court on the severance motion to support this theory.

(b) The eyewitnesses who implicated Cummings saw him outside the car and firing either three or four shots. (3 CT 629-30, 851-52.)

(7) Finally, the prosecutor's two-killers-pass-the-gun theory does not explain the remaining discrepancies in the eyewitness testimony.

(8) For a jury to convict petitioner of murder based upon the evidence presented at the preliminary hearing, it would have been required to ignore powerfully contradictory testimony.

d. In view of those conflicts, therefore, petitioner's conviction was by no means assured at the time of the preliminary hearing.

12. Joinder offered no benefits to overcome the prejudice to petitioner.

13. It is clear that judicial economy was not a legitimate consideration favoring joinder in this case since there was little or no duplication of evidence.

a. Here, any purported benefit from judicial economy was further diminished, while the prejudice remained, because a de facto "severance" of the evidence was permitted by the trial court's rulings.

b. The severed evidence was tried before the same jury.

(1) Petitioner was tried solely on the non-capital counts, and then both defendants were tried on the capital counts.

(2) Pamela Cummings was required to testify on numerous occasions and the trial court required petitioner's trial counsel to cross-examine her separately in the two cases.

(3) In effect petitioner was subjected to two trials before the same jury.

c. The trial court itself indicated that no benefits of judicial economy existed, stating: "I find that there has been no benefit to the prosecution by having these counts tried together [. . .]." (9 RT 777-78.)

14. In arguing against severance, the prosecutor offered as a justification for joinder only the motive evidence theory.

a. The prosecutor suggested no benefits of joinder either to the prosecution or to the defense.

b. The "motive" evidence, even if admissible, did not require joinder.

(1) A prior conviction on the non-capital crimes could have been offered as motive evidence.

(2) In view of the possibility of acquittal on the non-capital crimes, and the threat of prejudice to petitioner, the trial court should have completely severed the trials to insure that only crimes for which petitioner was convicted were introduced as purported evidence of motive.

15. The trial court failed in this capital case to undertake careful scrutiny of the severance motion.

a. In a capital case, the trial court is duty bound to analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a non-capital case.

b. Here the trial court engaged in no scrutiny of the severance motion.

(1) The trial court stated that its "initial feeling" was that petitioner should have been tried with a separate jury on the robbery counts. (32 RT 3163.)

(2) The court did not explain the reason that led it to alter its position.

(3) Instead, in conclusory fashion, the trial court merely stated:

> I think that the crimes -- alleged crimes -- took place, the robbery spree is so intertwined with the alleged murder of Officer Verna by these defendants that I deny the motion to sever the non-capital counts. (9 RT 778.)

c. This substantially less-than-exacting scrutiny in the face of the manifest potential prejudice to petitioner, and in the absence of any showing of benefit to the prosecution, fails the test for review of a severance motion in a capital case.

d. If the trial court engaged in the degree of scrutiny required, it would have realized that the other crimes evidence was not relevant to any ultimate fact in dispute in the murder case and was potentially inflammatory and prejudicial.

e. The trial court also would have realized that very little overlap in the evidence was involved, the robbery case against petitioner was particularly weak, and the murder evidence was based upon fundamentally contradictory testimony.

f. The trial court should have realized that if a single juror was permitted to hear the repeated evidence of violent crime committed in the jurors' community, the likelihood of a verdict based on

anger and prejudice, rather than a considered decision based upon the facts, was enhanced.

g. The trial court doubly failed in its deliberations because it drew no distinction between Cummings's motion for severance of the non-capital counts and petitioner's motion.

(1) Unlike petitioner, Cummings had been identified as a perpetrator in all but three of the non-capital counts for which he was charged with Petitioner.

(a) Cummings was also charged with four additional counts of robbery in which Petitioner was not named.

(b) The robbery case against Cummings was thus far stronger than that against petitioner.

(2) Regardless of whether the trial court properly refused to grant Cummings's severance motion, a considered view of petitioner's case would have shown that the serious weaknesses in the robbery case against petitioner required severance.

(3) The trial court failed, however, to consider separately the nature of the case against petitioner, but treated his case and that against Cummings as though they were identical.

h. A severance motion in a capital case must receive the most careful and exacting scrutiny.

i. The trial court here failed to undertake this exacting scrutiny.

16. The joinder of the capital and non-capital counts substantially prejudiced petitioner at trial.

a. As previously discussed, the repeated trial errors during the robbery portion of the trial necessarily prejudiced petitioner during the guilt phase of the trial.

(1) Repeated and serious errors occurred at the robbery portion of the trial: the erroneous introduction of petitioner's confession, trial counsel's ineffective assistance leading to the introduction of extremely prejudicial evidence and the erroneous admission of Cummings's guilty pleas and Robin Gay's convictions.

(2) This series of egregious and prejudicial errors occurred before the same jury that tried petitioner for the murder.

(3) As such, the result at a murder trial before a separate jury could have been quite different.

b. The prosecutor plainly sought to use joinder to enhance the chance of conviction on the capital counts.

(1) As noted above, the prosecutor argued that the need to show a "motive" for the killing required joinder.

(2) He returned to this theme before the jury in a blatant attempt to enhance a weak murder case and obtain a conviction.

(3) The evidence at trial on the murder was even more contradictory than it had been at the preliminary hearing.

(a) Several witnesses identified Cummings as the killer (67 RT 7354-7427, 7446-55; 75 RT 7512-26) and several witnesses identified petitioner.

(b) Of those who identified petitioner, Shannon Roberts previously had identified Cummings before the grand jury. (69 RT 7802.)

(c) Similarly, Robert Thompson had described Cummings as the killer to the police, on the evening of the homicide, and before the grand jury (68 RT 7647-51, 7691, 7764; People's Ex. 22) and Marsha Holt testified that she did not see petitioner with a gun until after the shooting and had testified before the grand jury that she had not seen anyone shoot the officer. (68 RT 7526-89.)

(d) Numerous witnesses testified that Cummings had admitted to firing all six shots (*see*, *e.g.*, 64 RT 6953-6954; 65 RT 7148-50) or otherwise to shooting the officer (66 RT 7202-07, 7286).

(e) Several witnesses testified regarding Cummings's expressed willingness to kill police officers. (66 RT 7234-337; 67 RT 7338-499; 68 RT 7500-655; 69 RT 7656-821; 78 RT 8886-95.)

(f) By contrast, petitioner had made no such admissions and, with the exception of one ambiguous statement by Pamela Cummings, there was no evidence that petitioner had ever expressed any intent to kill police officers.

(g) Indeed, the evidence regarding the murder was so contradictory that the prosecutor was reduced to telling the jury to ignore witnesses like Oscar Martin and Shequita Chamberlain who had identified Cummings as the killer. (95 RT 10886, 10887.)

(4) Faced with this conflicting and confusing record, the prosecutor argued to the jury that petitioner's participation in the robberies virtually compelled the conclusion that he too must have killed the police officer.

(5) The prosecutor argued:

> It is important to understand why somebody would commit apparently a senseless murder such as we have here. They have to have a very compelling reason, very strong reason to do it.
>
> Mr. Cummings -- pardon me – Mr. Gay had many reasons, but one of them was he was in a stolen car. That's why that testimony was produced.
>
> If you are responsible for as many robberies as these men were, that subject [of what to do if they meet the police] has got to come up.
>
> Two people doing these robberies. If one of them is going to violently resist the police and shoot his way out, the other one has to be willing to do the same thing.
>
> [. . .]
>
> Paul Verna doesn't know (about the robberies] when he stops them and they know he doesn't know. But he might find out.[. . .]
>
> It isn't really a question of whether Paul Verna knew these things. *It's whether they were worried about it.*
>
> Imagine how worried you would be if you were responsible for 17 armed robberies in the Valley. You would probably be frantic about it. (95 RT 10874, 10878, 10883.)

(6) The prosecutor engaged in this utter speculation plainly because there was otherwise such a paucity of evidence in the record with regard to any motive on behalf of petitioner to kill the decedent. Lest the jury be convinced by the compelling evidence that Cummings alone was the killer, the prosecutor needed to introduce the evidence of the robberies before the same jury which tried petitioner for murder to enhance his argument that petitioner not only was willing to, but did, shoot the decedent.

c. The prosecutor improperly sought to inflame the jury during closing argument to ensure a conviction.

(1) As suggested above, the sheer number and brutality of the non-capital counts raised the menacing specter of prejudice that materialized at trial.

(2) The robberies and murder were clearly linked in the prosecutor's mind and he desired the jury to make those same connections in order to obtain a prejudicial spillover effect.

(a) The prosecutor silenced any doubt, that he desired such a prejudicial effect, during his closing argument in which he repeatedly emphasized the violent nature of the robberies.

(b) During oral argument on the motion for severance, the prosecutor assured the trial court that his argument to the jury would be "sanitized" to avoid prejudice. (31 RT 3143, 3147, 3151.)

(c) Contrary to his assurances to the court, the prosecution repeatedly referred to the details of the robberies and repeatedly emphasized the beatings. (95 RT 10863-81.)

> The next one was the flower shop. The woman who ran the flower shop, Carmen Rodriguez I will show you this picture. It was a savage beating of Mrs. Rodriguez and a lot of blood on the floor of the store. (95 RT 10863.)
>
> There is also an allegation that Mr. Somunjian was the victim of great bodily injury. Just to refresh your memory about that . . . he said he had a hole in his head, which I take to mean a fractured skull, and a broken finger. So these are not just minor injuries. They are substantial injuries. (95 RT 10864.)
>
> [Richard Hallberg] was very savagely beaten, according to his testimony. You have a photograph depicting some of his injuries. . . .

> In addition to this evidence of injury to Mr. Hallberg, you may remember that he was beaten by Mr. Gay so savagely that the gun that Mr. Gay was beating him with broke and there were parts of it found on Mr. Hallberg's shop floor the next day by his employees. . . .
>
> Imagine how hard you would have to hit somebody on the head to do that.
>
> His injury specifically was 13 stitches. An eye was split. . . . The left ear was split and his hands and arms were bruised trying to protect himself. (95 RT 10865-66.)
>
> The next robbery is Count VII. That is the flower shop . . . this is the one where they came out . . . and had blood on their clothes. . . .
>
> You may remember Mrs. Rodriguez . . . not a very large woman, not that that would matter, but savagely beaten by these two large men.
>
> [People's] No. 4 is a series of photographs showing the florist shop as it was then. You can see the blood all the way down the hallway here. Blood over here and blood over here. That's a lot of blood if you look at it altogether. Blood by the safe.
>
> They savagely beat her while she was trying to get the safe open. . . (95 RT 10867.)
>
> They threatened to slit Corey Glick's throat with the knife. (95 RT 10869.)
>
> Carmen Rodriguez, nothing was taken from Mrs. Rodriguez because she didn't have anything. They beat her. . . . They beat her enough to cause all this blood all over the place. (95 RT 10870.)

(3) The prosecutor then expressly reminded the jury, all of whom were from the San Fernando Valley, that petitioner was "responsible for 17 [sic] armed robberies in the Valley." (95 RT 10885.)

(4) The prosecutor's recitation of the brutality of the non-capital crimes, his repeated references to blood "all over the place" and the fact that this series of violent crimes was committed in the very community from which the jury was drawn must have impacted the jury. Moreover, the prosecutor's closing argument, although framed in terms of premeditation and deliberation, suggested strongly that petitioner and Cummings were acting in conformance with a vicious nature and a propensity for violence:

> There has been discussion *about what will we do if the police stop us* and you heard a lot of that testimony. "We won't go easily. We'll shoot it out," that sort of thing, all of which contributes to the premeditation.
>
> It is kind of what we have here.
>
> "If we get stopped, we are going to shoot our way out."
>
> *They don't know where. They don't know when. And they don't know who.* But they do kind of premeditate to that extent.
>
> These men planned it for weeks ahead of time, *although then didn't know who they were going to kill and they didn't know when or where,* but they planned it to the extent if we are stopped we are going to shoot our way out.
>
> They had a few minutes while Paul Verna was trying to settle the circumstances.
>
> . . . .
>
> In that few moments you can imagine Mr. Gay and Mr. Cummings. *We don't have evidence of what they were talking about, but you can imagine what they are going to do.*
>
> *"We are going to kill," that kind of thing.,* That shows premeditation and malice aforethought.

. . . .

"What are we going to do if we run into the police?" Because now they were committing some [ ] and the reason they have to discuss it is kind of logical.

. . . .

Two people doing these robberies. *If one of them is going to violently resist the police and shoot his way out, the other one has to be willing to do the same thing.*

If one of them isn't going to do any shooting and he said, "Oh, no. If the police get me, I am going to surrender," and the other one has to do the same thing.

They have to coordinate.

It wouldn't make any sense for one of them to react one way and the other one to react the other way. (95 RT 10874-81, emphasis added.)

(5) The prosecutor's repeated references to both defendants having a desire to kill the police, although they did not know who or when or where, was not only unsupported by credible evidence with respect to petitioner but was also an improper argument that petitioner acted in conformity with a propensity for violence and killing. This argument was underscored by the prosecutor's claim that because both men had committed robberies, both men had to "coordinate" with one another "to violently resist the police."

(6) Particularly in the face of the erroneous admission of petitioner's purported confessions to the robberies and Cummings's guilty pleas, the jury could easily have concluded that petitioner must have committed the murder, notwithstanding the substantial conflicts in the evidence.

17. Because the trial court failed to sever the non-capital counts prior to trial and neglected to analyze the probable effects of joinder in this capital trial, petitioner's jury was permitted to hear evidence that it should not have considered.

18. The effect that such evidence had on the jury cannot be denied and petitioner's murder and special circumstance convictions must be overturned.

O. CLAIM FIFTEEN: THE TRIAL COURT ERRED IN REFUSING TO ORDER SEPARATE TRIALS FOR THE DEFENDANTS AND IN IMPANELING TWO JURIES TO HEAR THE MURDER EVIDENCE JOINTLY.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice by the trail court's erroneous, arbitrary and capricious refusal to order separate trials for petitioner and his co-defendants; and in impaneling two juries to hear the evidence jointly.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. On October 11, 1984, petitioner moved for severance and a separate trial from his co-defendant. (8 RT 743-54.)

a. Trial counsel submitted a short written motion and then joined in the arguments made by counsel for co-defendant Cummings at the severance hearing. (4 CT 113, 117.)

b. The motion was denied. (9 RT 777-78.)

3. On November 7, 1984, co-defendant Cummings pled guilty to all of the non-capital counts with which he was charged. (6 CT 1613, 1676-90.)

a. In light of the changed circumstances, the trial court considered the severance issue once again.

b. After lengthy argument by all parties with respect to the order of trial (31 RT 3137-54), especially as it pertained to when and under what circumstances the prosecution could introduce evidence of the non-capital crimes, the trial court ruled that it would "grant the severance [sic] and hold double juries." (31 RT 3154.)

(1) Petitioner was to be tried first on the non-capital counts before his jury.

(2) Afterwards, both juries were to be present for the murder evidence. (32 RT 3159-60.)

c. At one point, the trial court suggested that petitioner's jury hear all of the evidence, prosecution and defense alike, on the non-capital counts and then be permitted to deliberate before the murder case was tried. Petitioner's counsel declined to follow the trial court's suggestion.

4. Both juries, sitting in the same courtroom, heard the testimony of every witness on the murder count with one exception: Petitioner's jury

was excused for testimony concerning a statement made to police by Michael Kanan. (65 RT 7106-11.)

5. Based upon the showing at the time of the severance motion, the trial court erred in failing to grant fully separate trials and petitioner was demonstrably prejudiced by the procedure adopted by the trial court.

a. Petitioner's jury improperly heard three extra-judicial statements by co-defendant Cummings that incriminated petitioner.

b. In addition, petitioner's jury heard evidence that was only relevant, if at all, to the case against Cummings.

(1) This included evidence of Cummings's violent and brutal nature.

(2) The likely effect was prejudice towards petitioner before his jury without providing any relevant evidence in his case.

c. The admission of these two classes of evidence before petitioner's jury constituted an improper application of the dual jury procedure.

d. Failure to sever prejudiced petitioner in other ways as well.

(1) Petitioner and Cummings had fundamentally inconsistent defenses, such that petitioner not only faced incriminating evidence introduced by the prosecution, but also other incriminating evidence introduced solely by Cummings.

(2) The trial court's failure to sever the cases prevented the introduction of exonerating evidence from Cummings and others.

6. Petitioner suffered "specific and demonstrable prejudice" from the failure to sever and the use of dual juries. Consequently, the convictions should be reversed.

7. Petitioner's jury improperly heard three extra-judicial statements by Cummings that incriminated petitioner.

8. The trial court was aware at the time of the severance motion of inadmissible extra-judicial statements.

a. Although the prosecutor apparently indicated he would not attempt to introduce statements in violation of *Bruton/Aranda* (8 RT 747), the trial court was plainly aware that such statements might be utilized at trial. (8 RT 746.)

b. Thus, the trial court explicitly alluded to such statements in initially denying the severance motion:

> I will deny the motion as to the severance of the defendants with the clear understanding, particularly in regard to any Miranda or Aranda problems -- and again I know that counsel is [sic] experienced enough to approach the Court should there be any difficulty, and that they won't attempt to introduce any evidence that won't be admissible from [sic] defendant or another. (9 RT 778.)

c. Notwithstanding the distinct probability that such extra-judicial statements would be offered, the trial court permitted both defendants to be tried jointly for the murder.

9. On three different occasions during the murder trial, the trial court permitted petitioner's jury to hear evidence of extra-judicial admissions or statements made by co-defendant Cummings that implicated petitioner in the crime. Cummings did not testify at trial.

a. Deputy Rick McCurtain testified that on April 9, 1984, he was assigned to oversee prisoners, including co-defendant Cummings while they showered.

(1) During his shift co-defendant Cummings made incriminating statements regarding the homicide.

(2) On that day, Cummings, another inmate named Brooks, and two others were showering. Petitioner was not present. (66 RT 7203.)

(a) During their shower, McCurtain heard Brooks and Cummings speaking. When a deputy walked by, Brooks said "There's Paul Verna" and Cummings said, "Yep, that's Paul Verna" or "Looks like Paul Verna." (*Id.*) This occurred several times.

(b) When a deputy walked by, Cummings and Brooks extended their hands as if they held guns and said, "pow, pow." (66 RT 7204.)

(3) Cummings then turned to Brooks and stated, "Let me show you how it was done. . . . First, two in the back, 'pow, pow."' (66 RT 7206-07). McCurtain then testified that Cummings said, "Walked up and four more. Pow, pow, pow, pow." (66 RT 7207.)

(4) For the first two shots, McCurtain described Cummings standing with his arm straight out at shoulder level, hands together as if holding a gun. For the remaining four shots, McCurtain described Cummings holding his arms at a 45-degree angle, pointing toward the ground.

(5) On cross-examination by Cummings's counsel, McCurtain testified that after Cummings said "pow, pow" twice during the

demonstration, he then said, "Then we put four more." (66 RT 7217 (emphasis added).) McCurtain acknowledged that when he heard Cummings describe the last four shots, he was "referring to his crime partner, but he gave no names."

(a) The prosecutor then stated: "May the record reflect when Deputy McCurtain said 'his crime partner' he just turned to defendant Gay." (66 RT 7219-20.)

(b) Notwithstanding his failure to object to any of the foregoing, trial counsel for petitioner requested that the Court admonish the jury to disregard the references to petitioner in McCurtain's testimony. (66 RT 7225.)

(c) The jury was admonished only to ignore the reference to petitioner being called Cummings's "crime partner." (66 RT 7229.)

b. On direct examination, Pamela Cummings testified that she was unable to see who was holding the gun when the first shot was fired. (73 RT 8162.)

(1) However, on cross-examination by counsel for Cummings, and over objection by counsel for petitioner that the proffered testimony was hearsay, Pamela Cummings testified to a conversation with Cummings on the evening of the murder.

(2) According to Pamela Cummings, Cummings stated that Officer Verna asked petitioner for a driver's license and that petitioner said "something to the effect of, 'I got something, I got a driver's license for you' or something like that and raised the gun up and fired it." (73 RT 8220.) Following this testimony, the prosecutor objected on hearsay

grounds, and the trial court admonished petitioner's jury to disregard the statement. (73 RT 8221.)

c. On April 10, 1985, Dr. Cogan, the state's pathologist, testified concerning the autopsy of Paul Verna. Dr. Cogan described his numbering of the bullet wounds one through six.

(1) Deputy La Casella, who was the courtroom bailiff during parts of the trial (75 RT 8487-98; 95 RT 10912), was called to testify concerning an admission made by Cummings on April 10, 1985, following Dr. Cogan's testimony.

(a) Following an Evidence Code § 402 hearing (75 RT 8474 et seq.), the trial court permitted the testimony. (76 RT 8564-68.)

(b) Petitioner's counsel agreed that the testimony should be admitted. (*Id.* at 8564.)

(2) Deputy La Casella testified that he heard Dr. Cogan's testimony, and understood bullet wound number six to have been the wound on the right side of Verna's neck. (76 RT 8608.)

(3) La Casella reported that following Dr. Cogan's testimony, he escorted both defendants to their cell in the basement of the courthouse. (*Id.*)

(a) Shortly thereafter he heard "Mr. Cummings yell out, 'you know how he got number 6, don't you?'" (76 RT 8611.)

(4) Gay responded, "Number 6?" (76 RT 8610.)

(5) According to La Casella, Cummings then said, "Yeah. Gunshot number 6." (*Id.*)

(6) La Casella continued: "There was approximately a two- to three-second silence. Petitioner did not respond. Mr. Cummings then yelled, 'That's the one I put in the motherfucker.'" (76 RT 8611.)

(7) La Casella testified further that Cummings then yelled, "I know how he got all of them" and "I know exactly where he was when he got them." (76 RT 8612.)

(a) La Casella said he heard Cummings's remarks and immediately left the area in order to record what he had heard. (76 RT 8629-30.)

(b) At the time he left the area he heard both defendants speaking, but did not remain to hear the discussion.

(8) Most importantly, La Casella could not see the defendants and had no way of determining what if any nonverbal responses petitioner made to Cummings's remarks.

(9) During closing argument to petitioner's jury the prosecutor stressed the significance of Deputy La Casella's testimony:

> Then we get to Deputy La Casella. Deputy La Casella was the deputy that sat in the chair the gentleman is in now and part of his function was security for these men.
>
> So that each day when the court proceedings were over they were taking Mr. Cummings and Gay downstairs to their cells, which we went down there to look at those cells.
>
> The men were in 8 and 9, and they were yelling to one another.
>
> Deputy La Casella heard that when he walked by, and the evidence, that most direct import of that evidence, goes against Mr. Cummings.

It is very strong against Mr. Cummings, *but it says something by inference about Petitioner.* .La Casella heard Mr. Cummings say, "You know how he got No. 6, don't you?"

Petitioner replied, "No. 6?"

As though it were a question. Mr. Cummings says, "Yeah, gunshot No. 6."

Then there was a two or three-second silence and Cummings says, "That's the one I put in the motherfucker."

Very strong evidence against Mr. Cummings. "That's the one I put in him."

But the implication is, "And you put the other ones in."

Mr. Cummings didn't say, "I put them all in," or 1, 2 and 3 and 4 or any other number.

He said, "That's the one I put in. No. 6."

Well, now the only other person there is Mr. Gay. So it is clear between these two men that they understand Mr. Gay put the other five in, so Mr. Cummings was the speaker, but there is very strong evidence against Mr. Gay. and he didn't holler back and say,

"Wait a minute. I didn't shoot anybody. You shot them all."

There was no evidence like that. Mr Gay didn't say anything. That is tacit admission.

If I say something to you like do you remember the time we went and robbed the store and I am the one that robbed the check stand and you didn't do it, you would say, "hey, I wasn't there."

Mr. Gay didn't do that. He remained silent. *Very reliable evidence.*

Deputy La Casella was positive, and he wrote the quotes down exactly. (95 RT 10912-14, emphasis added.)

10. Introduction of Cummings's extra-judicial statements were indisputable violations of the *Bruton/Aranda* rule and the effect of those statements was so prejudicial that it cannot be demonstrated beyond a reasonable doubt that they did not contribute to the jury's verdict.

11. Even though two of the three statements discussed above were introduced on cross-examination by counsel for Cummings, all three were unquestionably violations of the *Bruton/Aranda* rule.

12. Since the trial court decided not to sever the defendants' cases for trial it was under an affirmative duty to excise the statements to avoid all reference to petitioner, to exclude the statements altogether or, at a minimum, to excuse petitioner's jury when testimony was delivered.

a. The trial court failed to comply with that duty.

b. Moreover, the limiting instructions to the jury after the testimony of McCurtain and Pamela Cummings did not mitigate the error.

13. These repeated violations of petitioner's Sixth Amendment rights are tested for prejudice under the constitutional harmless error test set forth in *Chapman v. California* (1967) 386 U.S. 18.

a. Whether considered singly or in combination, the effect of these three powerfully incriminating pieces of evidence was necessarily prejudicial to petitioner.

b. The sharply conflicting and contradictory evidence in this case demonstrates that admission of the three statements must have contributed to the jury's verdict and, as such, admission of those statements alone is sufficient to require reversal.

c. The properly admitted evidence against petitioner was not overwhelming, but was confused, deeply contradictory and could have easily resulted in an acquittal.

(1) If the statements in violation of the *Bruton/Aranda* rule were excluded, the jury could have reconciled the conflicts in the evidence by concluding that Cummings committed the killing alone.

(2) The prosecution sought to prove that Cummings fired once or twice from inside the car, passed the gun to petitioner and then only petitioner stood outside the car and shot the officer.

(3) Absent the statements made inadmissible by *Bruton/Aranda*, the evidence at trial was sharply in conflict with this version of events.

(4) The testimony of witnesses at the scene was fundamentally contradictory, confused or seriously biased.

(a) Oscar Martin, for example, testified repeatedly and insistently that he witnessed the entire shooting, that the man he saw outside the car shooting Paul Verna was Raynard Cummings and that Cummings shot Verna "four times" while outside the car. (67 RT 7359-65.)

(i) Martin further testified that he did not see petitioner at the scene. (67 RT 7362.)

(ii) Martin testified he saw Cummings get in the driver's seat of the car and drive off. (67 RT 7362.)

(b) Similarly, Shequita Chamberlain testified that, as she heard three shots, she saw a black man with a complexion like

Cummings's and wearing dark clothes, standing next to the decedent as he fell. (68 RT 7512-21, 7523, 7524.) She testified that petitioner was lighter-skinned than the man she saw (RT 7524-26) and that the black man who shot the decedent got into the car and drove off. (68 RT 7521.)

(c) Although Marsha Holt testified that petitioner was the man who shot the decedent (RT 7529), she admitted that her memory was "hazy." (68 RT 7555-57, 7566, 7588.)

(i) Holt stated that she saw petitioner walking, at a normal pace, with his hands by his sides, around the car from the passenger side. (68 RT 7531.)

(ii) Holt did not see him with a gun, but saw him pick up the officer's gun. (68 RT 7532-34.)

(iii) The evidence also showed that Holt did not see petitioner with a gun until after the last shot was fired. (*Id.* at 7533-34.)

(iv) Indeed, before the grand jury Holt testified that she merely heard the gunshots, did not see the man shooting the police officer and did not see the man with the gun. (68 RT 7556.)

(v) Gail Beasley, another witness, confirmed that Holt may not have seen the shooting. She stated that Holt, who was at Beasley's house, was getting up to look out her window after Beasley ran in to tell her about the shooting (74 RT 8332) and that by the time Ms. Beasley reached the bedroom, all the shooting had been completed. (74 RT 8336.)

(vi) Ms. Holt also testified that she saw the car drive up the street and make a U-turn, and that petitioner, who was wearing a white shirt, got in the passenger side before the car drove away. (68 RT 7550, 7554, 7563.)

(d) Robert Thompson testified that he saw Cummings fire the gun from the back seat, and then petitioner got out of the driver's side with the gun and shot the officer.

(i) Thompson's testimony was suspect because he could not continually watch what was occurring since he was moving and hiding behind bushes during the events.

(ii) Significantly, Thompson testified that when he saw petitioner straddling Verna in the street, he saw the gun, but saw no smoke and heard no shots. (68 RT 7600-02.)

(e) More importantly, Thompson's trial testimony was profoundly inconsistent with his previous statements and testimony.

(i) On the evening of the murder, for example, he told a police investigator that he observed a black man shoot the officer from the back seat of the car and that the black man in the back seat got out of the car and continued to shoot the officer. (69 RT 7765; People's Ex. 22; Ex. 45 at 1641-42.)

(ii) He also told the investigator that the "white man" in the front seat did not get out of the car. (69 RT 7765.)

(iii) Thompson's testimony at the grand jury substantially duplicated his statements to the police (68 RT 7648-50) and, neither at a line-up nor before the grand jury could Thompson identify petitioner. (68 RT 7642-47.)

(f) Before Thompson testified at trial, investigator Holder "walked" him through the events. (68 RT 7609.)

(i) Holder provided Thompson with a copy of his preliminary hearing testimony that both implicated petitioner and flatly contradicted his grand jury testimony.

(ii) Thompson read only his preliminary hearing testimony prior to trial. (68 RT 7612.)

(iii) Although Thompson denied that Holder had influenced him, he admitted that his conversations with Holder "may" have had some influence on the way he remembered the events at trial. (68 RT 7610.)

(g) The reliability of Thompson's trial testimony is also cast into doubt by his own admissions of confusion and bias.

(i) At the grand jury hearing, Thompson acknowledged that media coverage of the events had "destroyed" or "distorted" his "mind." (68 RT 7647; 69 RT 7687.)

(ii) Thompson also admitted that the publicity surrounding the events had made him "mad" and that "nobody does anything" when people get killed. (68 RT 7610; 69 RT 7658.) "[T]hey sit in jail that's all they do, just sit in jail." (69 RT 7658.)

(iii) Thompson testified he believes that death is the appropriate punishment for murder. (69 RT 7660.)

(h) Shannon Roberts, who was 12 years old at the time of trial, testified that he saw a man who looked like petitioner shoot the officer. (69 RT 7783-84.)

(i) However, Roberts did not identify petitioner either at a line-up or at the preliminary hearing. (69 RT 7795-96.)

(ii) At the grand jury hearing, which was nearest in time to the killing, Roberts identified Cummings as the man he saw at the scene of the shooting. (69 RT 7802.)

(i) The preliminary hearing testimony of Gail Beasley was read into the record.

(i) Beasley testified that after she heard two shots, she looked out from her house, and saw petitioner shooting the police officer. (74 RT 8309-36.)

(ii) Beasley testified that the person doing the shooting was wearing a "reddish" shirt and dark-colored pants the exact description of clothing worn by Cummings, not petitioner. (74 RT 8342-43.)

(iii) Pamela Cummings, pursuant to agreement with the prosecutor, stated that petitioner shot the decedent. She also testified that petitioner was wearing a white shirt that day and that her husband was wearing a burgundy shirt and pants. (73 RT 8174.)

(iv) Raynard Cummings's aunt, Eula Heights, confirmed that Cummings was wearing jeans and a burgundy-colored shirt day of the offenses. (74 RT 8377-80.)

(5) Into the confusing and contradictory array of eyewitness testimony must be added Cummings's numerous inculpatory statements.

(a) Deputy McMullan testified that Cummings boasted, "I put six in [Verna]" and "He took six of mine." (65 RT 7148-50.)

(b) Alfredo Montes testified that Cummings told him that he had "killed a cop that had medals of valor." (64 RT 7008.)

(c) Janet Mays and Dwayne Norton both testified that Cummings said, he would kill police "if they get in the way."' (66 RT 7248, 7277.) Mr. Norton and Mrs. May also testified that a few hours before the killing Cummings threatened them with a gun which was in his possession. (66 RT 7234-300.)

(d) Pamela Cummings testified that on numerous occasions Cummings carried a gun with him. (58 RT 6524-26.)

(e) Similarly, Debbie Cantu and Paul Smith, Pamela Cummings's siblings, both testified that they had seen a gun in Cummings's possession. (78 RT 8886-95; 79 RT 8956.)

(f) Debbie Cantu, Pamela's sister, testified further that Cummings said, "'If the police try to get me I will get them first. It will be me or them. They will never get me."' (78 RT 8889-90.)

(g) Likewise, Debbie Warren testified that Cummings and Pamela stayed with her on several occasions.

(i) On one such occasion Cummings told her that if he was stopped by a police officer it would be either him or me because he "was not going back to jail." (66 RT 7199-200.)

(ii) She also testified that Pamela told her that when Officer Verna asked if the men in the car had any identification, Cummings said "Yeah, I have I.D.," shot the officer from the back seat, then got out and continued to shoot the officer. (88 RT 9982, 10032.)

(iii) According to Ms. Warren, Pamela said nothing about petitioner shooting Verna. (88 RT 10031-32.)

(h) Perhaps most importantly, the first witness who testified, Gilbert Gutierrez, stated that Cummings admitted

doing all the shooting. (64 RT 6949-7005.) Significantly, Gutierrez further testified that Cummings offered an explanation for why some eyewitnesses thought petitioner was the killer.

(i) Cummings told Gutierrez that after the killing, petitioner got out of the car and picked up the gun, which Cummings had thrown to the ground. (64 RT 6999.)

(ii) In the excitement and confusion, those witnesses who saw petitioner with the gun assumed he had done the shooting.

(iii) According to Cummings, "They were pinning it on [petitioner] and that's cool." (64 RT 6999.)

(6) The evidence summarized above supported a finding that the eyewitnesses were confused and identified petitioner solely because they saw him at the scene and saw him pick up a gun.

d. If the jurors heard only the evidence summarized above, they might have concluded that the way to reconcile the deep conflict in the evidence was just as Cummings himself had done in his admission to Gilbert Gutierrez: that certain eyewitnesses mistakenly assumed that petitioner had done the shooting because they saw him pick up a gun from the street after the killing.

e. In fact, that plausible explanation was supported by substantial evidence.

(1) Rosa Martin, for example, saw petitioner at the scene and saw him pick up a gun, but saw no shooting. (67 RT 7456-58.)

(2) Rose Perez testified that she saw no shooting, but saw petitioner coming around the back of the car from the passenger side. (70 RT 7836-75.)

(3) Similarly, Marsha Holt testified that she saw petitioner come around the car and pick up a gun, and also testified that she did not see him with a gun until after the last shot had been fired. (68 RT 7532-33.) Before the grand jury, she testified that she saw no shooting. (68 RT 7556.) Ms. Holt testified that she saw the car drive off and turn around and petitioner entered the passenger side. (68 RT 7554.)

(4) Oscar Martin and Shequita Chamberlain each testified they saw the dark man get in the driver's side and drive off.

(5) Gail Beasley insisted that the man who shot the officer was wearing a reddish or burgundy shirt and dark pants, the clothing that Raynard Cummings was wearing.

(6) Robert Thompson testified that he saw petitioner with a gun standing over the decedent, but also testified that he saw no smoke and heard no shots. (68 RT 7600-01.)

14. The three statements admitted in violation of the *Bruton/Aranda* rule were not cumulative of other evidence but, instead, supplied essential support for the prosecution's theory of the case and necessarily prejudiced petitioner.

a. There is no other direct evidence that incriminates petitioner in substantially the same respects as the erroneously admitted extrajudicial statements.

b. At the outset, Cummings's statement testified to by Pamela Cummings, to the effect that petitioner did all the shooting, contradicted all the other evidence at trial, and thus was clearly not cumulative of any other evidence.

c. Of even greater importance, the sheriff's deputies each testified to incriminating admissions that depicted the killing in two phases: Cummings fired first and petitioner completed the killing.

d. Other than Cummings's admissions to which Deputies McCurtain and La Casella testified and which were erroneously introduced before petitioner's jury, Robert Thompson's trial testimony was the only evidence that even arguably supported the prosecution's two-killers-pass-the-gun murder theory.

(1) However, Thompson's testimony was, minimally, his third or fourth version of the events and even he did not testify that he saw Cummings pass the gun to petitioner.

(2) Indeed, the deputies' testimony provided critically needed corroboration for Thompson's testimony, because his credibility was clearly suspect.

e. The erroneously admitted statements testified to by the deputies thus conformed to the prosecution's theory of the case, supplied a critical missing link in the evidence, and provided necessary corroboration for an otherwise weak witness.

f. The prosecutor discussed Deputy La Casella's testimony in particular at length during closing argument.

(1) The prosecutor told the jury that petitioner's silence in the face of Cummings's statements was an admission of guilt.

(2) The prosecutor stated that when petitioner heard Cummings say "That's the one I put in, No. 6," petitioner should have said: "'Wait a minute. I didn't shoot anybody. You shot them all.'" (95 RT 10913.) That petitioner remained silent, the prosecutor argued was "very

reliable evidence" of petitioner's guilt and a "tacit admission." (95 RT 10914 (emphasis added).)

(3) The prosecutor concluded by telling the jury that it was "clear between these two men that they understand petitioner put the other five [shots] in." (95 RT 10913.)

g. The prosecutor essentially argued that La Casella's testimony indicated that petitioner "confessed" by silence to the two-killer theory of the case and that Cummings's statements "interlocked" with petitioner's admission. But such a statement by a co-defendant is inadmissible nonetheless.

(1) Cummings's incriminating statements would not and could not have been admitted in a separate trial against petitioner alone and were therefore a direct result of the trial court's erroneous decision not to sever the trials or excuse petitioner's jury.

h. Without those statements, a plausible theory was advanced by Cummings in his confession to Gutierrez and supported by substantial evidence upon which the jury could have acquitted petitioner. With those statements in evidence, however, the jury was presented with powerfully prejudicial support for the prosecution's version of the events.

i. It cannot be said beyond a reasonable doubt that the erroneous admission of the foregoing evidence did not contribute to the verdict against petitioner particularly in light of the prosecutor's emphasis during trial that Deputy McCurtain's testimony referred to petitioner as Cummings's "crime partner" (66 RT 7219-20), and his lengthy discussion of Deputy La Casella's testimony during closing argument.

j. In fact, the deputies' testimony may have attained particular significance in the jurors' eyes because both witnesses were deputy sheriffs sworn to uphold the law and because Deputy La Casella in particular had been the courtroom bailiff during jury selection.

k. The violations of *Bruton/Aranda* made it far more likely that the jury would convict petitioner and as such were manifestly prejudicial.

15. The defendants had fundamentally inconsistent defenses, such that petitioner was faced with a second prosecutor: counsel for Cummings.

a. From the outset, the two defendants were not charged with identical offenses.

(1) Initially, Cummings was charged with four counts (10-13) with which petitioner was not charged and the trial court severed only (original) Counts 12 and 13, leaving Counts 10 and 11 (the Linda Smith robbery) in the case at the time of the original motion to sever.

(2) By the time of trial, petitioner was to be tried in non-capital counts to which Cummings had pleaded guilty.

(3) At no time, therefore, were defendants faced with identical offenses.

b. More importantly, the parties repeatedly warned the trial court that the defendants had fundamentally inconsistent defenses with respect to the capital counts. Thus, counsel arguing the severance motion told the trial court:

> [W]hat we have here is a classic finger pointing contest between two defendants. The prosecution is in possession of statements for each of the defendants exculpatory to himself

> and incriminating to the other. Each puts the gun in the other's hand. (8 RT 746.)

c. After defendant Cummings pleaded guilty to the robberies, and while the parties were discussing the propriety of the two jury procedure, the prosecutor warned the trial court of the dangers inherent in the procedure:

> Mr. Watson: I am making a little humble prediction, and my humble prediction is that each of these men will produce in the other's [sic] defense the evidence that you don't want me to introduce.
>
> I think it is all coming in. (31 RT 3154.)

d. In particular, counsel specifically referred to the possibility that the defendants might seek to use such statements against one another. The threat, actualized at trial, that one of the defendants might utilize statements which implicated the other in violation of *Bruton/Aranda* was by itself a sufficient ground to sever the trial.

e. Other evidence that conflicting defenses existed should have led the trial court to order a severance.

(1) The conduct of, and evidence adduced at, the preliminary hearing clearly demonstrated the extent to which the defenses of the two defendants were irreconcilable.

(2) The evidence at the preliminary hearing revealed that Oscar Martin and Shequita Chamberlain would testify to facts that implicated Cummings as the shooter, but Gail Beasley, Marsha Holt and, perhaps, Robert Thompson would implicate petitioner.

(3) Thus, counsel for Cummings had an undeniable interest in ensuring that testimony implicating only petitioner was clear and emphatic.

(4) The cross-examination of Gail Beasley by Cummings's counsel at the preliminary hearing was indicative of the extent to which they sought to inculpate petitioner:

> While you were seated [in the kitchen], you heard some shots?
>
> Yes.
>
> And these shots all came one right after the other?
>
> Yes.
>
> Q. *And there was no pause in between?*
>
> *Yes.*
>
> Q. You think you heard how many shots altogether?
>
> Four.
>
> Q. *While you heard these shots,* you got up and went to the window.
>
> Yes.
>
> Q. How long do you think it took for all these shots that you heard to be fired? Did it happen rather quickly?
>
> Yes, it happened quickly. . . .
>
> Q. Would it be fair to say they happened one right after the other in quick succession?
>
> Yes. (74 RT 8341-42 (emphasis added).)

(a) The prosecution had no interest in establishing that the shots came in quick succession without pause because its theory of the case required a pause sufficiently long for Cummings to pass the gun to petitioner.

(b) Since Beasley had testified that she saw only petitioner at the scene, the testimony elicited by Cummings's counsel could have been construed, as it was clearly intended to be, as evidence that only petitioner shot the officer.

f. This single example of the inconsistent defenses gleaned from the preliminary hearing testimony, together with the possibility that extrajudicial statements would be used by either or both defendants, was a sufficient basis upon which to sever the trials.

16. The inconsistent defenses of the defendants resulted in the introduction of other evidence that prejudiced petitioner but would not have been introduced in a severed trial.

a. The prosecutor either would not or could not have introduced such evidence in a severed trial and, as a result, petitioner was faced with a second prosecutor: counsel for Cummings.

b. Significantly, there were numerous instances in which counsel for Cummings introduced evidence which implicated petitioner alone, but which was inconsistent with the prosecutor's "two-killers-pass-the-gun" murder theory.

c. The instances included, but were not limited to: (1) evidence introduced at a juror's request during Oscar Martin's testimony that petitioner remove his glasses and Martin's subsequent testimony that, without his glasses, petitioner looked like the man he had identified at the

line-up as the shooter (67 RT 7390-94); (2) Testimony of Officer William Gailey to suggest that Martin erroneously identified Cummings as the killer (84 RT 9571-9574); (3) Testimony of a police officer that Martin had agreed with Shannon Roberts that the "light-skinned black dude" was the killer (89 RT 10169-71); (4) Evidence introduced at a juror's request that gunshot residue tests could not establish that the gun was fired from the backseat of the car (7 CT 1952-53; 93 RT 9500); (5) Testimony of Gail Beasley (discussed above) to suggest that petitioner alone was the killer; (6) Expert and other testimony to suggest that petitioner inflicted gunshot wound number five by firing from inside the car (80 RT 9051-179; 81 RT 9180-342; 88 RT 10091); (7) Testimony of Pamela Cummings to suggest that she saw the gun apparently pointing from the front passenger seat of the car and not from the back seat where her husband was seated (78 RT 8841).

d. Added to the foregoing are a number of instances in which Cummings's counsel introduced evidence against petitioner solely for its unduly prejudicial value. The starkest examples of that evidence include the following: (1) Counsel's repeated references, during cross-examination of Rose Perez, to the "light-skinned" man as the "assailant," even though Perez had not testified on direct that petitioner had assaulted the decedent (70 RT 7845); (2) Evidence that Rose Perez, who testified on direct examination that she saw petitioner walking from the passenger side, was mistaken and had seen him near the driver's side of the car (84 RT 9563-64); (3) Cummings's counsel's recitation before the jury, during Pamela Cummings's testimony, of a list of the evidence and witnesses implicating petitioner as the killer (86 RT 9799); and, (4) Testimony of a

treating physician that petitioner, who had an arguably self-inflicted neck wound, said he had nothing to live for and "wanted to die" (83 RT 9508-9529).

e. While antagonistic defenses may not be grounds for severance *per se*, the antagonistic defenses here went beyond mere finger-pointing.

(1) Counsel for Cummings, in zealous defense of their client, resorted to introducing evidence against petitioner which the prosecutor either could not introduce himself or which was contrary to the murder theory advanced by the prosecution, but which was nevertheless inculpatory of petitioner.

(2) In effect, petitioner was required not only to defend against the prosecution's evidence and theory of the case, but to defend against the evidence and theory of the case advanced by the second prosecutor: counsel for Cummings.

f. From the outset the trial court was made fully aware that the defenses were antagonistic and that otherwise inadmissible evidence might be introduced as a result.

(1) The inconsistent defense issue at trial was so apparent that the prosecutor twice referred to it.

(2) When trial counsel for petitioner sought to introduce certain testimony damaging to Raynard Cummings, the prosecutor stated:

> I think it is obvious to everyone in this case as it *has been from day one* that the tactics of counsel for defendant Gay frequently have a lot in common with the tactics of the prosecutor against Mr. Cummings and vice versa. Very

> frequently Mr. Rucker has been suggesting the very same kind of [damaging] questions of certain witnesses who are strongly against Mr. Gay. (77 RT 8743.)

(3) When counsel for Cummings argued that the Cummings jury should not hear petitioner's defense case, the prosecutor stated "it is quite clear that this case is either [sic] that each one is trying to blame the other; and therefore, when defendant A tries to blame defendant B, it is admissible against B, regardless." (86 RT 9754.)

g. The record before the trial court on the severance motion amply demonstrated that antagonism, and the record at trial demonstrated that the conflict only deepened.

h. In a case of this magnitude, it is plain that severance should have been ordered under the circumstances presented and that the trial court's failure to do so severely prejudiced petitioner.

17. There was a strong likelihood that confusion would arise from trial of the multiple counts and the potential for confusion was inherent from the outset.

a. The numerous capital and non-capital counts involved in this case posed a real risk of confusing the jury.

(1) Petitioner and Cummings were originally charged jointly in fifteen counts of robbery, attempted robbery and conspiracy to commit robbery, one count of first degree murder and one count of conspiracy to commit murder.

(2) Cummings was originally charged in four counts of robbery, in which petitioner was not implicated, arising out of two additional robberies.

(3) Each defendant was charged separately in one count of being an ex-convict in possession of a firearm.

(4) Petitioner had been identified in only the capital count and one non-capital count, had been possibly identified by the victims in two other non-capital counts, and had not been identified at all in the remaining counts.

(5) Cummings had been identified as involved in all but three of the counts in which he was charged.

b. The record at the preliminary hearing showed that the prosecutor called 41 witnesses in connection with the various crimes. (CT Vols. I-IV.)

c. The evidence showed further that in certain of the robberies Cummings acted alone (Counts 10-11) and in still others another man, Billy Sims, was involved [(original) Counts 12-13].

(1) In some of the robberies Pamela Cummings was involved, and in still others Robin Gay was involved.

(2) Pamela and Raynard Cummings and petitioner were involved in the incidents leading up to the killing, while Robin Gay joined later.

d. The trial court's severance of (original) Counts 12 and 13 and Cummings's pleas of guilty to the robbery counts certainly simplified the proof at trial.

(1) However, at the time the two juries were impaneled, it was not settled how extensively the prosecutor would be permitted to introduce evidence of the robberies in the murder case.

(2) The overwhelming mass of evidence and crimes, therefore, could easily have confused the jury.

e. The trial began on February 26, 1985 and petitioner's jury did not complete its deliberation until June 5, 1985.

f. While petitioner's jury heard all the robbery and murder evidence against him, the jury was required to listen first to the robbery evidence, including a bifurcated cross-examination of Pamela Cummings because of the dual jury procedure. Indeed, during the non-capital phase, the trial court permitted only extremely limited cross-examination of her that pertained to the murder.

g. Petitioner's jury twice heard Linda Smith testify to the robbery Cummings committed at her home (Counts 10 and 11) (59 RT 6445 et seq., 68 RT 7510 et seq.), although petitioner was not involved in that crime.

h. Similarly, the jury twice heard the trial court take judicial notice of Cummings's guilty pleas and Robin Gay's convictions.

i. Finally, because of the procedure followed, petitioner's defense to the robberies did not begin until several months after that portion of the prosecution's case had been completed.

j. If the trial court severed petitioner's trial from Cummings's, the testimony could have been presented in a more timely and less complicated and confusing fashion.

18. Petitioner suffered prejudicial association with co-defendant Cummings.

a. There was evidence before the trial court on the severance motion to suggest that petitioner would be prejudiced by his association with Cummings.

b. Empanelling two juries did not prevent petitioner from being prejudiced by his association with Cummings.

c. The record at the severance motion and at the time of the trial court's decision to impanel two juries showed that petitioner had not been identified by the victims in the Kenn Cleaners, Salads Plus, Pizza Man and Poehlmann robberies (Counts 1-5, 12-15.) With the exception of Counts 4 and 5, Cummings had been identified in each of the foregoing.

d. The record before the trial court at the time of the severance motion and the decision to impanel two juries showed that Cummings was charged with inflicting great bodily injury in two of the non-capital counts and further with having beaten one of the teenage victims in the Pizza Man robbery.

e. The record also revealed that Cummings (1) had robbed and threatened Linda Smith, an elderly woman, and her ailing brother-in-law in a robbery in which petitioner was not involved (Counts 10 and 11) and (2) had threatened Dwayne Norton with a gun on the day of the murder. (1 CT 119-26; 2 CT 313.)

f. The risk was substantial that petitioner's association with an individual of Cummings's character seriously prejudiced him in the eyes of the jury.

(1) The evidence at trial and the prosecutor's argument added to the inherent prejudice from petitioner's association with Cummings.

(2) The starkest example of the prejudice to petitioner from his association with Cummings was the erroneous introduction into evidence of Cummings's guilty pleas to the non-capital counts.

(a) The jury was twice told that Cummings had pleaded guilty to all the non-capital crimes with which he and petitioner had been jointly charged, and that he admitted the allegations of the crimes charged in Counts 1-16 and 18. (61 RT 6714-16; 78 RT 8884.)

(b) The prosecutor referred to Cummings's guilty pleas a third time during his closing argument. (95 RT 10861.)

(c) That Cummings had admitted complicity in the same crimes for which petitioner was also charged necessarily left the jury with an indelible inference of guilt by association. The spillover effect into the capital crime from the introduction of the guilty pleas was undeniable.

(d) The prosecutor relied upon evidence of Cummings's threats to others and his threats to kill the police as a basis to convince the jury of petitioner's guilt.

g. In addition to Cummings's guilty pleas, the jury heard numerous instances of Cummings's threats to others, especially to kill the police, that must have prejudiced petitioner and, most importantly, that the prosecutor deftly utilized as a basis upon which to argue that petitioner was likewise responsible for the murder.

h. The prosecutor introduced evidence that Cummings was carrying a gun on numerous occasions prior to the murder, often in petitioner's presence. (*See, e.g.*, 60 RT 6524-26; 66 RT 7238-40; 79 RT

8956-58.) The purpose of this evidence, particularly in view of the erroneous admission of Cummings's guilty plea to being an ex-felon in possession of a firearm, was simply to remind the jury that Cummings, and by inference petitioner, were dangerous, armed felons willing to commit any kind of crime.

i. The purpose of the prosecutor's relentless efforts to introduce evidence of Cummings's threats and other conduct was to lay the foundation to permit him to draw prejudicial links between the defendants during closing argument.

j. The evidence of Cummings's threats was significant because except for one minor, ambiguous statement made by Pamela Cummings to a police agent (77 RT 8805), there was no evidence of any threat ever made by petitioner to or about anyone.

k. Despite this lack of evidence, the prosecutor argued strenuously to the jury that petitioner had actively participated in discussions about killing the police, plainly relying on the repeated evidence of such threats by Cummings to implicate petitioner:

> There has been discussion about what will *we* do if the police stop us and you heard a lot of that testimony. "We won't go easily. *We'll* shoot it out," that sort of thing....
>
> "If we get stopped, we are going to shoot our way out."
>
> *They* don't know where. *They* don't know when. And they don't know who....
>
> *These men* planned it for weeks ahead of time, although they didn't know who they were going to kill and they didn't know when or where, but the[y] planned it to the extent if we are stopped we are going to shoot ou[r] way out. (95 RT 10874-79, 10885 (emphasis added).)

l. In his argument, the prosecutor plainly utilized Cummings's conduct, Cummings's threats, and Cummings's intentions as evidence of petitioner's conduct and intentions.

m. The impermissible effort to link the defendants was thus the culmination of a trial that from the beginning threatened petitioner with an inference of guilt merely by virtue of his association with Cummings.

n. The prosecutor made that inference explicit during his closing argument and urged the jury to find petitioner guilty solely on the basis of evidence applicable to Cummings.

o. On this basis alone the convictions should be reversed.

19. When the co-defendant could give exonerating testimony, full severance is required.

a. Here, petitioner's trial counsel raised the possibility that Cummings might give exonerating testimony. (4 CT 1113-17.)

b. That this was more than speculation is suggested by the numerous self-inculpatory statements made by Cummings introduced at trial.

c. Furthermore, petitioner expressly discussed such exonerating testimony in a letter to the trial court after trial, "I have spoken with my co-defendant and he has expressed a desire to exonerate me". (9 CT 2632-36.)

d. In this capital case, the trial court should have explored at the outset whether Cummings might have so testified.

e. The trial court could then have assessed whether severance was required to protect petitioner's right to call witnesses under the California and United States Constitutions.

f. The trial court apparently ignored this possibility because it failed even to address such exonerating testimony in denying the motion to sever.

20. The trial court's failure to sever or regulate the dual jury procedure resulted in the loss of potentially exonerating testimony from Robin Gay in violation of petitioner's state and federal constitutional rights.

a. Besides losing the ability to obtain potentially exonerating testimony directly from Cummings, petitioner was unable to obtain such testimony indirectly through Robin Gay because of the trial court's decision not to sever the trials and because the trial court did not properly regulate the dual jury procedure.

b. The pretrial record was clear that Robin Gay could testify that Cummings had admitted to her that he had done all the shooting. (3 Supp. CT 716-19.)

(1) Robin testified before the grand jury that Cummings told her that when Verna leaned into the car and asked for identification, Cummings said, "'Yes, I have I.D. for you, you MF so-and-so,' and he shot the cop." (3 Supp. CT 718.)

(2) Cummings told Robin that he climbed out of the car and "just emptied the gun" into the officer. (3 Supp. CT 718-19.)

c. The prosecutor originally sought to call Robin at trial regarding Cummings's admission, but he was willing to grant her only limited immunity from prosecution.

(1) Cummings's counsel objected to her testimony on the grounds that Cummings's right to cross-examination would be limited by Robin Gay's invocation of her Fifth Amendment rights with respect to crimes in which she had not been tried and for which she would not be immunized.

(2) As a result, the prosecutor refrained from giving her full immunity or from calling her at trial. (75 RT 8464-74.)

(a) In view of the prosecutor's willingness to grant only limited immunity, the trial court's failure to sever effectively precluded Robin Gay from testifying and thus resulted in the violation of petitioner's constitutional rights to present a defense and call witnesses.

(b) The prosecutor's failure to grant Robin Gay a broader immunity itself violated petitioner's right to present a defense.

d. The loss of Robin Gay's testimony was especially harmful.

(1) Robin's testimony essentially was confirmed in Cummings's admissions testified to Gilbert Gutierrez (a prison inmate) and Debbie Warren.

(2) Had there been a severed trial, Robin Gay could have given the exonerating testimony without the threat of cross-examination by Cummings's counsel.

(3) In short, evidence which could have exonerated petitioner was not introduced because his trial was not completely severed from that of co-defendant Cummings.

21. Petitioner was plainly and demonstrably prejudiced by the trial court's failure to sever the defendants' trials.

a. Events at the non-severed trial, as discussed at length above, demonstrably prejudiced petitioner and deprived him of a fair trial.

b. Because the cases were not severed, petitioner was damaged by the plethora of inadmissible evidence presented in violation of the *Bruton/Aranda* rule directly supporting the prosecutor's theory of the case, and the prosecutor's failure to introduce evidence supporting Cummings's theory.

c. To this already stacked deck must be added the prejudice from the evidence of association between petitioner and Cummings.

d. The prejudice was only compounded by the confusion inherent in this long and complicated trial and the fact that joinder prevented petitioner's jury from hearing potentially exonerating testimony from either Robin Gay and/or Cummings himself.

e. Empanelling two juries may itself have increased the likelihood of conviction.

(1) Despite the fundamental conflicts in the evidence, there was no dispute that at least one of the two defendants shot the decedent.

(2) Faced with the evidentiary conflicts, petitioner's jury may have convicted petitioner in whole or in part out of fear that Cummings's jury would acquit and the murder would go unpunished.

(3) Moreover, the dual jury trial permitted the prosecutor to attempt to nullify the conflicts in his own evidence, while

effectively precluding petitioner from introducing evidence that incriminated Cummings during petitioner's case-in-chief.

(a) The prosecutor essentially conceded the conflicts in the evidence during his closing argument, but told the jury that such discrepancies amounted to "innocent misrecollection" and were "trivial detail[s]." (95 RT 10883.)

(b) Not content that the jury would actually treat the significant testimonial disagreements as "trivial," the prosecutor went further and told petitioner's jury to ignore the evidence implicating Cummings because it was purportedly not "relevant" to petitioner's case.

(c) Instead, the prosecutor asked the jury to concentrate only on the evidence implicating petitioner:

> The arguments that you are going to hear from me and the evidence I am going to talk about is very, very different that [sic] what went on in the Cummings case . . .. The reason for that is pretty obvious. It's a very, very different case. Same witnesses, same evidence, same crime charged, but *the things that were important in Mr. Cummings's trial in most instances are not important in this case and vice-versa.*
>
> [I]important witnesses on the very first shot were very important in Mr. Cummings's trial. Robert Thompson, Oscar Martin, Shequita Chamberlain and Mr. Cummings himself. The statements that he made. Very pivotal evidence, *but almost irrelevant in this case.*
>
> Did Mr. Cummings fire or not, and that is what most of the battling between the lawyers . . . dealt with.
>
> However, you might appraise that *however you might value the strength or weakness of that part of the case,* it's *not what you are here for.*
>
> * *

> Oscar Martin was the first witness about [the murder]. *He is not important to you to make a decision.* It was very important in the Cummings case.
>
> * *
>
> Shequita Chamberlain testified -- *she is unimportant to you* -- but she saw the first part of it. (95 RT 10852-53, 10854, 10886, 10887 (emphasis added).)

22. The prosecutor presented all his contradictory evidence and attempted to explain it away by a speculative theory, leaving it to the defendants to bloody one another in the process.

a. In a severed trial of petitioner, however, the prosecutor would likely have been faced with the unpleasant choice of attacking the credibility of witnesses such as Oscar Martin, Shequita Chamberlain, Gilbert Gutierrez, or Deputy McMullan -- all of whom were witnesses he needed to make out his case against Cummings.

b. It is unlikely the prosecutor would have chosen to undertake such a course.

c. Joinder, therefore, offered substantial benefits to the prosecution by increasing the chance of conviction of one or both defendants.

23. Based on the deep conflicts in the evidence introduced at trial, there is at least a reasonable probability that a more favorable result for petitioner would have been obtained in a severed trial.

P. CLAIM SIXTEEN: TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE JOINT TRIAL BY PERMITTING THE INTRODUCTION OF STATEMENTS IN VIOLATION OF THE *BRUTON/ARANDA* RULE.

As discussed elsewhere herein, three statements made by defendant Cummings were introduced at petitioner's murder trial in violation of the *Bruton/Aranda* rule. Two of those statements, those testified to by Deputies McCurtain and La Casella, were introduced without timely objection and with the concurrence of petitioner's trial counsel. Independent of the trial court's error in admitting this evidence, counsel's utterly inexplicable failure to timely or properly seek to exclude the statements violated petitioner's rights to the effective assistance of counsel, confrontation against self incrimination, a fair trial, a reliable guilt, special circumstance, and penalty determination based solely on admissible relevant evidence, due process and equal protection of the law under the Fifth, Sixth Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law, and thus, requires reversal of the murder conviction.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. The testimony from the deputies was inadmissible as a matter of law and would have been excluded had counsel properly objected.

3. Both Deputies McCurtain and La Casella testified to incriminating admissions made by co-defendant Cummings that implicated petitioner in the killing of the Paul Verna.

4. If petitioner's counsel had properly objected to the introduction of these statements, the evidence could not have been presented to petitioner's jury.

5. Failure to object to the introduction of statements made by co-defendant Cummings, and testimony by sheriffs' deputies relating Cummings's extra-judicial statements was so prejudicial that it cannot be demonstrated beyond a reasonable doubt that such errors did not contribute to the jury's verdict.

a. Whether considered singly, or in combination, the effect of these three powerfully incriminating pieces of evidence was necessarily prejudicial to petitioner.

b. A review of the sharply conflicting and contradictory evidence in this case demonstrates that admission of the three statements must have contributed to the jury's verdict and, as such, admission of those statements alone is sufficient to require reversal.

(1) The properly admitted evidence against petitioner was not overwhelming, but was confused, deeply contradictory and easily could have resulted in an acquittal.

(a) If the statements in violation of the *Bruton/Aranda* rule had been excluded, the jury could have reconciled the conflicts in the evidence by concluding that Cummings committed the killing alone.

(b) Absent the statements made inadmissible by *Bruton/Aranda*, the evidence at trial was sharply in conflict with the prosecution's contrived "pass the gun theory."

(c) The testimony of witnesses at the scene of the shooting was fundamentally contradictory, confused or seriously biased.

(2) The statements admitted in violation of the *Bruton/Aranda* rule were not cumulative of other evidence but, instead, supplied essential support for the prosecution's theory of the case and necessarily prejudiced petitioner.

(3) There is no other direct evidence that incriminates the petitioner in substantially the same respects as the erroneously admitted extrajudicial statements.

(a) At the outset, Cummings's statement testified to by Pamela Cummings, to the effect that petitioner did all the shooting, contradicted the other evidence at trial, and thus clearly was not cumulative of any other evidence.

(b) Of even greater importance, the sheriffs' deputies each testified to incriminating admissions that depicted the killing in two phases: Cummings fired first and petitioner completed the killing.

(4) Other than Cummings's admissions that Deputies McCurtain and La Casella testified to and were erroneously introduced before petitioner's jury, Robert Thompson's trial testimony was the only evidence that even arguably supported the prosecution's two-killers-pass-the-gun murder theory.

(5) Thompson's testimony was, minimally, his third version of the events and even he did not testify that he saw Cummings pass the gun to petitioner. Thus, the deputies' testimony provided critically needed support for Thompson whose credibility was clearly suspect.

(6) The erroneously admitted statements testified to by the deputies thus conformed to the prosecution's theory of the case,

supplied a critical missing link in the evidence, and provided necessary corroboration for an otherwise weak witness.

(7) The prosecutor discussed Deputy La Casella's testimony in particular at length during closing argument.

(a) He told the jury that petitioner's silence in the face of Cummings's statements was an admission of guilt.

(b) The prosecutor stated that when petitioner heard Cummings say "That's the one I put in, No. 6," petitioner should have said: "'Wait a minute. I didn't shoot anybody. You shot them all.'" (95 RT 10913-14.) Because "petitioner didn't do that" and "remained silent," the prosecutor argued that it was "very reliable evidence" of petitioner's guilt and a "tacit admission." (95 RT 10914 (emphasis added).)

(c) He concluded by telling the jury that it was "clear between these two men that they understand petitioner put the other five [shots] in." (95 RT 10913.)

(d) The prosecutor thus argued that La Casella's testimony indicated that petitioner "confessed" by silence to the two-killer theory of the case and that Cummings's statements essentially "interlocked" with petitioner's admission. The co-defendant's statement was improperly admitted.

(8) Without those statements, the jury could have acquitted petitioner under the plausible theory advanced by Cummings in his confession to Gutierrez, which was supported by substantial evidence.

(9) With Cummings's statements in evidence, however, the jury was presented with powerfully prejudicial support for the prosecution's version of the events.

c. It cannot be said beyond a reasonable doubt that the erroneous admission of the foregoing evidence did not contribute to petitioner's verdict, particularly in light of the prosecutor's emphasis during trial that Deputy McCurtain's testimony referred to petitioner as Cummings's "crime partner" (66 RT 7219-20), and his lengthy discussion of Deputy La Casella's testimony during closing argument.

d. The defendants had fundamentally inconsistent defenses, such that petitioner was faced with a second prosecutor: counsel for Cummings.

(1) As discussed above, from the outset, the two defendants were not charged with identical offenses.

(2) For this reason, counsel's utterly inexplicable failure to timely or properly seek to exclude Cummings's statements was especially prejudicial.

Q. CLAIM SEVENTEEN: TRIAL COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S IMPROPER CLOSING ARGUMENT BASED UPON DEPUTY LA CASELLA'S TESTIMONY.

The judgment of conviction was rendered in violation of petitioner's right to confrontation, a fair trail, against self incrimination, the effective assistance of counsel, a reliable guilt, special circumstance, and penalty verdict based on admissible and relevant evidence, due process and equal protection of the law pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Articile I, Sections 7, 9, 12-17,

24, 27-28 of the California Constitution and state law by trial counsel's unreasonable and prejudicial failure to object to the prosecutor's improper closing argument, based on Deputy La Casella's testimony, to falsely and unfairly incriminate petitioner.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. Petitioner's trial counsel rendered prejudicial ineffective assistance of counsel when he failed to object to the prosecutor's proposed use of Deputy La Casella's testimony during closing argument to the jury.

b. Prior to his closing argument, the prosecutor stated: "I have had a discussion with Mr. Shinn to double check my memory, but Deputy La Casella's statement of Mr. Cummings is in evidence against this defendant Gay as well, and I am going to argue that they can logically deduce some things about Mr. Gay's involvement in this because of the way Cummings said what he said." (95 RT 10849.)

c. Despite this advanced knowledge, trial counsel did not object to, or otherwise seek to limit, the prosecutor's proposed use of La Casella's testimony.

d. Thereafter, the prosecutor argued at great length that the jury could infer from La Casella's testimony not only that Cummings had impliedly incriminated petitioner, but most importantly, that by not responding to Cummings's brash and unsolicited remarks, petitioner "tacitly" admitted to shooting Officer Verna after Cummings fired the first shot. (95 RT 10912-14.)

e. While trial counsel failed to object to the prosecution's inappropriate argument with regard to this testimony, if he had proffered an objection it would have been sustained because petitioner's conduct was not an adoptive admission and it was likely that under the circumstances petitioner's lack of response was an attempt to protect his constitutional right to remain silent.

(1) Petitioner's conduct under the circumstances did not constitute an adoptive admission and the prosecution failed to satisfy the test for an adoptive admission.

(a) La Casella's testimony showed that petitioner and Cummings were in separate cells when Cummings made the incriminating statements.

(i) Although La Casella testified that he could hear both men when they spoke, he did not testify that he watched them at any point during the critical portion of Cummings's confession.

(ii) While petitioner apparently heard the first part of Cummings's statement since he responded, there is no evidence that petitioner actually could or did hear the allegedly accusatory statement at issue here.

(b) In addition, there was nothing directly accusatory about Cummings's statement, "That's the one I put in the motherfucker."

(i) Although the prosecutor argued that the statement contained an implied accusation that petitioner fired the remaining shots, the meaning and purpose of the statement is ambiguous.

(ii) There is no evidence that Cummings himself understood the statement to contain an accusation or intended to implicate petitioner.

(iii) La Casella, who did not see petitioner's reaction to Cummings's statement, but merely "heard" petitioner's silence, provided no evidence that petitioner understood Cummings's words or the alleged implication contained in the statement.

(2) In addition to the fact that petitioner's silence was not an adoptive admission, an inference can be drawn that petitioner was exercising his Fifth Amendment right to remain silent.

(a) Cummings's statements were made while the defendants were in custody and within hearing range of the police.

(b) Petitioner's silence may have been nothing more than an unwillingness to speak in the presence of the police, regardless of whether he understood the arguably incriminating implication.

(3) If trial counsel objected to the prosecutor's argument the objection would have been sustained and competent counsel would have so objected.

f. No purported tactical justification can explain counsel's failure to object to the prosecutor's proposed argument.

(1) The prosecutor's argument went to the most critical issues at trial: whether petitioner participated in the killing and whether the prosecutor's two-part murder theory had any merit or evidentiary support.

(2) As trial counsel was obviously aware, the eyewitness evidence was confusing and contradictory.

(3) Further, as he argued to the jury during his closing, the direct evidence of the two-part murder was notably lacking. (95 RT 10929-30.)

(a) Consequently, counsel should have realized, when informed of the prosecutor's proposed argument, that La Casella's testimony was potentially the most "direct" evidence of the two-part murder introduced at trial.

(b) Even if trial counsel wanted the jury to hear Cummings's admission that he shot the officer, that cannot explain or justify allowing the jury to hear an argument that his own client "tacitly admitted" to killing the officer.

(4) In failing to object to the prosecutor's argument based upon La Casella's testimony, trial counsel rendered ineffective assistance of counsel.

g. Trial counsel's failure to object to the prosecutor's closing argument with regard to La Casella's testimony was prejudicial.

(1) For the reasons discussed above, La Casella's testimony was plainly prejudicial to petitioner.

(2) In fact, the most prejudicial aspect of that testimony was emphasized by the prosecutor during closing argument: i.e., petitioner "admitted" the truth of the prosecutor's version of the events.

(3) In view of the contradictions in the eyewitness testimony and the lack of any real evidence supporting the two-part murder the prejudice from the statement was apparent.

(4) Moreover, coming from a deputy sheriff, the testimony, and thus the prosecutor's argument, must have had enhanced credibility in the eyes of the jury.

(5) The prosecutor emphasized to the jury, "Deputy La Casella was positive [of what he heard], and he wrote the quotes down exactly." (95 RT 10914.)

(6) The prejudice was also enhanced because the jury did not receive the CALJIC instruction (2.71.5) setting the standards by which the purported "adoptive admission" was to be evaluated. Instead, the jurors were simply "instructed" by the prosecutor, without objection by trial counsel, that petitioner "tacitly admitted" to the murder.

h. If counsel objected to the prosecutor's proposed argument, the prejudicial implications in La Casella's testimony would at least have been muted.

i. Trial counsel's failure to object to the prosecutor's closing argument based upon Deputy La Casella's testimony was itself prejudicial ineffective assistance of counsel.

j. This ground is sufficient to mandate reversal of the conviction.

R. CLAIM EIGHTEEN: THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING SUA SPONTE TO GIVE CALJIC 2.71.5 PERTAINING TO ADOPTIVE ADMISSIONS.

The judgment of guilt was rendered in violation of petitioner's rights to a fair trial, due process of law and the privilege self-incrimination, the right to a reliable guilt, special circumstance, and penalty determination, the right to a verdict based on relevant and admissible evidence, the effective assistance of counsel, confrontation, and due process and to equal

protection of the law as guaranteed under amendments Five, Six, Eight and Fourteen of the United States Constitution as well as Article I, Sections 7, 9, 12-17, 24, 27-28 of the California Constitution and state law by the trial court's failure to give, sua sponte, CALJIC 2.71.5 governing the consideration of adoptive admissions.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. The trial court had a *sua sponte* duty to instruct the jury in the language of CALJIC 2.71.5 with respect to adoptive admissions.

3. The trial court's failure to give this instruction was particularly prejudicial in this case.

a. Without guidance the jury was not provided with the opportunity to determine whether petitioner actually heard and understood Cummings's statements or whether he had a reasonable opportunity to deny them, especially in light of the custodial circumstances during which the statements were made.

(1) Instead, the prosecutor forcefully instructed the jury, without objection by trial counsel, that petitioner admitted the killing.

(2) Moreover, the jury was not instructed that it could not consider Cummings's statements for their truth.

b. This omission was particularly serious because the prosecutor was able to argue that petitioner had done more than admit complicity in the killing.

(1) The prosecutor additionally argued that both defendants had admitted the truth of his version of the commission of the homicide.

(2) The prosecutor told the jury, "Mr. Cummings didn't say, 'I put them all in,'. . . . He said, 'That's the one I put in. No. 6.' Well, now the only other person there is Mr. Gay. So it is clear between these two men that they understand Gay put the other five in." (95 RT 10913.)

c. Further, the prosecutor not only told the jury that La Casella's testimony was "very reliable evidence" against petitioner (95 RT 10914), but he erroneously emphasized the purported truth of Cummings's statements by stressing that La Casella "was positive . . . he wrote the quotes down exactly." (95 RT 10914; *see also* 95 RT 10916.)

d. As previously discussed, the eyewitness evidence was confused and contradictory and direct evidence substantiating the two-part murder was notably lacking.

(1) Thus, the prosecutor utilized more than four pages of the reporter's transcript describing La Casella's testimony and emphasizing its supposed veracity. (95 RT 10912-16.)

(2) The contradictions and confusion in the admissible eyewitness testimony were thus improperly and erroneously clarified to the jury by petitioner's purported "admission."

(3) Consequently, the failure to instruct was an extremely prejudicial abuse of discretion that provides an independent ground for reversal of the conviction.

S. CLAIM NINETEEN: THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY ADMITTING ROBIN GAY'S CONVICTION FOR BEING AN ACCESSORY TO THE MURDER.

The judgment of conviction is rendered in violation of petitioner's rights to due process and equal protection of the laws, the privilege against self-incrimination, a fair trial, confrontation, the effective assistance of counsel, the right to a reliable guilt special circumstance, and penalty determination, the right to a verdict based on relevant and admissible evidence guaranteed by amendments Five, Six, Eight, and Fourteen of the United States Constitution as well as Article I, Sections 7, 9, 12-17, 24, 27-28 of the California Constitution and state law by the trial court's erroneous, arbitrary and capricious admission of Robin Gay's conviction for being an accessory to murder.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. Robin Gay was convicted of armed robbery and accessory to murder. (61 RT 6715; 5 CT 1294.) At the prosecutor's request the trial court twice took judicial notice in open court that she had been convicted of these crimes. (61 RT 6715; 78 RT 8884-85.)

3. Petitioner's counsel objected to the evidence on grounds of hearsay, relevance and prejudice. (61 RT 6712.)

4. Without ruling on the prejudice objection, and in astonishing disregard of petitioner's rights, the trial court admitted the convictions into evidence.

5. Robin Gay's conviction for being an accessory to the murder was utterly irrelevant to the murder charges against petitioner and no

possible theory of admissibility can justify its introduction into evidence. Her conviction did not tend to prove any fact in issue in the case against petitioner. On this basis alone, the admission of Robin Gay's conviction was error.

6. Even if some theory of marginal relevance could be concocted, evidence of the accessory to murder conviction was so prejudicial that the trial court should have excluded it.

a. Where, as here, counsel objects to evidence on grounds of prejudice, the trial court has an obligation to weigh the relevance of the evidence against its potential prejudice before ruling on the motion. Although the trial court stated in a conclusory fashion that Robin Gay's accessory and robbery convictions were somehow relevant to petitioner's case, there was no indication that the court actually weighed the probative value of the evidence against its prejudicial effect. Its failure to do so was error.

b. The potential prejudice from evidence of the conviction was stark and undeniable. Petitioner's jury was twice permitted to learn that a court had previously held a trial and had concluded that petitioner's wife, with whom he had been traveling at the time of his arrest, was guilty of being an accessory to the very murder for which petitioner was being tried. Accordingly, it should have been plain to the trial court that Robin Gay's conviction was offered not for any legitimate purpose, but solely for the improper purposes of demonstrating petitioner's guilt.

c. The trial court should have excluded the evidence.

7. Petitioner was seriously prejudiced by the introduction of Robin Gay's conviction of accessory to the murder.

a. The prejudice to petitioner from the erroneous introduction of Robin Gay's conviction was extreme by any measure.

b. As noted several times, the properly admissible evidence against petitioner was confused and contradictory. The jury could easily have determined that the prosecution had not proved its case against petitioner beyond a reasonable doubt. But evidence of Robin Gay's conviction was one of many extremely damaging items of evidence that should not have been admitted against petitioner at the murder trial. Considered in this context, it is apparent that the jury must have been influenced by the plethora of inadmissible evidence such that it cannot be determined whether petitioner was convicted based upon proper or improper considerations.

c. Further, the inadmissible evidence of the conviction must have been of special significance for the jury. The jury likely considered it powerfully incriminating that a court had already determined the guilt of one of the original defendants in the murder case. Indeed, the trial court failed even to give a cautionary instruction to explain to the jury that adjudication of the facts in Robin Gay's case was not determinative of any fact in issue in petitioner's case or that Robin Gay's guilt did not prove whether Cummings or petitioner or both shot the decedent.

d. Instead, the prosecutor's closing argument, although it did not specifically mention Robin Gay's conviction, contained statements that may have suggested to the jury that the conviction was strong evidence of petitioner's guilt. At the outset of his argument to the jury, for example, the prosecutor argued that no matter how strong the evidence against petitioner, he was entitled to a jury trial:

> Anybody who is charged with a crime in California can have a trial. Okay. It's not based on how good or how bad the evidence is. Everybody gets one.
>
> You can have an instance or perhaps I commit a crime in the presence of all of you. You see me do it. The judge sees me do it. Maybe the television camera be [sic] here and I do it on television.
>
> I confess to it. I admit it. No doubt whatsoever.
>
> I can still have a jury trial.
>
> You have a case where *all* the evidence is on one side and the defendant says I want a jury trial. *That is what happened here.* (95 RT 10853-54 (emphasis added).)

e. Thus, the prosecutor underscored what may have been the erroneous impression in the juror's minds that the previous adjudication had already established petitioner's guilt.

f. The prosecutor also devoted a significant portion of his closing to arguing that petitioner's flight after the murder indicated consciousness of guilt:

> Now, imagine that you are pulled over for a traffic ticket. Mr. Cummings shoots all six shots. Mr. Gay doesn't shoot anything. He is an innocent man.
>
> Imagine if that man is innocent--petitioner is not guilty--Mr. Cummings is probably the most wanted man in the State of California at that time right after this killing. Maybe in the United States.
>
> If you were innocent and you were in the company of the most wanted man in the United States, would you go to his aunt's house? [Or][w]ould you say, let me out, let me out anywhere. I don't care where. . . .I am not going anywhere with you. You are a target for every police officer in the State of California. . . .I am not going to stay with you.

> Then when Mr. Cummings decides to leave, it makes sense for Mr. Cummings to leave. This innocent man goes with him down to Oceanside?
>
> Does that sound like an innocent man to you? That's crazy. (95 RT 10916-17.)

g. The jury also heard evidence that Robin Gay, who was not present at the murder scene, had participated in the escape attempt and had been arrested with petitioner. (73 RT 8192, 8197.)

8. The introduction of the evidence of Robin Gay's conviction utterly undermined petitioner's right to due process guaranteed by the U.S. and California Constitutions.

9. This evidence improperly enhanced the prosecutor's case against petitioner.

10. There is a reasonable probability that the introduction of this evidence improperly improved the chances of petitioner's conviction and, as such, the conviction should be reversed.

T. CLAIM TWENTY: THE TRIAL COURT ERRED IN IMPROPERLY PERMITTING THE JURY TO COMMUNICATE IN WRITING WITH TRIAL COUNSEL.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or

prejudice by the trial court's decision to permit the jury to communicate with counsel in writing.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. On several occasions during the trial, the trial court permitted the jury to submit written questions to trial counsel seeking immediate clarification of the evidence introduced at trial. (7 CT 1897-1900, 1903-4, 1910-10A, 1917, 1943-44, 1952-53.)

b. At least three times trial counsel for co-defendant Cummings responded to the juror inquiries by introducing evidence detrimental to petitioner.

c. A member of petitioner's jury submitted a written question with regard to the testimony of Oscar Martin, an eyewitness. Oscar Martin testified that he saw Cummings outside of the car, shooting the decedent. At a line-up, Martin originally identified a man designated as "number 4" as the assailant. He also testified that he initially identified the shooter as the man designated as number 4 at the line-up because his mother told him to do so. (67 RT 7395.) During cross-examination, counsel for co-defendant Cummings sought to demonstrate that Martin identified petitioner at the line-up. When petitioner was pointed out to Martin, he stated that petitioner did not resemble the individual who was number 4 at the line-up. (67 RT 7387.)

d. At that point, one of the jurors on petitioner's jury submitted a handwritten note to the trial court and counsel. The note read: "Why no one tell Gay to remove his glasses?" (67 RT 7390; 7 CT 1897-

98.) Over objection by Shinn, the trial court permitted all counsel to see the note. The judge stated that she "always" permitted the jury to ask trial counsel questions by written note and regulated the practice only by ensuring that all parties saw such notes. The trial court thought the practice a good one, because "sometimes [the jury] ha[s] a question that is relevant in their mind." (67 RT 7390.)

e. Petitioner's counsel objected again, and moved for a mistrial. (67 RT 7391.) The trial court denied the motion.

f. The trial court then informed the juries that the note had been received and it was within the discretion of trial counsel whether the question would be asked. (67 RT 7392.)

g. Thereafter, in the presence of the juries, counsel for co-defendant Cummings stated: "Your Honor, I have no objection whatsoever to following the suggested question [from the juror] if the Court please. Could your Honor suggest that Mr. Gay stand up and remove his glasses." (67 RT 7393.) The Court granted the request and petitioner's counsel objected. (67 RT 7394.) After petitioner removed his glasses, Martin agreed that petitioner resembled the man designated as number 4 in the line-up.

h. A member of petitioner's jury also submitted a question to an expert witness who testified regarding the gun shot residue tests performed on the automobile in which the defendants were riding.

i. Counsel for Cummings called Richard Raffel to testify about the gun shot residue tests he performed on the automobile in which the defendants were riding when the decedent stopped them. Raffel testified that he examined virtually the entire interior of the car. Lead

particles were found throughout the automobile with the exception of two places: at the base of the doorjamb on the driver's side and on the back of the headrest on the driver's seat. (82 RT 9393-94.)

j. A member of petitioner's jury submitted a question regarding whether barium and antimony, components of gun powder, were also found during the tests. (7 CT 1952-53.) Thereafter, on re-direct, Cummings's counsel elicited testimony from the witness to the effect that if barium and antimony had been found with the lead particles, that would have conclusively established the existence of gunshot residue. However, he testified that barium and antimony were not found combined with the lead. (83 RT 9500.)

k. On April 8, 1985, a member of Cummings's jury submitted a question to the trial court and counsel asking whether the "drivers [sic] seat need to be unlatched for person in rear to get out?" (7 CT 1903.) Several days later, the parties, the trial court and the jury participated in an unreported demonstration with the automobile. Although the trial court failed to have a court reporter present to record what occurred at the jury view, it is apparent that counsel for Cummings attempted to answer the juror's question. Following the demonstration, counsel for Cummings requested a stipulation that the driver's seat was not controlled by an automatic latch, but required the person in the back seat to push the seat forward.

> MR. PRICE: I think the record should reflect that we demonstrated to the jury that the front backrest portion of the front seat did not remain forward, but in fact because of the way it was built -- a weighted system or gravity -- always would flip back to the erect position by itself. Secondly, that

> there is no latch or lever that controls the moving of the back of the front seat forward to allow somebody in the back seat to exit the vehicle. You have to push forward and the seat will move forward.
>
> MR. RUCKER: If the Court please, what we have reference to is when your honor indicated to the jury that Mr. Price was going to demonstrate something to the front driver's seat at which time he stepped forward and pushed the back rest portion of the front driver's seat forward and it came back to the normal upright position by itself. He did that on three occasions and on none of those occasions did you have to manipulate a latch or anything else in order to move the seat. (72 RT 8128-29.)

l. Cummings's counsel asked the prosecutor to stipulate that the front seat had no latch. He refused to so stipulate and the trial court simply indicated that the "record" would reflect what was demonstrated. (*Id.* at 8129.)

m. The notes passed to the court and counsel from the jury substantially interfered with the adversarial method of truth finding and denied petitioner his rights to an impartial jury and a fundamentally fair trial.

n. By permitting communication between individual jurors and trial counsel, the trial court permitted the jurors actively to participate and assist in the evidentiary process. This alone undermined the guarantee of juror impartiality that is essential to the truth-finding process.

o. The communications permitted trial counsel to gain insight into the thought processes and concerns of certain jurors, prior to the close of evidence and beginning of deliberations, while inevitably stimulating the jurors to begin considering the evidence in the light of such

communications. As such, trial counsel for Cummings tailored the presentation of the evidence to meet those specific concerns, notwithstanding that such evidence otherwise may not have been presented.

p. The procedure thus permitted the particular concerns of some jurors to be stressed in a fashion that may have over-emphasized the importance of those concerns.

q. The trial court implemented no safeguards to regulate this prejudicial practice. The trial court circulated the questions to counsel, informed the jury that it was counsel's decision whether to respond, and as a result, in at least one instance, petitioner's counsel was required to object in the presence of the jury. (67 RT 7392-95.)

r. The trial court's participation in, and sanction of, the extraordinary and essentially unregulated note-passing procedure so fundamentally interfered with a fair trial that it should be considered *per se* prejudicial.

s. The juror communications were actually prejudicial, because at least three of the seven juror inquiries resulted in the introduction of evidence that was harmful to petitioner.

t. Even if this Court concludes that the unregulated note passing procedure permitted by the jury was not *per se* prejudicial, nevertheless the practice actually prejudiced petitioner in this case and denied him a fair trial.

u. Petitioner was prejudiced by Oscar Martin's identification testimony following a juror's request that petitioner be asked to remove his glasses. Oscar Martin was a critical eyewitness in the prosecution's case against co-defendant Cummings and, more importantly,

a critical witness supportive of petitioner's defense. Martin testified that he saw Cummings exit the car and shoot the decedent four times. He further testified that he did not see anyone else shoot Verna and specifically stated that petitioner was not the man he saw shoot Officer Verna. (67 RT 7354-87.)

v. Martin's testimony was thus essential to petitioner's defense. Shinn stressed Martin's testimony during closing argument (95 RT 10930-34), arguing that Martin's testimony alone was a sufficient to raise a reasonable doubt with respect to petitioner's guilt.

w. The juror's request that petitioner remove his glasses during Martin's testimony thus prejudiced petitioner in several important respects. When Martin acknowledged that without his glasses petitioner looked like the man in the line-up, the testimony drove home the possibility that Martin may have accurately identified petitioner as the killer at the line-up. Simultaneously, by causing Martin to change his testimony, Cummings's counsel cast doubt upon Martin's ability to perceive and remember. In fact, Cummings later introduced evidence from other witnesses designed to cast doubt on Martin's credibility and to suggest that Martin believed that petitioner was the killer. (*See* 84 RT 9571; 89 RT 10169-71.)

x. Moreover, because petitioner's counsel properly objected to the procedure and Cummings's counsel thereafter complied with the juror's request, any number of jurors may have perceived Cummings's counsel as graciously assisting their "truthfinding" function while petitioner's counsel may have been perceived as obstructing that process.

y. Evidence introduced in response to the juror inquiry concerning gun shot residue also prejudiced petitioner. The prosecutor sought to show that Cummings fired from inside the automobile. Expert testimony on direct examination had established that gun shot residue ("GSR") is composed of lead, barium and antimony. (83 RT 9484.) Thereafter, one of petitioner's jurors submitted the question asking whether barium and antimony were present with the lead found in the car. On re-direct Cummings's counsel asked that question. (83 RT 9500.) The witness testified that barium and antimony were not found with lead and accordingly it could not be conclusively established that the gun was fired from inside of the car. Because petitioner's defense was based upon demonstrating that Cummings solely was the killer, anything that blurred that view of the case was potentially devastating. The evidence solicited by petitioner's juror, and supplied by Cummings's counsel, laid a basis for petitioner's jury to conclude that Cummings had not fired from the car and thus may not have been the killer.

z. The inquiry concerning the ease with which Cummings could exit the back seat of the car may have produced evidence prejudicial to petitioner's defense. As noted above, a key component of petitioner's defense was that Cummings stepped out from the back seat of the car and shot the decedent. (*See, e.g.*, 95 RT 10965.) The juror's inquiry whether the seat had to be released by manipulation of a latch was aimed precisely at the ease with which Cummings could exit the back seat. Because no record of the jury view was made, the events that occurred are not precisely illustrated. But if, as is likely, counsel for Cummings demonstrated that the seat had no latch and that some special effort was required to push the seat

forward before a passenger could get out of the back seat, the evidence was damaging to petitioner. Inasmuch as petitioner's defense was premised upon the notion that Cummings exited the car and continued firing, any evidence which tended to undermine that defense was necessarily prejudicial.

aa. The juror-requested evidence and the manner of its presentation necessarily prejudiced petitioner and requires reversal. The foregoing incidents were prejudicial both in the evidence which was actually presented and in the manner in which the trial court permitted the evidence to be elicited. Two of the three juror inquiries discussed above came from petitioner's jury, all three inquiries focused on the critical issue for petitioner's defense of whether Cummings was the killer, all three inquiries were responded to by counsel for Cummings and the inquiries produced evidence which had not previously been introduced. In permitting essentially unregulated written inquiries to counsel, the trial court permitted the jurors to take an active role in the presentation of the evidence damaging to petitioner, a role utterly inconsistent with the adversarial truth-finding process. Thus, the necessary impartiality of the jurors was jeopardized.

bb. Moreover, because it was Shinn who initially objected to the note-passing procedure, and Cummings's counsel who introduced the evidence in response to the inquiries, petitioner's jury may have perceived Cummings's counsel as particularly trustworthy and petitioner's counsel as particularly untrustworthy. This was especially devastating since all the evidence introduced in direct response to the juror inquiries was harmful to petitioner.

cc. Finally, the jurors' communications must be understood in the context of Shinn's overall failure to present an affirmative case in defense at the murder trial. Trial counsel relied solely on the evidence against Cummings presented by the prosecution. Even the few witnesses he did call had originally testified as prosecution witnesses (*e.g.*, Rose Perez). In view of the foregoing, it is undeniable that the communications between the jurors and trial counsel were plainly prejudicial and made it substantially more likely that petitioner's jury would return a murder conviction.

dd. This improper and highly prejudicial practice sanctioned by the trial court denied petitioner his rights to an impartial jury and to a fundamentally fair trial guaranteed by the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, and the analogous sections of the California Constitution.

U. CLAIM TWENTY-ONE: THE TRIAL COURT FAILED TO INSURE THAT ALL PROCEEDINGS WERE ON THE RECORD.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice and to a meaningful appellate review by the trial court's unlawful,

arbitrary and capricious failure to insure that all proceedings were conducted on the record.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. The record below discloses at least 71 unreported conferences between the trial court and counsel during the guilt and penalty phases of petitioner's trial, including at least seven unreported conferences held in chambers. (*See* 1 Supp. CT 34-38.) These unreported conferences include the settling of petitioner's guilt phase jury instructions in chambers.

b. In addition to these unreported proceedings, the trial court, counsel, jury and parties participated in an unreported view of, and demonstration with, the automobile used during the homicide. (72 RT 8122.)

c. The trial court's failure to maintain a complete record has insulated significant portions of the trial from review. This should be considered prejudicial where, as here, petitioner might have used a transcript of the proceedings on appeal. No specific showing of prejudice should be required.

d. No specific prejudice need be shown to mandate reversal for failure to comply. When, as here, new counsel is appointed for an appeal, counsel must be furnished with an entire transcript of the proceedings below.

e. Thus, prejudice should be presumed from the trial court's failure to comply with Penal Code § 190.9, and any showing that a

transcript of the unreported proceedings might have been used is sufficient to require reversal.

f. The trial court's failure to adequately maintain a record has insulated from review by appellate counsel and this court a substantial portion of the trial and has thus hampered the defense on appeal. Significant portions of the trial have been insulated from review and it is plain that petitioner might have utilized a transcript of those unreported proceedings.

g. Regardless of the specific proceedings discussed below which were not reported, the sheer number of unreported proceedings (71) is sufficient to require reversal.

h. However, particularly in view of Shinn's deficiencies, failure to ensure a record of an important jury view and settling of jury instructions was particularly egregious.

i. The prejudicial failure to maintain a record insulated from review the jury observation of the automobile used during the murder. The trial court failed to have a reporter present when the jury, court, counsel and defendants participated in a demonstration with, and a view of, the automobile in which the defendants rode on the day of the killing. (72 RT 8120-32.) The defendants and others were positioned in and around the car and the defendants were photographed holding a weapon. The jury was permitted to get in and out of the car and was permitted to submit questions to counsel regarding the demonstration. (*E.g.*, 72 RT 8122.) Other than a series of cryptic and unrevealing photographs (People's Exhibit 30A-H), no record exists of this critical point in the trial. The conduct of the demonstration was potentially quite significant since one issue at trial was

whether Cummings could have easily gotten out of the back seat to shoot the officer. (85 RT 9659-88.) The record reveals that this issue was considered significant by at least one juror (7 CT 1903), and presumably others. As discussed above, prior to the demonstration, a juror specifically asked whether the "drivers [sic] seat need[s] to be unlatched for [the] person in [the] rear seat to get out?" (7 CT 1903-04.)

j. The failure to maintain a record at the jury view was thus critical because the parties later disagreed over what had actually been demonstrated in this regard.

> MR. PRICE: I think the record should reflect that we demonstrated to the jury that the front backrest portion of the front seat did not remain forward, but in fact because of the way it was built -- a weighted system or gravity -- always would flip back to the erect position by itself. Secondly, that there is no latch or lever that controls the moving of the back of the front seat forward to allow somebody in the back seat to exit the vehicle. You have to push forward and the seat will move forward.
>
> THE COURT: I think that is argument at this point to the jury.
>
> MR. PRICE: That is not argument. We want the record to reflect that was demonstrated down there.
>
> THE COURT: I don't know if you demonstrated that there was no latch.
>
> MR. RUCKER: We did.
>
> THE COURT: I think that can be argument to the jury that there was no latch shown, or you can certainly ask the question, unless you want to stipulate on the record tomorrow that there is no latch.
>
> MR. WATSON: They can prove anything they want. There are certainly not cut off from proving anything today.

> THE COURT: The only question I don't know if it was clearly shown there was no verbal testimony and no one said I want to show you there is no latch. I think if you can reach that stipulation or we can have them take a look at the car again.
>
> MR. PRICE: Everybody knows there is no latch. Maybe we can stipulate now. Would you be willing to stipulate?
>
> MR. WATSON: No.
>
> MR. RUCKER: If the Court please, what we have reference to is when your honor indicated to the jury that Mr. Price was going to demonstrate some-thing to the front driver's seat at which time he stepped forward and pushed the back rest portion of the front driver's seat forward and it came back to the normal upright position by itself. He did that on three occasions and on none of those occasions did you have to manipulate a latch or anything else in order to move the seat. That is all we are talking about.
>
> THE COURT: I think the record will clearly reflect as to whether there was a latch there or not. I don't know." (72 RT 8128-29.)

k. Without a transcript, a fundamental ambiguity exists in the record as to the evidence that was actually presented to the jury on this issue. If the demonstration could have shown, but did not show, that Cummings could have easily exited the back seat, then petitioner's trial counsel seriously failed in his duty to present a defense. Demonstrating that Cummings could easily exit the back seat could have been powerful corroborating evidence of the eyewitness testimony implicating Cummings as the sole killer. Without an accurate transcript of what was demonstrated, however, appellate counsel and this Court are unable to determine whether trial counsel failed to comply with his duties.

l. Moreover, if the evidence at the jury view showed that the back seat could be easily moved, the failure of the trial court to ensure a record has precluded petitioner from utilizing such evidence on this appeal.

m. The demonstration itself, and the statements and conduct of counsel and the trial court during the demonstration could have left an indelible impression upon the jury that may have prejudiced petitioner. For example, at one point during the demonstration there was apparently an angry interchange and colloquy among counsel and the trial court, which went unreported. The trial court acknowledged its error in engaging in such colloquy without a reporter present. (72 RT 8124.)

n. Nor can there be any claim that recording the proceedings would have burdened the trial court. The fact that a record of the proceedings could easily have been prepared is obvious since later in the trial, when the jury was taken for a demonstration of the basement holding cells, all testimony was placed on the record. (*See* 79 RT 9037-40.)

o. The lack of a complete record has insulated from review trial counsel's conduct during unreported proceedings, including the settling of jury instructions. The repeated conferences held off the record preclude all review of trial court's rulings or the conduct of counsel during those conferences.

p. Particularly where, as here, Shinn's competency is an issue on appeal, violation of the statute requiring a complete record must not be permitted to preclude scrutiny of his conduct during the guilt phase. Significantly in this regard, jury instructions during the guilt phase of the trial were settled during unrecorded chambers conferences. (99 RT 11342.) Without a full record of conferences on the instructions as required by

statute, the stipulation effectively prevents any review of Shinn's conduct in connection with the jury instructions, or of his tactics in agreeing to withdraw instructions and in failing to object to instructions given.

q. Agreement by the trial court and trial counsel that nothing of substance was unreported cannot substitute for informed review of the record required by law. The record on appeal was augmented to include affirmation by trial counsel that they could not remember anything significant that occurred during the unreported conferences. (1 Supp. CT 208, 209, 227.) However, reliance on the memories of court and counsel of what occurred during these numerous unreported proceedings cannot cure the fundamental denial of petitioner's right to a complete record on appeal.

r. Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently, issues simply cannot even be detected, let alone assessed, without reading an accurate transcript.

s. Moreover, the actual record (if appellate counsel could have it to inspect) might disclose issues substantial enough to constitute probable or possible "plain error," even though trial counsel was not aware of their existence, and the indigent should have the same opportunity as the wealthy to urge that plain error should be noticed on appeal.

t. Not surprisingly, trial counsel and the trial court have no specific memory of the unreported conferences. The self-serving statements added to the record that nothing of substance occurred, or that only minor procedural matters were taken up, during these conferences cannot substitute for informed review of the record by appellate counsel and this Court.

u. Furthermore, those statements are not only self-serving, but also particularly suspect. It cannot be seriously claimed that the jury view and the settling of instructions were unimportant or minor procedural matters.

v. Whether any error would have been shown in the unreported proceedings is not here at issue. All that is required to be shown, and has been shown, is the potential for use by appellate counsel of such a transcript. Trial counsel and the trial court have all agreed that they have no memory of any of the proceedings, which were not recorded as required by statute. It is equally plain that significant proceedings were undertaken without benefit of a court reporter. Inasmuch as the participants cannot recall what occurred during those proceedings, no "suitable alternative" to a verbatim transcript is possible.

w. Accordingly, the failure of the trial court to ensure that a verbatim transcript of the dozens of unrecorded trial proceedings is a violation of petitioner's federal and state constitutional right to due process.

x. The convictions and sentence of death should be reversed.

V. CLAIM TWENTY-TWO: THE TRIAL COURT ERRED BY INTRODUCING GAIL BEASLEY'S PRELIMINARY HEARING TESTIMONY AT TRIAL.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the

presumption of innocence, a fair trail free of false and/or misleading evidence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice by the trial court's erroneous, arbitrary and capricious ruling permitting introduction of Gail Beasley's preliminary hearing testimony.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. On April 10, 1985 the trial court held a hearing to determine whether Gail Beasley was unavailable as a trial witness. The prosecution called Jack Holder, a Los Angeles County police officer, to testify regarding his efforts to locate Gail Beasley.

b. Holder testified that on December 12, 1983, he visited 12127 Hoyt Street, in Los Angeles, where Ms. Beasley's mother lived, and learned that Beasley was "no longer at [that] address." (70 RT 7824.) There was no evidence that he asked where Beasley might be located.

c. Although Holder knew Beasley no longer lived at 12127 Hoyt Street, he returned to that address twice in January 1984 and left messages for Beasley to call him. (70 RT 7824.) Holder made no further efforts to contact Beasley until April 1984 when he returned to 12127 Hoyt Street and spoke with Beasley's sister, Gwen. She told Holder that Beasley worked at Mountain View Convalescent Hospital. (70 RT 7825.)

d. He did not attempt to locate her again until October 1984, when he returned to 12127 Hoyt Street; he left a message for Beasley to call him on October 26, 1984. (70 RT 7825.) Beasley called Holder at

the appointed time and told him that she did "not want to testify." She stated that she was being threatened "because she was going to testify against these defendants." (70 RT 7826.) She promised to meet Holder on October 30, 1984, at the police station.

e. When Beasley did not arrive on October 30th, Holder recognized that he would "need a body attachment." (70 RT 7826.) He attempted to locate her two weeks later at her home on Vancouver Street. She was not there. At that point he went for the first time to the convalescent hospital where her sister had said in April 1984 that Beasley worked. He found that Beasley was no longer employed at the hospital. Over the next several days, Holder learned Beasley's home phone number, but failed to reach her at home. He also checked at 12127 Hoyt Street to see if her car was there, but it was not. (70 RT 7827.) Holder knew that Beasley had "a little red car" that he thought was "a Ford Pinto." Although he had performed a warrant check on the car in November 1984, he had not made a more recent check. (70 RT 7831.)

f. On November 20, 1984, Holder served Beasley with a subpoena at her home and placed her "on call." (70 RT 7828.) He did not attempt to contact Beasley again, however, until nearly five months later.

g. On April 4, 1985, he left another subpoena in her door, and returned on April 8, to find that the subpoena was still there. (70 RT 7828.) On that same day, Holder spoke with her mother and learned that Beasley's phone had been disconnected. (70 RT 7829.) He then requested that other officers attempt to serve her with a subpoena.

h. Between April 8, 1985, and April 10, 1985, various officers attempted to serve Beasley at her home. She could not be found.

Her mailbox "was full of junk mail and it appeared no one had been at the location in a number of days." (70 RT 7829-30.)

i. The trial court found that the prosecution's efforts had been insufficient to establish Beasley's unavailability. (70 RT 7833.) It noted that, in the past, where a "body attachment" for a witness had issued "and we put it in the computers, many times the witnesses are found." (70 RT 7831.) The trial court stated it would "postpone the reading of the testimony until at [sic] the conclusion of the direct testimony . . ." (70 RT 7834), issued a body attachment for Beasley (70 RT 7835), and required the prosecution to undertake additional efforts in the following week to locate her.

j. On April 17, 1985, Ronald Carpenter, another police officer, testified about his efforts to serve the body attachment on Beasley following the April 10 unavailability hearing. Between April 10 and April 15, he drove by her apartment during the evening on 14 occasions. On 10 of those occasions, he stopped, went to the door and looked around. On each occasion the drapes were closed and it appeared that no one was home. He never saw her car in its parking space. He spoke with the apartment manager and a neighbor and left his business card. He heard nothing from them. Other officers also made several unsuccessful efforts to locate her. (74 RT 8259-61.) Other than driving by her residence, Carpenter made no efforts to locate her. He admitted that he failed to check any of the following: Voter registration lists; Department of Motor Vehicle ("DMV") records; car registration records; Beasley's last place of employment; unemployment records; social security or "C.I.I." records; or welfare records. (74 RT 8264-65.)

k. Jack Holder then testified regarding his attempts to locate Beasley. He testified that he spoke with Beasley's mother and with the convalescent hospital where she had been employed in early 1984. He stated that he believed Beasley was "on welfare" (74 RT 8267), but admitted that he checked no welfare, social security or unemployment records to locate her. (74 RT 8268-69.) Nor did he check police, C.I.I. or F.B.I. records. (*Id.* at 8269.)

l. Finally, Carmel Labate was called to testify that the body attachment for Beasley had been entered into the computer system the day after it was issued, i.e., less than a week before the April 17 hearing. (74 RT 8271.) Labate testified that he believed the body attachment issued on April 12, which would have meant that it had been in the computer system a mere four days by the time of the hearing. Even assuming the attachment issued on April 10, it would have been listed in the system for only six days at the time of the hearing.

m. Based on the foregoing, the trial court concluded that the prosecution had demonstrated due diligence in obtaining Beasley's attendance and overruled a defense objection to the introduction of the preliminary hearing testimony. (74 RT 8272-73.)

n. Nevertheless, the trial court ruled that the body attachment would remain outstanding. (74 RT 8272.)

o. Although the trial court had ruled on April 10 that the reading of the Beasley testimony would be postponed until the conclusion of direct testimony, Beasley's prior testimony was read to the jury on April 17, 1985, in the midst of the prosecution's case-in-chief. (74 RT 8278-82, 8293-317, 8319-73.) On direct examination Beasley testified that she was

in the kitchen of her home at 12127 Hoyt Street on the afternoon of the killing. (*Id.* at 8294.) Before the shooting, she saw the officer speaking with a white woman. (*Id.* at 8297-98.) Thereafter, she heard "loud noises", which she said were "approximately four" shots being fired, and she looked out. (*Id.* at 8299-300.) She stated that she looked out after hearing two shots, and that then she heard "some more" shots that were fired together. (*Id.* at 8300-01.) She saw a man shooting a gun and the woman in the same place as before. She also "vaguely" remembered seeing someone in the back seat of the car. (*Id.* at 8301.) Although at one time she thought the man in the back seat had gotten out of the car, she now believed that she was mistaken. (*Id.* at 8321-22.) According to Beasley, the man shooting the gun was "black," about six feet, slim with curly hair; he had a light complexion and was wearing a "rust/brown, or rust/orange to brown" shirt and dark pants. (*Id.* at 8304-05, 8310.) Beasley was unable to positively identify petitioner on direct examination. But she referred to a photograph of petitioner as "a good resemblance" of the man she saw. (*Id.* at 8322.) Under cross-examination by Mr. Shinn, Beasley stated that she heard two shots, looked out the window for "two or three seconds" and then ran into the bedroom to tell the others what was happening. (*Id.* at 8329.) It took about "15 seconds" to run back and tell everyone what was happening. (*Id.* at 8333.) Despite her testimony on direct, Beasley testified that she did not watch all the shots while she was in the kitchen, but that all the shots had been fired by the time she got to the bedroom. (*Id.* at 8334-35.) Beasley confirmed that neither at the lineup nor at the grand jury hearing did she positively identify petitioner. (*Id.* at 8338-39.) On redirect, Beasley stated that she had been "confused" by Mr. Shinn's questioning. (*Id.* at 8346.)

She agreed that she heard all the shots while she was in the kitchen. (*Id.* at 8347.) She then testified that on a scale of one to ten, petitioner was "nine-and-a-half" compared to the man she saw shooting and that petitioner was lighter then the man she saw, but "only by a tan." (*Id.* at 8348-49.) On re-cross-examination, Beasley admitted that she had changed her testimony between her original cross-examination and her redirect, because she had been "confused." (*Id.* at 8355-56.) During the lunch period, she had spoken with the prosecutor and his two detectives, Holder and Helvin. (*Id.* at 8356.) She discussed with them how she had been confused and that she "was saying that I thought I had seen the man out of the car, but it must have been the girl. I was trying to explain to him that." (*Id.* at 8358.) The prosecutor asked her questions during the lunch break and told her to explain what happened the way she saw it. She stated, "I didn't know I could explain. . . . I thought I could just answer yes and no." (*Id.* at 8359.) The prosecutor suggested to her the use of a one-to-ten scale for comparing petitioner to the man she saw and also suggested the use of the word "tan" to explain how he looked different on the day of the shooting. (*Id.* at 8359-60.) Under further questioning by Shinn, she emphasized again that she looked out the window for only about "two seconds" and that during that time, she saw the shooting. (*Id.* at 8361.)

p. On Thursday, April 25, 1985, eight days after her testimony had been read into the record, and while the prosecution's case was still in progress, Gail Beasley was brought to the court under arrest. (79 RT 8949.) The trial court ordered that Beasley be available for questioning if any counsel requested her appearance. (79 RT 8951-53.) The

prosecution failed to undertake reasonable and good faith efforts to obtain Gail Beasley's attendance at trial.

q. Accordingly, admission of her preliminary hearing testimony at trial violated petitioner's right to confront witnesses against him.

r. A fact finder must have an adequate opportunity to assess the credibility of witnesses.

s. The prosecution failed to demonstrate the legitimacy of introducing Ms. Beasley's prior testimony and the trial court erred in finding that the prosecution satisfied its burden.

t. In view of the damaging character of Beasley's preliminary hearing testimony, the error in admitting it was plainly prejudicial.

u. Gail Beasley was available. The prosecution failed to exercise due diligence in attempting to procure Beasley's attendance at trial. Beginning in December 1983, more than one year before trial began, the prosecution learned that Beasley no longer resided at 12127 Hoyt Street. Nonetheless, the prosecution repeatedly attempted to locate her at that address and did not attempt to learn her new address until November 1984. The prosecution did not seek to learn her work address until April 1984 and then made no effort to locate her at work until October 1984, six months later.

v. Most importantly, in October 1984 Beasley told police investigators that she did not want to testify and repeatedly failed to return phone calls or keep appointments. She was so clearly an unwilling witness that Officer Holder recognized that he "would need a body attachment."

Nevertheless, the prosecution made no effort to contact Beasley again for nearly five months, until shortly before she was scheduled to testify in April 1985.

w. The evidence demonstrated, and subsequent events confirmed, that if a body attachment issued and was put in the police computer, witnesses generally, and Ms. Beasley particularly, could be located.

x. Although the prosecution knew what type of automobile Beasley drove, there was only one attempt, sometime after September 1984, to locate her through the DMV. At no time did the prosecution check welfare or Social Security records, although Officer Holder admitted that he had reason to believe Beasley was on welfare. At no time did the prosecution check unemployment office records, although Holder knew she no longer worked for the convalescent hospital. At no time did the prosecution check police or other law enforcement agencies to determine if she might be located in that manner. The foregoing "efforts" were simply inadequate and clearly not due diligence. The prosecution plainly failed to exercise reasonable efforts to obtain Beasley's appearance at trial.

y. Beasley told Holder in October 1984 that she did not wish to testify because of threats against her. That statement, together with Beasley's repeated failure to keep appointments and her absence from home, convinced Holder very early on that he would need a body attachment. At trial, the prosecutor admitted that if a body attachment issued, someone stopped for a mere traffic violation could be located. (70 RT 7832.)

z. Nevertheless, the prosecution neither sought to utilize the material witness provisions of Penal Code §§ 879, 881, 882 nor to obtain a body attachment following successful service upon her in November 1984. No such effort was made until ordered by the trial court.

aa. That such a body attachment could or would have been successful was not only admitted by the prosecutor, it was also borne out by Beasley's ultimate appearance under arrest.

bb. Even after service upon her, the police did not attempt to contact her for nearly five months; by that time, not surprisingly, she had disappeared. Then, the police did not attempt to locate her through welfare or unemployment offices although they knew that she had changed jobs and might have been on welfare. Notwithstanding the reasonable assumption that Beasley was likely to disappear to avoid testifying, the prosecution did nothing to prevent her disappearance. This failure is incompatible with the prosecutor's obligation to exercise due diligence.

cc. Beasley's preliminary hearing testimony demonstrated that she was unreliable. Beasley was a particularly unreliable witness because her ability to perceive was limited. However, because her testimony was read into the record, the jury was robbed of the ability to assess her credibility. Beasley changed her testimony several times with respect to the number and timing of the shots she heard. (*Compare* 74 RT 8299-8300 *with* 74 RT 8329.) She also admitted that she was poor at estimating time and distances and emphasized that her entire testimony was based upon the "two seconds" of viewing the murder scene. (74 RT 8329.) She also stated that when the murder occurred she was concerned for her daughter and the others in the house, and that everyone was "hysterical."

(74 RT 8310.) Her memory of the events was also seriously flawed. Beasley testified several times that the man she saw shooting the officer was wearing a "burgundy" or "reddish" shirt and dark pants. (*E.g.*, 74 RT 8305.) It is undisputed, however, that the clothes she described were worn by Raynard Cummings. (73 RT 8174; 74 RT 8377-80.) In light of her confusion over what the men were wearing, Beasley's hesitation on direct examination regarding whether she had seen another man at the scene become more added significant.

dd. Because the jury heard Beasley's testimony only through the mouth of a reader appointed by the prosecutor, the jury was denied the opportunity to assess for itself the strength and conviction of Ms. Beasley as a witness. Her damaging testimony had substantial weaknesses, which were necessarily blunted by the artificial manner in which the testimony was presented to the jury. Beasley was confused by the examination process and easily manipulated by counsel. At the end of her preliminary hearing testimony she stated that she had not understood that she could explain her testimony but thought she could answer only "yes or no." (74 RT 8359.)

ee. The veracity of much of her testimony was open to serious question because all the lawyers who questioned her used numerous leading or compound questions to elicit her testimony. Beasley also showed that she was easily manipulated by counsel to petitioner's prejudice. On more than one occasion, the prosecution suggested to her the wording or phrasing to be used in her testimony. For example:

> Q. After you heard the two [shots], did you hear some more?
>
> A. Yes.

> Q. The 'some more' you heard, were they bunched together or spread out?
>
> A. Bunched together. (74 RT 8308.)

Similarly, the prosecutor suggested that Beasley use a one-to-ten scale to characterize how petitioner compared to the man she says shot the officer. (74 RT 8359-60.) It was also the prosecutor who suggested to her that she describe the assailant as darker than petitioner (at the hearing) by a "tan." The appearance of confusion and uncertainty Beasley must have exhibited, as well as the manipulation of her testimony, were lost, or necessarily diminished, because the jury only heard that testimony read. The jurors were unable to see and hear for themselves whether Beasley seemed more or less sure about one version or another of the events.

ff. Petitioner's counsel did not have the same motive and opportunity to cross-examine Beasley at the preliminary hearing and at trial. At the time of trial facts concerning Beasley and her testimony were before the trial court which either did not exist or were unknown at the preliminary hearing. Beasley told the police she was being "threatened" because she was scheduled to testify at trial against "these defendants." (70 RT 7826.) At the preliminary hearing there was no indication that she had been threatened or was unwilling to testify. Had the record disclosed such threats or had counsel had reason to suspect such threats, cross-examination at the preliminary hearing may have revealed that the testimony was biased as a result. In view of the fact that her preliminary hearing testimony implicated only petitioner, her later statement that she was fearful because she was going to testify against the defendants becomes particularly significant. It is possible that co-defendant Cummings had threatened her

and that accounted for her testimony at the preliminary hearing. Absent any evidence of threats at the preliminary hearing, however, petitioner's counsel had no incentive or motive to inquire into the extent to which her testimony may have been biased as a result of any threats.

gg. Petitioner was manifestly prejudiced by introduction of the preliminary hearing testimony. Gail Beasley's testimony was unquestionably damaging to petitioner and there is far more than a "reasonable possibility" that it contributed to the verdict. The prosecution case against petitioner rested entirely on eyewitnesses, but their testimony was contradictory or confused. As the California Supreme Court noted, "[t]he eight independent eyewitnesses testified variously . . ." (*People v. Cummings*, 4 Cal. 4th at 1269.) Other eyewitnesses testified that they saw petitioner at the scene but did not clearly testify that they saw him shooting the officer. Rosa Martin and Rose Perez, for example, saw no shooting. Marsha Holt testified that she saw petitioner walk around the car and did not see him with a gun until after the killing. (68 RT 7526-89.) Similarly, Thompson said he saw petitioner with the gun but heard no shots. (68 RT 7597-98.)

hh. Even those witnesses who identified petitioner as the man who shot Officer Verna (i.e., Pamela Cummings, Shannon Roberts, Robert Thompson) were either open to serious attack on credibility grounds or gave ambiguous testimony. For example, Pamela Cummings was plainly biased against petitioner and repeatedly admitted that she had to implicate others to remove the blame from her husband. Robert Thompson, who eventually identified both men, had given at least two other radically different versions of the events prior to his trial testimony. Shannon

Roberts was only eleven years old at the time of the shooting and had identified Cummings at the grand jury. Moreover, as noted several times, other witnesses (e.g., Oscar Martin and Shequita Chamberlain) testified to facts which led to the conclusion that Cummings was the lone killer. Finally, Cummings admitted to numerous witnesses that he had shot the decedent.

ii. In this confusing context, it was not surprising that during closing argument the prosecutor discussed Gail Beasley's testimony at length and stressed that her testimony alone was a sufficient basis upon which to convict petitioner. He stated that her testimony was "very compelling evidence and enough just there [sic] . . . enough there just to support a verdict of guilty." (95 RT 10897.) Indeed, the prosecutor underscored the importance of her testimony in petitioner's case by insisting that the jury ignore those witnesses, such as Oscar Martin and Shequita Chamberlain, who claimed that Cummings had done the shooting. (95 RT 10886-87.) He contended that these witnesses saw only the "first part" of the killing and were therefore not significant to determining petitioner's guilt. By contrast, people "that saw the second part," such as "Gail Beasley ... [were] very important in this case." (95 RT 10853.)

jj. Her testimony also provided a critical link in the prosecution's "two-killers-pass-the-gun" theory of the case. This is so because, as noted previously, the prosecution attempted to reconcile the conflicting eyewitness accounts of the shooting by arguing that Beasley was a witness who did not see the first one or two shots (when Cummings was presumably shooting), but did see petitioner complete the shooting outside the car. (95 RT 10893-97.)

kk. Beasley's testimony also provided the prosecutor with potential corroboration for Robert Thompson's testimony that petitioner looked angry. (95 RT 10896.) Beasley testified that [Gay] was angry when he was doing the shooting, talking very harshly to the decedent as he was executing him, although she couldn't hear what was being said.

ll. In short, Beasley's testimony alone was arguably sufficient to support a conviction, added a crucial eyewitness component to the prosecution's theory of the case, and bolstered the credibility of other witnesses. There is every reason to believe, therefore, that her testimony contributed to the verdict against petitioner. The evidence was plainly prejudicial, its admission was error and the conviction must be reversed.

mm. Even if this Court finds that Beasley's prior testimony was admissible, the trial court erred in permitting her testimony to be read in the middle of the prosecution's case-in-chief. The trial court initially ruled that Gail Beasley's preliminary hearing testimony would not be read until the completion of the direct testimony in the prosecution's case-in-chief. (70 RT 7834.) The trial court inexplicably reversed itself one week later and permitted the testimony to be read, although the prosecution had not otherwise completed its case. The trial court's failure to abide by its earlier ruling was an abuse of discretion, requiring reversal of the conviction.

nn. Introduction of Gail Beasley's preliminary hearing testimony violated petitioner's constitutional rights to confront and cross-examine witnesses. Accordingly, reversal of the murder conviction is mandated.

W. CLAIM TWENTY-THREE: SHINN RENDERED INEFFECTIVE ASSISTANCE BY INTRODUCING, OR FAILING TIMELY TO OBJECT TO INCRIMINATING EVIDENCE AT THE CAPITAL TRIAL.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, a fair trial free of false and/or misleading evidence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice by trial counsel's unreasonable and prejudicial acts and/or omissions leading to the introduction of inadmissible, incriminating evidence.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. Shinn's decision to introduce Defendant's Exhibits C and D at trial fell below objective standards of reasonableness and constituted prejudicial ineffective assistance of counsel. Shinn introduced as Defendant's Exhibit C a statement given by Pamela Cummings in which she blamed petitioner for having sole responsibility for the homicide. As discussed previously, Shinn also introduced as Defendant's Exhibit D a statement made by Raynard Cummings in which he squarely implicated petitioner in the robberies and in the murder. Both exhibits purported to

describe the murder in detail and each clearly stated that petitioner was the only killer. (89 RT 10190.)

b. Defendant's Exhibit C states in pertinent part: "Ofcr [officer] went back to driver's window a second time - Ofcr asked Kenny for ID[.] Pamela still at rear of veh[icle]. Kenny said he had ID -- reached down. . . .Kenny came up w/a gun & fired once. Ofcr grabbed LT shoulder - neck area & turned . . . .Kenny slid across seat & jumped out of drivers door & fired some more. Ofcrs back was turned to Kenny & was being shot. Don't know how many times - Raynard was hollaring [sic] at Kenny about 'what is going on[?]'" (89 RT 10190.)

c. Exhibit D, in addition to statements implicating petitioner in the robberies, describes the murder in terms quite similar to Exhibit C: "The cop was slightly leaning in the car. He had his head inside. Ray heard a shot from the front seat. The distance from the cop to Kenny was approx. 3 feet. . . . The cop grabbed his left shoulder. Ray then couldn't see the cop anymore. Ray then saw Kenny slide out of the drivers seat. Ray hears more shots. Ray looks out the window & sees the cop on the ground." (89 RT 10190.)

d. Exhibit C was inadmissible hearsay that the prosecution never attempted to introduce during the direct examination of Pamela Cummings. (89 RT 10190.)

e. Raynard Cummings's statement in Exhibit D could not, consistent with the *Bruton/Aranda* rule, have been introduced by the prosecution. (*Id.*)

f. Accordingly, had Shinn not introduced the exhibits they would not have been admitted into evidence.

g. The introduction of these exhibits constituted ineffective assistance of counsel. No knowledgeable choice of tactics can justify the introduction of the evidence. Shinn apparently offered the evidence because both exhibits placed Milton Cook at the murder scene and because Pamela Cummings had called the police after the killing to tell them to search for Cook. (60 RT 6532-33; Def. Ex. E.) Since Cook was not at the scene and had nothing to do with the killing, Shinn apparently sought to show that Pamela Cummings could not be believed when she testified that petitioner shot Paul Verna. (95 RT 10958-61.)

h. Whether or not this tenuous rationale for the admission of highly prejudicial evidence might come within the broad range of legitimate trial tactics in the abstract, it withers when considered in light of the evidence actually introduced at trial. Milton Cook bore a striking physical resemblance to Raynard Cummings. (*See* People's Exhibits 2 and 12.) The jury could just as easily have believed that the statements about petitioner in Exhibits C and D were true and those about Cook were designed only to cause the police to pursue Cook rather than Cummings.

i. Moreover, whatever the merits of this dubious theory of defense, Shinn easily could have made his point without ever introducing the highly incriminating and prejudicial evidence contained in Exhibits C and D. Pamela Cummings admitted on direct examination, and thereafter on cross-examination, that she called the police and told them to look for Milton Cook. (60 RT 6532.) Exhibit C was introduced after this testimony and was thus cumulative on that point, completely unnecessary as impeachment, and lacking any other legitimate evidentiary purpose. With respect to Exhibit D, Shinn introduced it through Pamela Cummings

without attempting a less damaging method for eliciting the evidence that Raynard also told the police about Cook. For example, Shinn could have called the police detective who recorded the statement and simply asked him whether Cummings had given a statement that Cook was at the scene of the crime.

j. Finally, competent counsel would have realized that even if the jury did not believe petitioner fired the first shot, as Exhibits C and D stated, the balance of the description of the murder in the exhibits confirmed the prosecutor's theory of the killing in all essential respects. Both exhibits stated that the officer leaned in the car, was shot once and then, after the first shot, petitioner slid across the front seat, exited the driver's side and continued shooting the officer.

k. The introduction of Defendant's Exhibits C and D clearly prejudiced petitioner. The evidence introduced at trial by the prosecutor was inherently contradictory and thus closely balanced. The jury had before it substantial evidence upon which it could have concluded that certain of the witnesses were mistaken in claiming that petitioner shot Paul Verna, and could have concluded that Cummings alone was the killer. The exhibits were prejudicial because they constituted a sufficient basis upon which the jury could convict petitioner.

l. In addition, the exhibits bolstered the prosecutor's theory of the killing. The properly admissible evidence supporting the prosecutor's two-killers-one-gun theory of the killing was thin at best. Only Robert Thompson, a highly suspect witness, had testified to facts from which the jury could legitimately infer that the prosecutor's theory was accurate. Exhibits C and D, however, added substantial weight to that

theory. Both exhibits describe in precise detail exactly what the prosecutor contended petitioner had done, i.e., that he slid across from the front passenger seat, exited the driver's door and fired five more bullets into Paul Verna.

m. Indeed, virtually all of the direct evidence supporting the prosecutor's theory came as a result of Shinn's ineffectiveness. In a case where the properly admissible evidence was otherwise so internally inconsistent and evenly balanced, Exhibits C and D made it far more likely that the jury would convict. Counsel's unreasonable decision to introduce the exhibits plainly prejudiced petitioner. But for counsel's unprofessional errors, the jury's verdict would have been different, and therefore petitioner's murder conviction must be reversed.

n. Shinn's introduction of, or failure timely to object to, other incriminating evidence fell below objective standards of reasonableness and severely prejudiced petitioner. Shinn inexplicably introduced a sympathetic photograph of the victim. As his first piece of evidence, Shinn introduced a large photograph of Paul Verna in full dress uniform. (89 RT 10190.) The photograph is particularly flattering and, in fact, had been utilized by the prosecution at the pretrial hearings. (1 Supp. CT 20.) No tactical consideration exists to justify Shinn's introduction of the photograph. Shinn introduced it during Pamela Cummings's testimony without apparent purpose and did not seek to use it at any other time in the trial. Shinn's inexplicable conduct prejudiced petitioner. The properly admissible evidence against petitioner was sharply contradictory and confusing and otherwise evenly balanced. Although the prosecutor did not refer to Exhibit A in his closing argument, his argument may have evoked

undue sympathy for the decedent. This urge for sympathy would have been underscored by the large flattering photograph. As noted numerous times previously, a central theme in the prosecutor's case was that petitioner and Cummings were vicious, desperate criminals who "planned for weeks" to kill a police officer, although they did not know "who or when." (95 RT 10874-85.) Into this volatile mix, argued the prosecutor, stepped Paul Verna, a motorcycle officer with a Medal of Valor, who "doesn't know" about the defendants' criminal behavior. (95 RT 10885.) Instead, the prosecutor emphasized that Paul Verna was simply doing his job. He was "polite. Professional. Not rude to them. Wasn't picking on them." He "was not inciting any of this." (95 RT 10900.) Verna was thus portrayed as an unsuspecting victim who was killed because he was unfortunate enough to have been a police officer in the wrong place at the wrong time. Moreover, the prosecutor argued that Verna was not simply murdered, "to execute is probably a better way to describe what Mr. Gay did standing over Paul Verna." (95 RT 10880.) The photograph of Verna introduced without purpose by Shinn could have had no effect other than to move the jury to feel deep sympathy for an unwitting police officer who was randomly victimized by the defendants. In view of the evidence at trial and the prosecutor's argument, the photograph was prejudicial.

o. Counsel also failed properly to object to People's Exhibit 39 and to the testimony of Dr. Neil Joebchen on grounds of undue prejudice. The prosecution sought to show that petitioner had attempted suicide while in police custody by cutting his own throat. (95 RT 10908-11.) The prosecutor played a secret tape-recording of petitioner discussing the suicide attempt with Cummings and introduced, as People's Exhibit 39,

a transcript of the tape. Shinn objected to the tape-recording on the ground that the recording violated petitioner's privacy (75 RT 8445-61), a ground for objection that previously had been expressly rejected. Shinn did not object on the valid ground of undue prejudice.

p. However, the tape and transcript are manifestly and unduly prejudicial: Petitioner: "...The mother-fucker been fucking with me, man -- I told them last night, 'Man, fuck you all. If you ever going to kill me, just kill me. I don't give a fuck, you know.' I said, 'You can kill me now or you can gas me later.' I said, 'What's the mother-fucking difference?' I said, 'I am not going to try and kill my mother-fucking self again...'" (People's Ex. 39.) In a capital murder case, the impact on the jury of the shocking nature of People's Exhibit 39 must have been considerable. Shinn made no effort to attack Exhibit 39 based on its prejudice, an effort that any competent counsel would have made.

q. Furthermore, even if the prosecution ultimately would have been permitted to introduce evidence of the suicide attempt, Shinn made no effort to limit the undesirable impact of the tape-recording or Exhibit 39. For example, counsel could have offered to stipulate that petitioner had admitted to inflicting the wound on himself to avoid introduction of the tape or requested that the trial court excise all the statements other than that in which petitioner expressly admitted attempting suicide.

r. Thereafter, counsel for Cummings called Dr. Neil Joebchen, who treated petitioner for the knife wound, to testify that petitioner stated at the time of his treatment that he had "nothing to live for." (83 RT 9510-9511.) Shinn made no effort to object to this testimony

as unduly prejudicial, as any competent counsel would have done. In light of the introduction of Exhibit 39, Dr. Joebchen's testimony was entirely cumulative and thus the prejudice inherent in that testimony far more than outweighed its probative value. Despite this obvious prejudice, Shinn did not seek to limit the testimony. Instead, he merely reemphasized the prejudice by eliciting on cross-examination Dr. Joebchen's further testimony that petitioner had said he "wanted to die." (83 RT 9520.) Shinn's inexcusable failure to object or otherwise to seek to limit the evidence pertaining to his purported suicide attempt was actually prejudicial.

s. The prosecution stressed that the suicide indicated petitioner's guilt (95 RT 10906-11) and specifically stated that Dr. Joebchen's testimony indicated petitioner's guilt: "You heard testimony of Doctor Neil Joebchen ... [petitioner] told the doctor he was depressed and had nothing to live for. Okay. Does this sound like a man arrested for something he didn't do in California in our system? No. No." (95 RT 10906-11.) In a murder case, and especially a death penalty case, the prejudiced impact that this evidence must have had on the jury is irrefutable. Counsel's failure to attempt to exclude or limit the testimony constituted constitutionally ineffective assistance of counsel.

t. Shinn also failed timely to object to opposing counsel's repeated references to petitioner as the "assailant" during cross-examination of Rose Perez. On direct examination Rose Perez had identified petitioner as being at the scene of the murder, but clearly testified that she did not see petitioner shoot the officer. Rather, she saw him walking around the car from the passenger side. (70 RT 7836 et seq.) On cross-examination

Cummings's counsel referred to petitioner as the "assailant" or as having "assaulted" Paul Verna. This occurred on at least four occasions before Shinn objected. The objection was then sustained. (70 RT 7848.) Because Shinn ultimately objected to opposing counsel's argumentative and improper characterization of the evidence, no tactical justification can explain why he did not object to the unacceptable references sooner. Instead, his failure to do so can only be the result of inattentiveness and lack of concern for the jury's perception of his client.

u. By permitting the prosecutor improperly to imply that Ms. Perez saw petitioner "assault" the officer, Shinn provided support for the prosecutor's theory that petitioner was the killer. Indeed, the prosecutor implied during argument that Perez had identified petitioner as the killer simply because she saw him "outside the car." (95 RT 10899.) In failing to object, counsel also undermined his own ability to use Perez's testimony as support for a theory that petitioner did not kill the officer. As argued previously, Perez's testimony was consistent with Cummings's admission to Gilbert Gutierrez that the eyewitnesses who identified petitioner as the killer were mistaken because they had seen him picking up the gun. Perez's testimony suggested that this version was correct.

v. Likewise, Perez's testimony was itself corroborated by Marsha Holt and Robert Thompson who, although they claimed to have seen petitioner shooting, also testified to facts which indicated they did not see petitioner firing the gun. Shinn failed to use Perez's testimony in this fashion, however. Instead, in closing, Shinn argued meekly only that Ms. Perez "didn't see much." (95 RT 10975.)

w. Accordingly, Shinn's failure to object to the characterization of petitioner as an "assailant" was unreasonable and prejudicial.

x. Shinn also failed to object to prejudicial slides used by the prosecutor to "illustrate" his theory of the killing. During his opening statement, the prosecutor used a series of drawings presented as a slide presentation to "illustrate" his theory of the murder. (58 RT 6286 et seq; 7 CT 1866.) Shinn failed to object to such slides on grounds of prejudice (Evid. Code § 352) or lack of foundation (Evid. Code § 403), although an objection by counsel for Cummings to such slides was in part successful. (63 RT 6816-86.) Counsel's failure to object cannot be explained on the basis of legitimate trial tactics. The slides were part of the prosecution's opening statement. In view of the lack of direct evidentiary support for the prosecutor's theory and the potential impact that the slides could have had, and in view of the trial court's willingness to exclude at least some of the slides, it is clear that counsel failed to act as a competent and zealous advocate when he failed to object. That objection would have been successful, at least in part.

y. Counsel's failure to object was prejudicial. The slides elucidated the prosecutor's two-killers-one-gun theory of the case. (7 CT 1866 et seq; 63 RT 6833-79.) The pre-trial evidence was considerably at variance with the prosecution's illustrations. Indeed, the trial court found with regard to Cummings's motion to exclude the slides that the prosecutor did not have sufficient evidentiary foundation for this theory to permit use of all of the slides. (63 RT 6885-86.) Nor did the slides accurately depict the evidence actually introduced at trail. For example, and most

importantly, contrary to slides depicting petitioner shooting the officer, (7 CT 1864-66), at least two eyewitnesses, Oscar Martin and Shequita Chamberlain, testified that it was Cummings who was outside of the car; Cummings himself admitted on numerous occasions that he committed the killing; Rose Perez testified that petitioner was walking around the back of the car, although one slide shows petitioner climbing from the driver's door (63 RT 6858); the slides show petitioner standing near the back of the car (7 CT 1864-66), although Shannon Roberts said he saw petitioner walk around from the passenger side and stand near the front of the car. (69 RT 7777 et. seq.) Without the slide presentation, the jury would have been required to sort through the inconsistencies and contradiction in the evidence and to envision for itself the series of unlikely events that were necessary for the two-part murder to have occurred as the prosecution contended. But because the slide show visually depicted the prosecution's theory the jury was preconditioned at the outset to accept that theory. It cannot be seriously denied that the slides must have had an impact on the jury and thereby prejudiced petitioner.

z. Shinn further unnecessarily elicited harmful testimony on cross-examination that amounted to prejudicial ineffective assistance of counsel. During cross-examination of Pamela Cummings, Shinn elicited testimony that she, Raynard and petitioner were driving in the neighborhood on the day of the killing for the purpose of making a drug purchase. (77 RT 8711.) This same evidence came before the jury in Defendant's Exhibit D, Cummings's post-arrest statement to the police which Shinn inexplicably offered into evidence. Shinn also elicited testimony from Pamela Cummings that petitioner and Cummings jointly owned a second gun in

addition to the blue steel revolver used to kill the police officer. (79 RT 8984.) Thereafter, in reference to bullets found in the possession of all four defendants when they were arrested, counsel elicited testimony from Pamela that usually the bullets were kept on a shelf in petitioner's apartment. (79 RT 8985.) With respect to each of these examples Pamela Cummings had not testified to the damaging facts on direct examination that Shinn unexplainably elicited from her on cross examination.

aa. Shinn's cross examination of Pamela Cummings was unreasonable and fell below prevailing professional norms. And, but for counsel's unprofessional errors, the result of the proceeding would have been different.

bb. A central theme in the prosecutor's case was that both petitioner and Raynard had planned or intended to kill a police officer prior to the murder. Thus, during pretrial proceedings the prosecutor argued that the robberies and murder should not have been severed because the jury needed to "understand" the purported motive behind the killing. (8 RT 740, 774-75.) In addition, the prosecutor was required to prove that the defendants killed to avoid arrest. During his closing argument, the prosecutor stressed that purportedly petitioner was a desperate criminal, who was frightened of being captured:

> "If we get stopped, we are going to shoot our way out." They don't know where. They don't know when. And they don't know who. They do kind of premeditate to that extent. These men planned it for weeks ahead of time, although they didn't know who they were going to kill and they didn't know when or where. They had a few minutes while Paul Verna was trying to settle the circumstances. In that few moments you can imagine Mr. Gay and Mr. Cummings. We don't have

> evidence of what they were talking about, but you can imagine what they are going to do. "We are going to kill," that kind of thing. . . . (95 RT 10875-80.)

The only evidence even remotely connected to prior planning that the prosecutor introduced with respect to petitioner was a vague statement by Pamela Cummings made during a taped statement to a polygrapher. She was asked whether Raynard had made statements about killing the police and she answered that "the men" had made such statements. (77 RT 8806.) All of the other evidence of this type pertained only to statements Raynard Cummings had made about killing the police. (*See* testimony of Janet Mays (66 RT 7239), Dwayne Norton (66 RT 7277), and Debbie Cantu (78 RT 8886).) The testimony elicited by Shinn from Pamela Cummings, however, merged with the prosecutor's themes. The jury heard evidence elicited by Shinn that petitioner was seeking to purchase drugs, that both men jointly owned and used another gun, and that petitioner stored the bullets for their weapons at his apartment. Plainly, Shinn's blunders on cross-examination were prejudicial.

cc. Shinn failed to introduce potentially exonerating evidence despite his apparent ability to do so. Shinn prejudicially failed to introduce the testimony of expert witnesses designed to call into question the reliability of eyewitness testimony. Reasonably competent counsel would have called an expert to cast doubt on the prosecutor's witnesses. At a hearing before the trial court on March 7, 1985, Shinn informed the court that he intended to call one or more expert witnesses to testify about the unreliability of eyewitness testimony. He said:

> We were going to put a psychologist -- two or three psychologists -- regarding eyewitnesses testimony. So, you know, the doctors -- I didn't anticipate bringing them this early. I told my investigator -- told him to get these doctors but get them for the end of the murder case where eyewitness testimony is going to be essential, just like the robbery case. Eyewitness testimony. I am going to use him -- that psychologist -- for eye witness testimony aspects of the case at the end of the trial for the robberies and for the murder. (Sealed Pretrial RT, 3/7/1985, 14.)

dd. In fact, Shinn never called such witnesses. His failure to do so was prejudicial ineffective assistance of counsel. Shinn's decision not to call the expert witness cannot be justified as a legitimate tactical decision. As Shinn himself emphasized at the hearing, the prosecution's murder case against petitioner rested entirely upon eyewitness testimony. In fact, the prosecutor told the jury during closing argument that, unlike his case against Cummings, the case against petitioner was not based even in part upon the expert testimony pertaining to the angle of the gunshot wounds. (95 RT 10851 et. seq.) He stated that the coroner's testimony was "really not important to this jury. . ." and that gun shot residue analysis was not "significant in any way. . . to the Gay jury." (*Id.*) Instead, the prosecution rested its case almost entirely upon the testimony of eyewitnesses.

ee. The jury was instructed in the language of CALJIC 2.91 and 2.92 pertaining to identification testimony. (95 RT 10812-14.)

ff. As argued previously, the eyewitness testimony in this case was particularly suspect. Various witnesses identified either petitioner or Cummings as the man who shot the police officer. No witness specifically testified that both men did the shooting. The witnesses

disagreed as to what the shooter was wearing, and at least one witness, Gail Beasley, who identified petitioner, testified that he wore clothing that other witnesses described Cummings as wearing. The witnesses even disagreed as to where the shooter was standing. Some said he was near the front of the car coming from the passenger side, while others stated he was on the driver's side. Another witness testified that she saw petitioner on the passenger side coming around the back of the car. The opportunity thus existed to create tremendous doubt surrounding the prosecution's case. Particularly in the context of a case built entirely on contradictory and confused eyewitness testimony and where virtually no other defense witnesses were called, reasonably competent counsel committed to a zealous defense of his client would have offered expert testimony to cast doubt upon the reliability of the prosecution's witnesses.

gg. Shinn's failure to call an expert witness was prejudicial. As noted above and elsewhere, the witnesses called by the prosecution related fundamentally inconsistent versions of the killing. The California Supreme Court noted, "[t]he eight independent eyewitnesses testified variously . . ." (*People v. Cummings*, 4 Cal. 4th at 1269.) Oscar Martin and Shequita Chamberlain, for example, testified that Cummings, or a man resembling him, stood outside the car and fired several shots into the officer. The prosecutor was so obviously concerned about Oscar and Shequita's testimony that he told the jury to ignore it as unimportant to his case against petitioner. (95 RT 10886-87.) Gail Beasley and Marsha Holt testified that they saw petitioner outside the car shooting the officer. But at trial, Holt admitted her memory was "hazy" and, at the grand jury, she testified that she did not see the shooting. Beasley and Holt disagreed about

the clothing worn by petitioner. Holt said petitioner was wearing white and Beasley described petitioner as wearing "dark" or "reddish" clothing. Pamela Cummings and Eula Heights, Cummings's aunt, confirmed that Cummings wore dark clothing. Significantly, Beasley testified that she was confused whether she had seen another man at the scene, admitted that she had difficulty estimating time and distances, and stated she was "hysterical" on the day of the shooting. Robert Thompson, on different occasions, stated that either Cummings or petitioner was the man he saw outside the car shooting the officer. During a post-incident interview, which was closest in time to the killing, he stated that Cummings, wearing dark clothing, was the man outside the car. (People's Ex. 22.) At trial, Shannon Roberts testified he saw petitioner shooting the officer, although at the grand jury he identified Cummings as the man he recognized. Roberts also testified at trial that he saw petitioner standing near the front passenger side of the car while doing the shooting. No one else placed the shooter on that side of the car. Rose Perez did not see the shooting, but saw petitioner walking around the back of the car from the passenger side. Plainly concerned over these substantial discrepancies, the prosecutor told the jury they were "trivial" details with which it need not be concerned. (95 RT 10883.) Although Shinn cross-examined the various witnesses called by the prosecution, he did not put on any affirmative evidence designed to exploit the discrepancies in, or to call into doubt the reliability of, the prosecution's case. If he had called an expert to testify about the unreliability of eyewitness testimony, it would have underscored the inconsistencies in that testimony.

hh. Of particular importance, any doubt about the reliability of the prosecutor's eyewitnesses cast by such expert testimony could have corroborated the testimony of Gilbert Gutierrez, who testified that Cummings had admitted responsibility for all of the shooting and that the eyewitnesses remembered petitioner as the killer simply because they saw him picking up the gun after the killing.

ii. By emphasizing the inherent weaknesses in eyewitness testimony, expert testimony could thus have corroborated other evidence in the case essential to petitioner's defense. Counsel's failure to call an expert was crucial given the absence of any other evidence connecting defendant with the crime. The evidence on that issue was close given the potential weaknesses in the prosecution's testimony and the presence of both eyewitness and other testimony favorable to the defense. An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless.

jj. Shinn inexplicably and prejudicially failed to introduce testimony of petitioner's wife, Robin Gay, that Cummings had admitted killing the police officer. As discussed above, Robin Gay waived her privilege against self-incrimination at the grand jury and testified, although she refused to testify at trial. (76 RT 8568-91.) During her grand jury testimony she stated that on the evening following the killing, Raynard Cummings admitted that he alone shot Paul Verna:

> A: [Raynard] said, "I downed the officer," and he reenacted the whole thing, what had happened.
>
> Q: Tell us what he did.

A: He said that Pam and Raynard and Kenny, okay, were in the car, and I guess they had gone to go and buy some weed, or something, okay. Pam came to a stop sign, she didn't make a complete stop, she made more like a California stop. Therefore, the officer came around the corner, I guess, and pulled them over, stopped them for a traffic violation. And when the officer approached her, he had asked her for her driver's license, and Pam had said she didn't have a driver's license, and that she had other I.D. with a picture on it, but I don't know what kind of an I.D. it was. The officer took her I.D., asked her to step out of the car, okay. After he -- I guess he had a little piece of paper, or whatever, and was writing the information down. He had gotten back to the car, he had gone back to the car, he reached inside the car and pulled the keys out of the ignition, and asked my husband, Kenny Gay, for his I.D., and also asked her for the registration to the car, and then asked Mr. Cummings for his I.D. And that's when he shot him the first time.

Q: Raynard?

A: Yes. He came from the back seat, he shot him the first time, and I don't know exactly where the bullet lodged.

Q. After Raynard shot him in the neck with the first shot, what happened?

A: Raynard got out of the car. The cops, from what they tell me-

Q. That's all I want to know is what they told you.

A: Which is hearsay, okay. Okay, they told me -- well, Raynard was standing up there in the room acting like a big cheese. He turned around and reenacted the whole thing and said that the cop grabbed his neck, he spun around and went down to his knees, and he got out of the car -- Raynard Cummings got out of the car and shot the cop to death.

Q. What did Raynard tell you that he said when he shot the police officer?

A: He said, "Yes, I have I.D. for you, you MF so-and-so," and he shot the cop. (3 Supp. CT 716-18.)

kk. Shinn did not call Robin Gay to testify at trial nor did he attempt to utilize her grand jury testimony that implicated Cummings. Shinn's decisions not to call Robin Gay to testify about Cummings's admission and not to utilize her grand jury testimony fell below an "objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington*, 466 U.S. at 688.) Reasonably competent counsel, particularly in a serious capital case, would always seek to introduce potentially exonerating evidence. Legitimate trial tactics cannot explain Shinn's failure to utilize the exonerating testimony.

ll. Robin Gay's testimony was not merely cumulative of Cummings's other admissions and could have had a significant impact on the jury. First, she would have testified to an admission made immediately after the killing. Second, her testimony would have corroborated or enhanced the credibility of other witnesses. For example, Cummings's admission to her was consistent with the admission he had made to inmate Gutierrez. Both testified that Cummings admitted firing on the officer after the decedent had asked Cummings for identification and that Cummings then got out of the car to complete the killing. The other witnesses who testified to Cummings's admissions all testified to somewhat inconsistent versions of the killing. Similarly, Robin Gay's testimony was consistent with that given by Debbie Warren. (88 RT 9978 et. seq.) Third, if Robin Gay had continued to refuse to testify on Fifth Amendment grounds, counsel could simply have read her testimony into the record without concern for whether she would give contrary testimony on the stand. No

conscious choice of tactics can explain why Shinn chose not to utilize such potentially helpful testimony.

mm. Shinn's failure even to attempt to utilize the exonerating testimony was necessarily prejudicial. Shinn called very few witnesses at the guilt trial and none gave testimony so potentially useful as Robin Gay's grand jury testimony. In the context of the incongruous and confusing evidence in this case, anything which placed additional blame for the killing upon Cummings could only serve to enhance petitioner's chances before the jury. Moreover, by failing to call Robin Gay or use her testimony Shinn hampered his own ability to argue that the testimony of others, notably witnesses Gutierrez and Warren, was particularly believable. Finally, even if the jury would have viewed Robin Gay's testimony as suspect because she was petitioner's wife, that perception would have emphasized that the damaging testimony given by Pamela Cummings, Raynard's wife, was equally suspect.

nn. Shinn also rendered prejudicial ineffective assistance of counsel by failing to undertake live cross-examination of Gail Beasley when offered the opportunity to do so. As described above, Gail Beasley, whose preliminary hearing testimony was read to the jury, was brought to court under a body attachment on April 25, 1985. Inasmuch as her testimony had already been read to the jury, the trial court offered Shinn the opportunity to cross-examine her. The trial court asked Shinn when they would like for her to return. (79 RT 8950.) Shinn knew that the prosecution was close to resting its case and initially asked that she be required to return in "two weeks . . . approximately." (79 RT 8950.)

Pressed for a certain date, Shinn then changed his estimate and specifically requested that Beasley be ordered to return on June 6. 1985:

> Mr. Shinn: June 6, your honor.
>
> Your Honor [sic]: June 6?
>
> Mr. Payne: May 6.
>
> Mr. Shinn: June 6, your honor. June 6, 1985.
>
> Mr. Price: June? What happened to May?
>
> Mr. Shinn: June 6 is the day I picked.
>
> The Court: 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 by [sic] witnesses through the 6th, your honor. (79 RT 8951.)

The trial court then ordered Beasley to return on June 6, or sooner, if she was contacted by the court. Upon Beasley's agreement to return no later than June 6, the trial court released the body attachment. (79 RT 8951, 8953.)

oo. Although counsel stated on the morning of April 25 that he projected witnesses through June 6, 1985, later that day he took a substantially different position. During an on-the-record discussion with other counsel, it was revealed that the prosecutor intended to rest at the beginning of the following week. Counsel for Cummings indicated that their case-in-chief would consume about three or four days. Shinn estimated that his case would take approximately one week. (79 RT 9043.) Shinn did not ask the trial court to revise the date upon which Gail Beasley

should be ordered to return. Indeed, Shinn made no mention of Beasley. Shinn began his case-in-chief on May 7, 1985, and called no other witnesses after May 8, 1985. All counsel for defendants then officially rested on May 20, 1985. (89 RT 10173.) At no time prior to resting his case did Shinn request that Beasley be ordered to return. On May 31, 1985, one week before the date by which Shinn had requested that Beasley return, the jury found petitioner guilty of first-degree murder.

pp. Legitimate trial tactics cannot explain counsel's failure to undertake the opportunity to cross-examine witness Gail Beasley. Beasley's testimony alone was a sufficient basis upon which to convict petitioner. Counsel obviously was aware of its potentially damaging effect because he attempted to exclude the reading of her testimony on grounds that the prosecution did not exercise due diligence in seeking to locate her. Moreover, her examination and cross-examination at the preliminary hearing revealed that she was not an entirely reliable witness. Her perception was flawed and she had shown herself to be confused by the examination process. Because Shinn had previously cross-examined her, he would have been aware of the aspects of her testimony and demeanor which could have been used to petitioner's advantage. In addition, during the due diligence proceedings the parties and trial court had learned that Beasley had been unwilling to testify and had felt threatened by at least one of the defendants. Most importantly, requiring her to appear before the jury would have permitted the jury to assess Beasley herself. Reasonably competent counsel in vigorous defense of his client would have insisted upon his right to cross-examine Beasley and no satisfactory explanation exists for Shinn's failure to do so.

qq. Counsel's failure to cross-examine Beasley when given the opportunity to do so was prejudicial. As noted previously, Gail Beasley was obviously an easily manipulated and confused witness, but her testimony was crucial to the prosecution. First, Beasley's testimony which was read to the jury, was itself a sufficient basis upon which petitioner's jury could have convicted him. As the prosecutor stressed in closing argument, her testimony was "enough. . .to support a verdict of guilty." (95 RT 10897.) Second, as the prosecutor emphasized in closing argument, Beasley's testimony provided a basis for him to argue (a) that the evidence supported his two-killers-one-gun theory and (b) that Beasley corroborated Robert Thompson thereby enhancing Thompson's credibility. (95 RT 10893-97.) These reasons alone were sufficient to justify live cross-examination of Beasley.

rr. Anything that cast doubt on Beasley's credibility and ability to perceive would have been essential to the defense. But counsel's failure to cross-examine her meant that he lost the opportunity to emphasize a fundamental, perhaps crucial, inconsistency in her testimony as it related to other witnesses. Although Beasley was adamant in her testimony that petitioner was the killer, she also made two statements that potentially undermined this testimony. She stated that at one time she had believed that she had seen another man at the scene. In addition, she testified that petitioner was wearing "dark" clothing, which both Pamela Cummings and Eula Heights insisted that Cummings wore that day. Counsel had not explored these critical statements during his cross-examination of her at the preliminary hearing. Had Shinn cross-examined her before the jury he could have explored whether indeed she had seen Cummings that day and

could have emphasized to the jury that she stated that the killer wore clothing that Cummings had worn. Having failed to undertake this opportunity, Shinn missed the chance to call into question the testimony of an essential prosecution witness.

ss. Particularly in view of the many inconsistencies and contradictions in the testimony of other eyewitnesses, undermining Beasley's testimony could have significantly altered the evidentiary collection at trial. A reasonable probability exists, therefore, that if counsel took advantage of the opportunity to cross-examine Beasley when offered the chance to do so, a different result would have been obtained at trial.

tt. Shinn committed other errors and omissions that demonstrated that he was not acting as a reasonably competent attorney in this case. From the outset, counsel failed to undertake the vigorous defense mandated in such a serious capital case. For example, although Cummings was permitted two counsel pursuant to state law (Penal Code § 987(d)), Shinn never sought funds to hire a second lawyer. Moreover, Shinn submitted only a handful of written pretrial motions, all of which were perfunctory and made without any serious effort to connect them to the facts of the case. (*See, e.g.*, 4 CT 1070-111; 5 CT 1370-90.) Shinn's motion to suppress identification testimony did not specify to which witnesses the motion was addressed, and his change of venue motion failed to include any newspaper articles as exhibits. (4 CT 1096-112.) Shinn's motions generally were little more than a series of disconnected quotations from cases. (*See, e.g.*, 4 CT 1070-117; 5 CT 1370-90.) With respect to significant pretrial motions, such as the motions to sever the various counts for separate trial and the motion to quash the jury panel, Shinn did not

submit a written motion, but merely joined in the motions brought by Cummings's counsel. (8 RT 727-39.) In the two motions (to quash the jury panel and to change venue) in which some evidence was introduced, Shinn asked no questions and made no oral arguments in support. (1 RT 26-59, 61 et. seq.)

uu. At trial in the murder case, Shinn affirmatively called in his case-in-chief only three witnesses, all of whom, including Pamela Cummings, were previously called by the prosecution. (85 RT 9713; 86 RT 9782, 9787.) As noted above, despite the importance of eyewitness testimony in the case against petitioner, Shinn called no expert witnesses to cast doubt upon the reliability of the prosecutor's eyewitness testimony.

vv. As the examples set forth in this claim demonstrate, Shinn did not undertake a vigorous defense of petitioner. Although petitioner does not suggest that the quality of representation that Cummings received is the industry standard, the contrast between the energetic, sustained advocacy of Cummings's counsel and the feeble efforts made by Shinn is nevertheless telling. An able, conscientious advocate in a serious capital case would have taken his role far more seriously than Shinn did. Thus, even if the particulars listed above were not prejudicial considered individually, though petitioner contends that they were, considered cumulatively, they reveal the ineffective assistance of counsel that petitioner received. When considered in context, counsel's repeated errors and omissions demonstrate that the prosecutor's case was not subjected to "meaningful adversarial testing."

ww. Even if each of Shinn's errors and omissions discussed above were not alone sufficient to constitute prejudicial ineffective

assistance of counsel, when considered in context, those errors and omissions exemplify Shinn's inability and/or unwillingness to represent petitioner as a zealous, competent advocate. Petitioner's jury must have found it powerfully incriminating, for example, that his own lawyer introduced Defendant's Exhibits C and D. Those exhibits supported the contention of both the prosecutor and co-defendant Cummings that petitioner shot Paul Verna. Moreover, both exhibits described in precise detail the prosecutor's theory of how petitioner completed the killing once the first shot had been fired. In the context of the highly contradictory evidence introduced by all parties, the jury witnessed one constant: the prosecutor, counsel for Cummings, and Shinn all introduced evidence that blamed petitioner for the killing. More generally, Shinn's willingness to introduce plainly inadmissible and harmful evidence, such as Paul Verna's photograph; his failure to exhaust available challenges to evidence, such as petitioner's alleged suicide attempt; his failures to object to other prejudicial material, such as the prosecutor's slide show; his failure to introduce plainly exculpatory evidence such as expert testimony or Robin Gay's testimony; his repeated blunders on cross-examination; and his general lackadaisical attitude toward defending the case all form part of the tapestry of ineffective assistance in this case. The picture that emerges is of a lawyer either completely confused, utterly unconcerned with his client's interests, or worse, unconvinced of his client's right to a vigorous defense.

xx. This Court also cannot ignore the less obvious, but no less significant, impact that Shinn's acts and omissions must have had on the jury's perception of petitioner and his defense. By failing to object either vigorously or at all to harmful evidence and by actually introducing

evidence sufficient to convict petitioner, Shinn must have repeatedly conveyed to the jury the unspoken message that he believed that petitioner was guilty. Indeed, after trial, Shinn expressed no surprise at the death judgment, stating to the media, "When you kill a police officer, what do you expect?" (101 RT 11451.)

yy. Shinn's insensitivity to his client's interests in this last instance is itself revealing and brings into focus his general lack of concern throughout the trial. Shinn himself, whether inadvertently or otherwise, essentially functioned as a prosecutor at petitioner's trial. He effectively aligned himself with the prosecution against his own client. Shinn's egregious and repeated breaches of ethical duty constituted a failure to provide petitioner with effective assistance of counsel. As such, this trial lost "its character as a confrontation between adversaries" and the constitutional guarantee of effective assistance was violated. But for this constitutional violated, the jury's guilt phase verdict would have been different.

X. CLAIM TWENTY-FOUR: THE EVIDENCE WAS INSUFFICIENT TO CONVICT PETITIONER OF ATTEMPTED ROBBERY IN COUNT 7.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, a fair trail free of false or misleading evidence at which the prosecution was required to prove his guilt beyond a reasonable

doubt, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice because the evidence was insufficient to convict him of the attempted robbery alleged in Count 7.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. At the conclusion of the prosecutor's case-in-chief, trial counsel moved for acquittal on Count 7 (attempted robbery at Design Florist) on the grounds of insufficiency of the evidence and, at the conclusion of trial, moved for a new trial on the same grounds. (62 RT 6799, 6801; 10 CT 2686-2714.) Both motions where denied. (62 RT 6800, 6802; 107 RT 11951.)

b. The evidence was insufficient to convict petitioner of attempted robbery in count 7 (Design Florist).

c. Petitioner did not confess to the attempted robbery at the Design Florist and the prosecutor introduced no physical evidence to link petitioner to that crime.

d. The prosecutor relied, instead, solely upon the accomplice testimony of Pamela Cummings, the testimony of the victim (Ms. Rodriguez) and Brent Sincock, a witness in the vicinity, and the erroneously admitted guilty plea to that crime by Raynard Cummings.

(1) Pamela Cummings testified that she drove the car and waited outside the store for Petitioner and Raynard Cummings. She said they came out with blood on their clothes and that they had not taken anything. (60 RT 6505-11.)

(2) This testimony was required to be corroborated by other evidence before the jury could consider it. (Penal Code § 1111.)

(3) The admissible evidence in corroboration was insufficient under this test to support the conviction.

(a) Mrs. Rodriguez testified at trial affirmatively and repeatedly that petitioner was not one of her assailants.

(b) Although Ms. Rodriguez had identified Raynard Cummings (59 RT 6372), she insisted that the second man involved in the attempted robbery was not in the courtroom. (59 RT 6384-85.)

(c) Indeed, on redirect, the prosecutor pointed out petitioner to Mrs. Rodriguez and she unequivocally stated, "I see the man, no, he is not the man." (59 RT 6392.) When the prosecutor persisted, still Ms. Rodriguez stated that petitioner was not the second assailant:

> Watson: Do you recognize him [*i.e.*, petitioner]?
>
> Rodriguez: No.
>
> Watson: Does he look like the second man who assaulted you?
>
> Rodriguez: No. (*Id.*)

(d) The evidence further showed that at the time of the crime Ms. Rodriguez was emotionally upset and "did not get a very good look" at the second man. (*Id.*)

(e) She described the second man only as a light-skinned black man, with loose curly hair and a mustache, who was between 5'10" and 6' tall and weighed about 150 pounds.

(f) Nor was Ms. Rodriguez's identification of Raynard Cummings probative of petitioner's participation.

(g) The jury heard evidence of two other robberies committed during the same period in which Billy Sims assisted Raynard Cummings. (86 RT 9758-71.)

(h) Finally, the prosecution introduced Brent Sincock's testimony. He identified Pamela Cummings and also identified Robin Gay's automobile as having been at the scene. (60 RT 6478-79.) Mr. Sincock offered no evidence, however, that petitioner was at the scene.

e. In short, no confession, no identification testimony and no physical evidence existed to connect petitioner to the crime or to corroborate Pamela Cummings' plainly biased testimony.

f. The only purported "evidence" of petitioner's participation was Ms. Rodriguez's unsupported statement on direct examination that "Kenneth Gay" was the second man. (59 RT 6373.)

(1) She stated at the Evidence Code § 405 hearing held before her testimony that she knew petitioner's name because of newspaper clippings she kept. (59 RT 6362.)

(2) Her bald statement at trial was undermined, however, by her affirmative testimony that, in fact, Kenneth Gay "was not the man." (*Id.*)

(3) In addition, trial counsel, in an apparent slip of the tongue, referred to the second man as "Mr. Gay." Certainly that cannot

be credible evidence upon which a conviction may rest. However, if either or both references to petitioner are found to be sufficient evidence upon which to convict, then, as discussed *infra*, they are both traceable to trial counsel's prejudicial ineffectiveness and inattentiveness at trial. The conviction – at least on this count – should be overturned on that basis as well.

g. The lack of corroborating evidence was so apparent that, during closing argument, the prosecutor was left with nothing other than speculation about petitioner's participation in the crime and repeated references to the brutality of the attack upon Ms. Rodriguez as the bases upon which he requested a conviction. (*See* 95 RT 10863, 10867-68, 10870.)

h. Thus, in addition to his repeated references to the evidence that Ms. Rodriguez had hemorrhaged profusely following the attack, the prosecutor speculated that because Robin Gay's car had been seen at the shop, this somehow constituted evidence of petitioner's involvement (95 RT 10858, 10868-69), notwithstanding that Brent Sincock, who identified the car, saw no one other than Pamela Cummings. (60 RT 6479.)

i. In addition, the prosecutor resorted to bold misstatements of the evidence in his zeal to seek a conviction on this count.

(1) He stated that Ms. Rodriguez testified that she had identified petitioner at the preliminary hearing. (95 RT 10868.)

(2) In fact, there was no such evidence.

(3) This statement drew no objection from trial counsel.

j. In summary, the corroborating evidence produced at most a mere suspicion of petitioner's involvement, an insufficient basis upon which to convict.

k. The absence of corroborating evidence of petitioner's participation in the crime plainly disturbed the jury. The jurors requested that Ms. Rodriguez's testimony be read on June 3, 1985, during their deliberations and requested that it be re-read on June 4, 1985. (96 RT 11019A, 11019B.)

l. On an almost equal lack of corroboration of Pamela Cummings's testimony, the trial court acquitted petitioner in Count 15 (Poehlmann robbery) and should have done so here. Petitioner's conviction on Count 7 should be reversed.

m. Although the California Supreme Court ultimately reversed the robbery convictions based on instructional error, this error severely prejudiced the murder trial because the prosecutor extensively argued that the robberies provided petitioner with motive to murder Officer Verna.

Y. CLAIM TWENTY-FIVE: THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE SPECIAL CIRCUMSTANCE OF MURDER TO AVOID OR PREVENT A LAWFUL ARREST AND THE TRIAL COURT FAILED PROPERLY TO INSTRUCT THE JURY THAT THE SPECIAL CIRCUMSTANCE REQUIRED A FINDING THAT PETITIONER WAS THREATENED WITH IMMINENT ARREST.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due

process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, a fair trial free of false and/or misleading evidence, and at which the prosecution was required to prove his guilt and the truth of any special circumstance allegation beyond a reasonable doubt, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice because the evidence and instructions were insufficient to support a finding that the homicide was committed to avoid or prevent a lawful arrest.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

a. Petitioner was charged with the special circumstance, based upon Penal Code § 190.2(a)(5), that the killing of Officer Verna was accomplished for the "purpose of avoiding or preventing a lawful arrest." (4 CT 978.) On May 15, 1985, following the conclusion of the guilt trial, petitioner moved for acquittal on the special circumstance and the trial court denied the motion. (89 RT 10203-14; 7 CT 2037.) Thereafter, the jury found the special circumstance to be true. (96 RT 11007-09.)

b. The trial court failed to instruct the jury that it was required to find that petitioner was "threatened with imminent arrest," necessary elements of the special circumstance.

c. Before the special circumstance of killing to avoid or prevent a lawful arrest (Penal Code § 190.2(a)(5)) may be found true, the evidence must show that petitioner was either "under arrest" or "threatened with imminent arrest." Unless the facts show that an arrest has been

perfected the evidence must support a finding that under the circumstances, an arrest was objectively "imminent" and the accused felt "threatened" with such an arrest.

d. It is undisputed that petitioner was not under arrest at the time of the killing.

e. There was insufficient evidence to support a finding that an arrest by Officer Verna was imminent. The prosecution introduced no evidence, beyond the fact of the traffic stop itself, to support a finding that an arrest of petitioner was "imminent." At the time of the traffic stop, petitioner was not considered a suspect in any crime. The evidence was undisputed that there were no wants or warrants outstanding for petitioner at the time of the killing. (84 RT 9653.) Even the reports on the Mays/Norton incident that preceded the murder had not been put in the police computer system at the time of the traffic stop. (88 RT 10037.)

f. The evidence showed that the field investigation card that Verna filled out before he was killed was purely a record-keeping device, not prefatory to any arrest. (88 RT 7646-51.) Similarly, Verna made no radio calls about petitioner to police department headquarters. (84 RT 9652.) Pamela Cummings testified, under questioning by the prosecutor, that Verna was courteous and did not act in a threatening manner. The foregoing course of conduct is plainly not the behavior of a trained police officer about to make an arrest. (78 RT 8940; 84 RT 9605-9609.) Nothing in the record intimated that Verna was contemplating an arrest of petitioner, much less that such an arrest was "imminent." There was no evidence that Verna had formed the intent to arrest either or both

petitioner or Ms. Cummings. The evidence was insufficient to support a finding that petitioner felt threatened that an arrest was imminent.

g. The lack of evidence of imminence of arrest is alone fatal to the special circumstance finding and is equally probative that no arrest was "threatened."

h. Other evidence also contributes to the conclusion that petitioner was not "threatened" with arrest. When Officer Verna stopped the car, petitioner told Pamela Cummings "not to worry," that Verna was probably only going to give them a ticket. (73 RT 8144.) Furthermore, as noted above, Verna made no threatening gestures and merely bent over into the car to speak to the defendants.

i. Nor was there any evidence introduced to support the prosecutor's rank speculation during closing argument that the defendants were "worried" that Verna might "eventually find out" they had previously committed crimes. (95 RT 10881, 10885.) The only evidence even suggesting that petitioner might ever have harbored a willingness to kill the police was an ambiguous statement Pamela Cummings made to police investigators. She was asked whether her husband had ever threatened to kill the police, and she stated that "the men" had made such statements. (77 RT 8805-06.) No other evidence of any such statements or intent by petitioner was introduced at any time.

j. Even assuming, without conceding, that petitioner shared Cummings's expressed desire to kill the police, that necessarily undermines the special circumstance finding. A generalized desire to kill police, even one which was purportedly "planned for weeks," is not a subjective desire to kill now because of an imminent arrest threatened now.

The prosecution's wholly speculative argument that the defendants were "worried" that Verna would "eventually find out" that they had committed robberies and were driving a stolen car (95 RT 10881, 10885-86), even if true, evinced an intent to kill to avoid or prevent an unspecified future arrest, not one which was "imminent" and "threatened."

k. In short, no evidence was introduced to support a finding that petitioner was "threatened with imminent arrest."

l. In submitting the special circumstance to the jury, the trial court violated petitioner's rights to due process guaranteed by the state and federal constitutions.

m. Although this Court asserted that there was strong circumstantial evidence to support the special circumstance finding, one of its main bases for this conclusion was that "there was also testimony that Cummings had stated more than once that he was not going back to jail and would shoot any police officer who stopped him." (*People v. Cummings*, 4 Cal.4th at 1299.) Testimony regarding comments made by Cummings should have had no reflection upon petitioner. Likewise, the Court's findings regarding the robberies reflect the lack of evidentiary basis for the finding of the special circumstance. The robbery convictions were ultimately reversed. Without the robberies there was no basis for establishing that petitioner suffered from an imminent fear of arrest.

n. Whether or not the evidence was sufficient to support the special circumstance finding, the trial court failed to instruct the jury on all necessary elements of the special circumstance. The jury was instructed in the bare words of Penal Code § 190.2(a)(5) that it was to determine whether the killing was "committed by the defendant for a purpose of

avoiding or preventing a lawful arrest." (95 RT 10836.) The jury was not instructed that it was required to find that petitioner was under arrest or that petitioner was "threatened with imminent arrest." An instruction [on the threat of imminent arrest] is required when the special circumstances issue is tried to the jury. Failure to instruct the jury on every fact necessary to support a special circumstance deprived petitioner of due process of law under the state and federal constitutions.

o. The instruction given to the jury necessarily implied that the jury could find the special circumstance true, even if petitioner was not "threatened" with an "imminent" arrest. As actually instructed, the jury could have concluded that killing to avoid the mere possibility of arrest at some unspecified point in the future was a sufficient basis upon which to find the special circumstance to be true.

p. In fact, although the prosecutor did not specifically address the special circumstance in his closing argument to petitioner's jury, his arguments implied that killing to avoid the mere possibility of future arrest was sufficient for the jury to find the special circumstance true. He stated:

> This weighing process, this weighing things like do we want to run the risk of being convicted of these robberies or not. Do we want to run the risk of being sent back to prison? He is on parole. He has a gun and committed robberies in violation of parole. 'Do I want to go back or do I want to shoot my way 'out? We are in a stolen car. We have got no identification, no registration. pretty soon this police officer is going to figure out, check the license plate. The license plate is going to come back stolen. It is going to come back not fitting the Olds because it is taken from a different kind of car. And when they eventually find out the true nature of the Oldsmobile that

> is going to turn out to be stolen.' So, they are suspects in all of these [robberies]. Paul Verna doesn't know that when he stops them and they know he doesn't know. But he might find out. Supposing he looks at them and says these guys match the description that I heard at roll call or I saw a wanted poster or something. It's possible. It isn't really a question of whether Verna knew these things. It's whether they were worried about it. Imagine how worried you would be if you were responsible for 17 armed robberies in the valley. You would probably be frantic about it." (95 RT 10881, 10885-86.)

q. In addition to the foregoing, the prosecutor's final argument was replete with statements to the effect that the defendants were motivated to kill to avoid detection and apprehension in the future, if not by Verna, then by some unspecified police officer. (95 RT 10874-85.) If the jury believed those arguments, as it apparently did, then it rested its conclusions on the special circumstance upon an improper legal and factual basis.

r. The instructional error "completely eliminated" from the jury's consideration the issue of whether petitioner was threatened with imminent arrest. No properly given instructions resolved the factual question of whether petitioner was threatened with imminent arrest nor did the jury receive merely contradictory instructions on that issue or otherwise find the necessary predicate facts beyond a reasonable doubt.

s. As detailed above, the evidence plainly did not establish as a matter of law that petitioner was threatened with imminent arrest.

t. The evidence was insufficient to support the special circumstance finding and the trial court should have granted an acquittal.

Z. CLAIM TWENTY-SIX: THE CUMMULATIVE EFFECT OF THE ERRORS AND OMISSIONS OF TRIAL COUNSEL, THE PROSECUTOR AND THE TRIAL COURT PREJUDICED PETITIONER.

Petitioner's convictions and confinement were unlawfully obtained in violation of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution and Article I, Sections 1, 7, 9, 12-17, 24, 27-28 of the California Constitution and state law rights to due process, a fair and impartial jury, confrontation, compulsory process, notice of the evidence against him, the effective assistance of counsel, the presumption of innocence, a fair trial free of false and/or misleading evidence, and a fair, accurate and reliable guilt and penalty determination based solely on record evidence and reason, not passion or prejudice by cumulative impact of the errors and omissions of trial counsel, the prosecution and the trial court.

1. The following facts, among others to be presented after full investigation, discovery, funding, and access to this court's subpoena power, support this claim:

2. Each of the errors of cited in this petition warrants a reversal of petitioner's conviction. The numerous errors of constitutional dimension and magnitude committed during the trial constituted a pervasive pattern of unfairness.

3. As discussed in detail in the preceding claims, the properly admissible evidence against petitioner on the non-capital counts was astonishingly weak. The properly admissible evidence at the capital phase of the trial was confused and inherently contradictory. Thus, the jury easily could have acquitted petitioner, but for the intertwining errors committed by

the trial court and trial counsel, which resulted in the improper exposure of the jury to powerfully prejudicial evidence. The prosecutor capitalized on the improperly admitted evidence by emphasizing it during closing argument to ensure conviction.

4. Even if these errors did not individually rise to the level of prejudice necessary for the granting of the writ, viewed in its entirety, the unwavering pattern of error resulted in a fundamentally unfair trial and compels the granting of a new trial. In addition, these errors combined to exacerbate the prejudice that such errors caused individually. Therefore, to adequately review the magnitude of error and its prejudicial impact on the guilt phase of the trial of petitioner, all errors must be considered together.

5. For the reasons discussed in detail above, absent these numerous errors, it was reasonably probable that a result more favorable to petitioner would have been reached. Without the repeated errors by the trial court and his own counsel, the outcome with regard to the capital count would likely have been different.

6. The record establishes numerous examples of ineffective assistance of petitioner's trial counsel and failures on the part of the trial court. The combined prejudicial effect of such errors rendered petitioner's conviction violative of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the analogous sections of the California Constitution the conviction therefore must be reversed.

PRAYER FOR RELIEF

WHEREFORE, petitioner respectfully requests that this Court:

1. Take judicial notice of the contents of the certified records on appeal, all pleadings filed and evidentiary hearing records in *People v. Cummings and Gay*, No. S004699, *In re Kenneth Earl Gay,* Capital Case No. S030514 and *People v. Gay*, Capital Case No. S093765;

2. Take judicial notice of the contents of the file, pleadings, records, judgment and findings, and the record and decision on review in all proceedings in the State Bar Court of the State Bar of California Hearing Department, Los Angeles, the Review Department of the State Bar Court; *In the Matter of Shinn,* 2 Cal. State Bar Ct. Rptr. 96; and this Court's order filed September 16, 1992, in *In re Daye Shinn on Discipline*, S027609 (State Bar Court Case No. 85-0-11506);

3. Take judicial notice of the contents of the file, pleadings, records, judgment and record on appeal in *People v. Linda Sue Jones*, Los Angeles Superior Court, Case No. A088857;

4. Order respondent to show cause why petitioner is not entitled to the relief sought;

5. Grant petitioner the right to seek sufficient funds and time to secure additional investigative and expert assistance as necessary to prove the allegation in this petition;

6. Order the Los Angeles County District Attorney to disclose all files pertaining to petitioner's case and grant petitioner leave to conduct discovery, including the right to take depositions, request admissions, propound interrogatories, issue subpoenas for documents and other evidence, and afford petitioner the means to preserve the testimony of witnesses;

7. Order an evidentiary hearing at which petitioner will offer this and further proof in support of the allegations herein;

8. Permit petitioner a reasonable opportunity to supplement the evidentiary showing in support of the claims presented here and to supplement the petition to include claims which may become known as a result of further investigation and information which may hereafter come to light;

9. After full consideration of the issues raised in this petition, considered cumulatively and in light of the errors alleged on direct appeal, vacate the judgment imposed upon petitioner in Los Angeles County Superior Court Case No. A392702; and

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

Dated: December 28, 2004 Respectfully submitted,

HABEAS CORPUS RESOURCE CENTER

By: GARY D. SOWARDS

By: PATRICIA DANIELS

By: KIMBERLY DASILVA
Attorneys for Petitioner
Kenneth Earl Gay

VERIFICATION

Gary D. Sowards declares as follows:

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

I am authorized to file this petition for writ of habeas corpus 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 or more than petitioner's.

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

Executed under penalty of perjury on this December 28, 2004, at San Francisco, California.

Gary D. Sowards

PROOF OF SERVICE

Re: People v. Kenneth Gay, (Related Capital Case Nos. S004699, S030514 and S093765 (L.A. Sup. Ct. No. A392702)

I, Valerie Martinez, 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 50 Fremont Street, Suite 1800, San Francisco, California, 94105.

On December 28, 2004, I served a true copy of the following documents:

PETITIONER'S WRIT OF HABEAS CORPUS

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:

Office of the Attorney General
Attn: Lance Winters
Deputy Attorney General
300 South Spring Street, Ste 5212
Los Angeles, CA 90013

Kenneth Lezin
Office of the Public Defender
200 W. Compton Blvd.
Compton, CA 90220

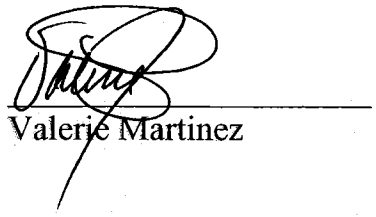
Therene Powell, OSPD
221 Main Street, 10th Floor
San Francisco, CA 94105

Los Angeles County District Attorney
Lawrence Morrison
210 West Temple Street, 18th Floor
Los Angeles, CA 90012

Law Office of Robert Bryan
2088 Union Street, Suite 4
San Francisco, CA 94123

California Appellate Project
101 Second Street, Ste 600
San Francisco, CA 94105

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 28, 2004, at San Francisco, California.



Valerie Martinez