

SUPREME COURT COPY

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In the Supreme Court of the State of California

In re

KENNETH EARL GAY,

On Habeas Corpus.

CAPITAL CASE

Case No. S130263

SUPREME COURT
FILED

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Deputy

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

RESPONSE TO PETITIONER'S OBJECTIONS

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INTRODUCTION

This brief responds to petitioner's Objections to the Referee's Report. No attempt is made to reply to every objection lodged by petitioner. The respondent addresses the Referee's Report at length in the previously filed Brief on the Merits.

The focus of this proceeding has been and remains defense counsel Daye Shinn, whose serious misconduct, unrelated to the adequacy of his trial defense of petitioner, was addressed both by his disbarment and in this Court's granting of penalty-phase relief to petitioner. In granting penalty relief, but affirming petitioner's conviction, this Court recognizes that petitioner needed to—but could not—demonstrate that the proof of petitioner's guilt was lacking, or that any of Shinn's alleged deficiencies played any role in the jury's determination that petitioner was one of the killers of Officer Paul Verna.

But petitioner continues to assail Shinn as a thoroughly disreputable character who, by implication, could not have adequately defended anyone in any case. The overarching theme of petitioner's arguments is that the untrustworthy and "disengaged" Shinn willfully failed to produce any evidence that would have exonerated petitioner at his original capital murder trial in 1985. In support of that claim, however, petitioner refers to the same evidence and theories evaluated by Shinn at the 1985 trial. And even after 31 years of post-trial investigation and a dozen different lawyers who have succeeded Shinn in advocating on petitioner's behalf over the last three decades, the evidentiary picture has remained the same. There is no "new evidence" casting doubt on petitioner's guilt, and never has been. Petitioner continues to rely exclusively on the investigation conducted in the aftermath of the murder in 1983. Try as he might to vilify Shinn and all of Shinn's work, petitioner produces nothing new that alters the evidentiary portrait of the crime. The jury was presented with varying eyewitness

accounts of the shooting, and Shinn capably focused the defense on the alleged lack of proof that petitioner was a shooter and that petitioner did not share the shooter's intent. The original trial eyewitnesses were aggressively questioned by new counsel for petitioner at his penalty retrial. A new jury imposed the death sentence on petitioner. A different group of attorneys for petitioner again challenged the testimony of the original trial witnesses at the 2014 Reference Hearing. The Referee appointed by this Court conducted a lengthy evidentiary hearing and heard testimony from 29 witnesses during proceedings that lasted for several months. But following the most recent evidentiary hearing, the Referee credited the original witnesses and made no findings supportive of any of the witnesses who were not called at the original trial. On the contrary, the Referee made numerous findings that are supportive of Shinn's original defense, and made no findings that would support granting relief to petitioner.

None of petitioner's Objections to the Referee's findings, whether considered individually or cumulatively, undermine confidence in the Referee's assessment or the judgment of conviction. The evidence continues to make clear that petitioner was the "second shooter" in the murder of Officer Verna.

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

A. *Question 1, Part 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?*

1. *Petitioner's Objection to the Date Investigator Payne Began Working on Petitioner's Case*

Petitioner objects to the Referee's conclusion that Defense Investigator Douglas Payne became involved in petitioner's case in August

of 1983, and argues Payne did not begin investigating the case until May of 1984. (Petitioner's Objections ("PO") 6-7.) Petitioner seeks to downplay Payne's involvement by claiming that Payne's only work prior to May of 1984 was to "sit with Shinn at the preliminary hearing and, perhaps, assist with taking notes." (PO 6.) Stated another way, Payne was actively working on petitioner's behalf—even before he started billing on the case—by attending the preliminary hearing in 1983 and undoubtedly beginning to collaborate with Shinn long before the trial. The measure of Payne's work is not based on the date he became involved in the case. It is based on the nature and quality of his work. The Referee evaluated and credited Payne's extensive work, at length, in the Referee's Report. (RR 11-13.)

2. *Petitioner's Objection to the Referee's Conclusion That Payne or Shinn Developed a Witness List*

Petitioner claims there is "no evidence" that Payne formulated a witness list of guilt phase witnesses or interviewed those witnesses. (PO 7.) "No evidence" ignores Payne's testimony, at the first evidentiary hearing, that his duties included, among other things, formulating a witness list and interviewing potential witnesses, canvassing the crime scene for three days and creating a diagram of the scene and an analysis of the crime. (Referee's Report ("RR") 12.) Moreover, the record shows—and the Referee concluded—that Shinn "read the reports generated by the police investigation which included witness statements." (RR 9.) In other words, Shinn was familiar with the eyewitness accounts of the crime, and the potential witnesses. The Referee pointed to numerous examples of Shinn's trial cross-examination that demonstrated that Shinn had analyzed the witness statements produced by the police investigation. The Referee also pointed to Shinn's awareness of witness accounts as illustrated by his use of Grand Jury testimony at trial, his familiarity with preliminary hearing

testimony and his objections to evidence offered by the prosecution. Finally, as to Payne, the Referee found his testimony in the 2014 Reference Hearing (specifically on the subject of his duties and tasks) was consistent with his testimony at the 1996 hearing. (RR 9-13.) In short, there was ample evidence that Shinn, assisted by Payne, adequately evaluated potential witnesses and effectively cross-examined prosecution witnesses and otherwise challenged the prosecution's evidence in order to advance the defense theory that Raynard Cummings was the sole shooter.

B. *Question 1, Part 2. What Were the Results of That Investigation?*

1. *Petitioner's Objection to the Referee's Finding That Shinn Placed No Limits on Payne's Efforts*

The Referee found that Shinn placed no limits on Payne's efforts, but noted that Shinn did not request permission for out of state travel or Spanish language interpreters. (RR 12, lines 19-22.) Petitioner objects, speculating that if Payne had travelled to Mexico, that would somehow have rendered Martina Jimenez Ruelas an available and credible witness. But it would not. There were various reasons not to call her as a witness, as explained below and as recognized by the Referee. (PO 9-11.)

2. *Petitioner's Objection to the Referee's Finding That Shinn "Did Not "Disengage" from a Guilt Phase Investigation*

Without citing to the record, petitioner alleges the Referee made a finding that Shinn "did not disengage" from guilt phase investigation. (PO 13-15.) Petitioner portrayed Shinn at the Reference Hearing as completely disconnected and disinterested in the representation of petitioner at the guilt phase. The Referee obviously disagreed, and found that Shinn actively and adequately defended petitioner in the guilt phase. That Shinn may have recognized that a penalty phase was likely does not

constitute incompetence. As this Court has recognized, the evidence of petitioner's guilt was "overwhelming." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1324.)

C. Question 2, Part 1. What Additional Evidence Supporting The Defense, If Any, Could Petitioner Have Presented at the Guilt Phase of His Capital Trial?

1. Eyewitnesses

a. Martina Jimenez Ruelas

Petitioner, who claims that Martina Jimenez Ruelas (Martina) would have identified Raynard Cummings at trial as the lone gunman, objects to the Referee's "omission" that Martina identified Cummings as the shooter when she testified at the 2014 Reference Hearing. (PO 18.)

When discussing Martina, as well as other child witnesses who were not called as defense witnesses at trial, petitioner continues to ignore obvious potential impeachment of them, including their extreme youth and their limited view of the murder. Their age and fragility alone could cause a reasonable defense attorney to question their value as witnesses, particularly when combined with the damaging testimony (as explained below), and the easy impeachment of them based on other difficulties with their testimony. Martina was only nine years old when Officer Verna was murdered. (Pet. Exh. 43:1, 65.) When first interviewed by police a few hours after the murder, she told them that she did not see the suspect's face but described him as black, possibly in his mid-twenties, 5'10"-6'0", with a medium to thin build. (Pet. Exh. 43:1.) During that initial statement, she indicated that, while she did not see the suspect shoot the officer or who was driving the car from her distant location (125 feet from the shooting), she did see the suspect entering the *passenger* door of the car. (Pet. Exh. 43:1; 12RHT 1940-1942; Resp. Exhs. 771(d) and (e).) In other words, her initial description was harmful to petitioner, both in terms of her assessment

of the shooter's height and her statement that the shooter got out of the passenger door of the car.

On February 9, 1985, when re-interviewed by the prosecutor and detectives prior to the start of the guilt phase evidence, 11-year-old Martina stated that there were two black men in the car, one was the driver and one was the passenger. (Pet. Exh. 43:3.) She "observed a male black get out of the passenger side of the car, point the gun at the policeman and shoot." (Pet. Exh. 43:3.) She could not recall the shooter's clothing, but described him as "black, tall, young looking, thin and ugly." (Pet. Exh. 43:3.) Thus, neither of her initial statements was helpful to petitioner since Martina *twice* told police that the suspect either entered into or exited from the passenger side of the car at the time of the shooting. (Pet. Exh. 43:1-3.)

At the 2014 Reference Hearing, petitioner's current counsel showed (now-adult) Martina pictures of Cummings and petitioner. (12RHT 1379, 1382; Pet. Exhs. 101, 103.) Martina then selected Cummings (Pet. Exh. A-101) over petitioner (Pet. Exh. A-103) as having a similar skin color to the shooter. (12RHT 1382.) However, she recalled seeing those same pictures (Pet. Exhs. 101, 103) "way back" and giving a statement to a woman. (12RHT 1384-1385.) Petitioner's Exhibit 103 depicts petitioner with metal staples in both sides of his neck and abrasion injuries to the left side of his face. During the 2014 Reference Hearing, Martina's recollection was that she identified the shooter during one of the live line-ups. (12RHT 1389.) However, she was *unable* to identify anyone as the suspect in any of the three line-ups she attended on June 6, 1983, indicating to officers at that time that she "couldn't remember what the people looked like when the policeman got shot." (12RHT 1391-1394; Pet. Exh. 43:5-8; Resp. Exhs. 757, 758.)

Petitioner has failed to meet his burden that Martina would have assisted in petitioner's case in 1985 for the following reasons. She only

selected a photo of Cummings in favor of petitioner after 32 years, and after her recollection had been tainted by defense investigators—this type of statement would not have been available to Shinn at trial. Shinn had ample reasons not to call a 9-year-old child whose inconsistent view of a murder 125 feet away from her incriminated petitioner.

b. *Walter Roberts*

Petitioner claims that the Referee “omitted” that Walter Roberts’s (Walter) initial description to the police were consistent with Cummings’s appearance and inconsistent with petitioner’s appearance. (PO 18.)

When Walter testified at the 2014 Reference Hearing, he recalled seeing an officer lying on the street and only two people in the car: an African-American male driver and a Caucasian woman passenger. (10RHT 1270-1272.) Walter was 12 years old at the time of the murder. He saw only a few seconds of the shooting from where he was playing, approximately 235 feet east of the shooting; he would have been looking at the back of the shooter as the shooter stood firing the final two shots into the downed officer. (Resp. Exhs. 770-U, 771-C; RHT 1273, 1937-1940.)

Walter spoke to the police twice on the evening of the murder, when the event was fresh in his memory: first at 6:25 p.m. and later at 8:30 p.m. During his first interview, Walter told Detective Burrow that the driver got out of the car, pointed a small handgun at the downed officer with his right hand and fired two rounds. The female passenger got out of the car, walked to the back of the car where she removed the officer’s gun, and then got back in the car. There was a passenger in the back of the car who got out of the car, ran westbound to Gladstone and then ran back to the car. In his first interview at 6:25 p.m., Walter described the driver/shooter as a male black, 6’0” tall, 170 pounds, 25-30 years old, wearing a multi-colored shirt, dark pants, tennis shoes, and sporting a 1-2 inch Afro. That description is consistent, specifically as to height, with petitioner and not Cummings.

Walter described the *rear passenger* as a male black, 18-20 years old, and wearing dark clothing. (Resp. Exh. 752.) Walter's description of the shooter was consistent with petitioner's tape-recorded admission that he was wearing a burgundy and gray jacket at the time of the shooting. Shinn was present when petitioner made that admission, and would have known that Walter's version incriminated petitioner.

Two hours later, Walter was re-interviewed by Detective Rock. Walter described the shooter/driver as a clean-shaven male black with a medium complexion, 6'0"-6'1" tall, 175 pounds, 25-30 years old, 3-4" Afro, wearing a dark blue long-sleeve shirt, blue jeans, and dark shoes. That description, specifically height, is consistent with petitioner rather than Cummings. Walter described the *rear seat passenger* as a male black, 6'0", 19-20 years old, 3-4" Afro, black long-sleeved shirt, and blue jeans. (*Ibid.*)

Walter later attended three in-person lineups. Petitioner was in Position No. 4 in Lineup 7. Walter selected the man in Position No. 2 partly "because he had the same kind of curls." (67RT 7382-7383 (Defense "H"); Pet. Exhs. A-104, A-44:3; Resp. Exh. 753.) While all the participants in Lineup 7 (with the exception of participant 3) had that kind of hairstyle, participants 2 and 4 (petitioner) also shared very similar body structure and facial features. (Defense "H"; Pet. Exh. A-104.)

Cummings was in the Position No. 5 in live Lineup 8. Walter failed to identify anyone in Cummings's lineup. (67RT 7395-7398 (Defense "I"); Pet. Exh. A-105, A-44:4; Resp. Exh. 754.)

Milton Cook resembled Cummings and was participant 6 in live Lineup 9. (59RT 6439 (People's 12); Pet. Exhs. A-106, A-44:5; Resp. Exh. 755.) On the preprinted witness card for Lineup 9, Walter wrote "4" where the preprinted form states "I am unable to make an identification." In the

remarks section of the lineup card Walter wrote, "I believe that it was [No. 4] because he looked the same." (Pet. Exh. A-44:5; Resp. Exh. 755.)

Walter's statements are more consistent with a description of petitioner than of Cummings. In particular, his description of the shooter as clean shaven and 6'0" or 6'1" describes petitioner, not Cummings. Shinn was aware of that incriminating description, and for that reason alone could validly decide not to call Walter as a witness. Shinn therefore had multiple tactical reasons for not calling Walter.

c. Ejinio "Choppy" Rodriguez

Petitioner contends the Referee failed to address the "additional evidence" that Ejinio "Choppy" Rodriguez (Choppy) saw a light-skinned man (different from the dark-skinned shooter) jump out of the car after the shooting to retrieve the gun. (PO 18-19.)

After the shooting, nine-year-old Choppy never provided a statement to police. (11RHT 1342.) He had no recollection in 2014 of having been subpoenaed to San Fernando Superior Court for petitioner's 2000 penalty retrial with his sister Irma. (11RHT 1703-1705, 1344, 1347-1348.) He had no recollection of speaking with anyone about what he saw. (11RHT 1343.) As for the shooting, he "saw people. I don't know how many I saw. One or two maybe. I would say two." (11RHT 1330.) He did not recall any descriptions of them in terms of sex or race. (11RHT 1330.) He did not recall seeing the two people doing anything to or with the police officer. (11RHT 1330.) In 2003, Choppy did not recall who was actually driving the car. (11RHT 1350.) At the 2014 Reference Hearing, Choppy testified:

Q. And so if I'm understanding what your [*sic*] saying,

Between the time you heard the first firecracker shot until the car stopped by the officer your [*sic*] aware there are some people there, but you don't recall now what happened between those two times?

A. No.

(11RHT 1331.)

Choppy was not interviewed by police after the murder. Twenty years after Officer Verna's murder, Choppy described the shooter to a defense investigator as a dark-skinned, male black who was standing over the police officer but Choppy unable to provide any type of clothing description for the lighter-skinned male. (Pet. Exh. A-24.) And he only saw the shooter's *back*. (11RHT 1351-1352.) The other man, with much lighter skin, was in the car and later jumped out of the car, after the car made a U-turn on Prager Avenue, to pick up a gun belonging to the officer. (Pet. Exh. A-24.) Over 31 years after Officer Verna's murder, Choppy testified at the Reference Hearing. He recalled that the cement pillars were at the front area of his lawn but the wrought iron had not been installed. (11RHT 1349.) Choppy did not move his position after shots were fired. (11RHT 1352.) Choppy observed the person getting back into the car, but did not recall where. (11RHT 1352.) Choppy did not recall seeing anyone else around. (11RHT 1352.) He could not see clearly inside the car. (11RHT 1351.) He could not see the lighter-skinned man clearly when he got out of the driver's side of the car to get the gun. (11RHT 1353-1354.) He believed that he could have been mistaken as to the whether the person standing over the officer had dark or light skin. (11RHT 1355.) Choppy's potential exposure to the "outside shooter" was very brief and from a vantage point over 200 feet to the east of the shooting and looking primarily at the shooter's back. He had only a second to observe the skin tone of the shooter as he turned around and re-entered the car. Shinn therefore had obvious tactical reasons for not calling him as a witness.

2. *Peace Officer Witnesses*

a. *Deputy William McGinnis*

Petitioner contends the Referee “omitted” that Cummings admitted to Deputy William McGinnis that Cummings shot Officer Verna three times rather than twice, and therefore Deputy McGinnis would have supported the claim that Cummings alone fired all the shots. (PO 22.) During an Evidence Code section 402 hearing, Deputy McGinnis testified that Cummings told him, “Yeah. Well, I put two in front of the motherfucker, and he wouldn’t have got three in the back if he hadn’t turned and ran. Coward punk-ass motherfucker.” (65RT 7041.) Cummings never said he alone shot Officer Verna nor did he say that *he* shot Officer Verna in the back. In fact, Officer Verna suffered four gunshot wounds to the back, not three. If Cummings wanted to express that he alone shot Officer Verna in the back, he would have simply said, “I put three in the back.” Cummings’s actual statement is *not* inconsistent with shooting Officer Verna while in the car and then passing the gun to petitioner who got out and shot Officer Verna in the back as he attempted to flee.

And even if Deputy McGinnis’s testimony incriminated Cummings alone, it was cumulative to the trial testimony of Deputies McMullan, McCurtain, and LaCasella.

3. *Impeachment Witnesses*

a. *Deborah Cantu*

Petitioner contends that the Referee “omitted” evidence that Deborah Cantu would have exculpated petitioner. (PB 24.)

Many of Cantu’s statements would have implicated petitioner in the cover-up and creation of the false accusation of Milton Cook. Further, the attempt to falsely incriminate Cook was *petitioner’s* idea. (Pet. Exh. 137, pp. 518-520.) The night before Cantu testified at the Grand Jury, Pamela

Cummings (Pamela) called Cantu and admitted that Cook had not been in the car and had nothing to do with the shooting. Pamela told Cantu, “Kenny told me to say it was Milton.” (Pet. Exh. 137, pp. 519-520.) Cantu’s version did not exonerate petitioner. On the contrary, Cantu’s version would have would only have corroborated Pamela Cummings’ testimony that she had lied about Milton Cook’s involvement in her initial statements to police.

b. *Celester Holt*

Petitioner maintains that Celester Holt, Marsha Holt’s mother, would have testified that Marsha could not have been looking out a window and seen the officer being shot because she was lying on a bed with her mother watching television at the time. (PO 26.) Nowhere in Celester’s June 2, 1983, statement to police (Pet. Exh. A-118, p. 1) or in her Grand Jury testimony does Celester state where in the room Marsha was standing or sitting when Gail Beasley entered the room. (2 Grand Jury (“GJ”) 256-261.) After Beasley told them the officer was shot, Celester went into the family room, looked out a window and saw a *light-skinned* man holding a gun. (Pet. Exh. A-118, pp. 1-2; 2GJ 257-259.) At the Grand Jury, Celester looked at a photograph of petitioner and stated his skin color “could be the same color” as the man she saw with a gun. (2GJ 260.) Whether Celester learned of the shooting from Marsha or Beasley was a minor discrepancy. But if Shinn had presented Celester’s testimony, the jury would have heard another witness testifying that a light or mixed-race man had a gun in his hands. Because Celester’s statements would have bolstered the prosecution’s case that petitioner shot the officer, and there was nothing in the statements which would have impeached Marsha, Shinn had a sound tactical reason for not calling Celester as a witness.

c. Mackey Como

Petitioner argues Mackey Como would have impeached Marsha's testimony by establishing that her view out of a window was obstructed. (PO 26.) But Payne, a very experienced investigator, had examined the crime scene and did not identify any obstruction on the window that would have conflicted with Marsha's testimony. Payne spent three days (January 14, 17, and 20, 1985) examining the vicinity of the shooting locations and eventually prepared a diagram reflecting witness locations. He did not identify any obstructions precluding observations from the Beasley residence. (4RHT 212-213.)

d. Marsha Holt

Petitioner complains that the Referee neglected to identify additional impeachment evidence of Marsha Holt (Marsha), and in particular claims Shinn should have recalled Gail Beasley, as a defense witness. (PB 26.)

Shinn would not have scored a tactical advantage by calling Beasley as a witness to impeach Marsha. The prosecution's introduction of Beasley's preliminary hearing testimony had already directly impeached Marsha's testimony that Marsha was standing at the bedroom window when Officer Verna was shot and killed. (2PHT 106.) Moreover, petitioner told Payne that he knew people who lived at the Beasley house. If Beasley had testified, the prosecutor could have asked her whether someone in the home had been threatened—a fact which could incriminate petitioner. (Resp. Exh. 709, pp. 799-801; 4RHT 258, 263-264.) By limiting the evidence to Beasley's preliminary hearing testimony, Shinn minimized petitioner's exposure to new testimony by Beasley regarding witness threats and intimidation, while still being able to argue that Beasley impeached Marsha's testimony.

Moreover, Beasley testified at the 2000 retrial about such threats. (2000 RT 2044-2046.) And there she again positively identified petitioner; she had no doubt that the light-skinned front seat passenger (not the dark skinned male in the back seat) was the outside shooter. (2000 RT 2035-2037.)

e. *Robert Thompson and the Composite Drawings*

Petitioner contends that Shinn could have presented evidence that Robert Thompson created three drawings, and also claims one of the three drawing “perfectly described” Cummings as the shooter but went missing. (PO 26.) There is no evidence of a third drawing. Petitioner never presented evidence that Thompson drew three drawings, there is no evidence of three drawings were ever created by Thompson, there was no evidence a third drawing that went missing, nor was there any evidence that a missing drawing described Cummings at trial, much less that the non-existent drawing “perfectly described” Cummings. Thompson did not identify a “third” drawing when he testified before the Grand Jury, at the preliminary hearing or at trial.

On the contrary, Thompson identified a composite drawing (Resp. Exh. 707; 1985 Trial (Cummings) Defense Exh. N; 1985 RT 7639) as a drawing of the outside shooter. The drawing does not include any rendering of clothing; it is a face in profile only. Furthermore, the drawing closely resembles petitioner. At the preliminary hearing, Thompson identified petitioner as the outside shooter, and described the shooter as light skinned—a description matching petitioner and not Cummings. Thompson similarly testified at trial that petitioner was the outside shooter. Petitioner equates three *descriptions* by Thompson (of the driver, the right passenger and the rear seat passenger) with three *drawings*, but there is no evidence there were three drawings.