

# SUPREME COURT COPY

In the Supreme Court of the State of California

In re

**KENNETH EARL GAY,**

On Habeas Corpus.

**CAPITAL CASE**

Case No. S130263

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

SUPREME COURT  
**FILED**

JUN 29 2016

**EXCEPTIONS TO REPORT OF THE  
REFEREE AND BRIEF ON THE MERITS**

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DEATH PENALTY

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## I. INTRODUCTION

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

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

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

## II. QUESTIONS PRESENTED

### Reference Question 1:

What actions did petitioner's trial counsel, Daye Shinn, take to investigate a defense at the guilt phase of petitioner's capital trial that petitioner did not participate in the murder of Officer Verna? What were the results of that investigation?

### Reference Question 2:

What additional evidence supporting the defense, if any, could petitioner have presented at the guilt phase of his capital trial? What investigative steps, if any, would have led to this additional evidence?

### Reference Question 3:

How credible was this additional evidence? What circumstances, if any, weighed against the investigation or presentation of this additional



evidence? What evidence rebutting this additional evidence reasonably would have been available to the prosecution at trial?

**Reference Question 4:**

Did the Los Angeles County District Attorney's investigation of allegations that petitioner's trial counsel, Daye Shinn, had engaged in acts of embezzlement unrelated to petitioner's case give rise to a conflict of interest in petitioner's case? If so, describe the conflict of interest.

**Reference Question 5:**

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

**III. BACKGROUND**

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

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

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

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

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

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

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

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

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

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

#### **IV. STANDARD OF REVIEW FOLLOWING REFERENCE HEARING**

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

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

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

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

## ARGUMENT

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

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

#### A. Legal Standard

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

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

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

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

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

#### **B. Shinn's Investigation and Trial Strategy**

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

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

transparent attempt by her to exculpate her husband from a murder conviction and a death sentence. (13RHT 1641-1642.)<sup>2</sup>

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(continued...)

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

Shinn clearly recognized the need to impeach Pamela Cummings, in light of her vantage point from inside the car during the murder and her devastating testimony.<sup>9</sup> Shinn assailed Pamela Cummings’s credibility

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(...continued)

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

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

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

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