

# 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

SUPREME COURT  
FILED

SEP 19 2016

Frank A. McGuire Clerk  
Deputy

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

**REPLY BRIEF**

*Respondent's Brief on the Merits*

KAMALA D. HARRIS  
Attorney General of California  
GERALD A. ENGLER  
Chief Assistant Attorney General  
LANCE E. WINTERS  
Senior Assistant Attorney General  
JAMES WILLIAM BILDERBACK II  
Supervising Deputy Attorney General  
DAVID F. GLASSMAN  
Deputy Attorney General  
State Bar No. 115664  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
Telephone: (213) 897-2355  
Fax: (213) 897-6496  
Email: DocketingLAAWT@doj.ca.gov  
David.Glassman@doj.ca.gov  
*Attorneys for Respondent*

DEATH PENALTY

## TABLE OF CONTENTS

	Page
Introduction .....	1
Argument.....	7
I.    Petitioner was not deprived of the adequate assistance of counsel; the Referee’s findings, which are supported by the record, confirm that counsel adequately investigated the case and, even assuming otherwise, any error is harmless in light of the overwhelming evidence of petitioner’s guilt .....	7
A.    Child witnesses.....	24
1.    Irma Rodriguez Esparza .....	24
2.    Ejinio “Choppy” Rodriguez .....	29
3.    Walter Roberts .....	31
4.    Martina Jimenez Ruelas .....	34
B.    Peace officer witnesses .....	37
1.    Deputy William McGinnis .....	38
2.    Sergeant George Arthur .....	39
3.    Deputy Richard Nutt .....	39
C.    Inmate witnesses.....	40
D.    Deborah Cantu.....	42
E.    Shinn’s alleged failure to present expert testimony .....	42
II.   Petitioner failed to establish that Shinn’s unrelated misconduct gave rise to a conflict of interest in petitioner’s case and, even assuming a conflict was shown, petitioner failed to establish prejudice .....	43
Conclusion.....	44

**TABLE OF AUTHORITIES**

**Page**

**CASES**

*In re Gay*  
(1998) 19 Cal.4th 771 .....37

*In re Welch*  
(2015) 61 Cal.4th 489 ..... 22, 23

*People v. Bolin*  
(1998) 18 Cal.4th 297 .....29

*People v. Cummings*  
(1993) 4 Cal.4th 1233 .....*passim*

*People v. Gay*  
(2008) 42 Cal.4th 1195 ..... 6, 16

*People v. Kipp*  
(1998) 18 Cal.4th 349 .....23

*Strickland v. Washington*  
(1984) 466 U.S. 668 ..... 22, 29, 31, 39

**STATUTES**

Evidence Code  
§ 402 .....38

## INTRODUCTION

This brief replies to particular claims raised in petitioner's brief on the merits. No attempt is made to respond to every point raised in petitioner's brief, as these claims have been addressed both in Respondent's Objections and Respondent's Brief. The specific focus of this reply brief is on petitioner's effort to portray the case as involving only unconvincing and equivocal evidence of petitioner's guilt, and to portray trial defense counsel as completely inept. A review of the trial record and the post-trial evidentiary proceedings, along with the Referee's recent findings, makes clear that petitioner's guilt of the murder was established, and that trial counsel adequately represented petitioner at trial.

Throughout his brief, petitioner ignores the "overwhelming evidence" of his guilt as found by this Court in its 1993 affirmation of his conviction for the execution murder of Los Angeles Police Officer Paul Verna. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1324.)<sup>1</sup>

The facts of the crime are depicted by petitioner in the introduction to petitioner's brief, but are viewed there in the light most favorable to petitioner. Viewed in the appropriate light, the facts showed that at about 5:40 p.m. on June 2, 1983, in the 12000 block of Hoyt Street in the Lakeview Terrace area of the San Fernando Valley, a suburb of Los Angeles, Los Angeles Police Department Motorcycle Officer Paul Verna stopped a two-door 1979 Oldsmobile Cutlass coupe being driven by Pamela Cummings for a traffic violation. The car stopped in front of 12124 Hoyt.

---

<sup>1</sup> "The evidence of both guilt of the murder and the motive for it was *overwhelming*. The evidence of motive was not limited to evidence of the robberies of which petitioner was convicted, but included evidence of the joint commission of another robbery, evidence that the car used by defendants was stolen, and evidence of parole violation." (*People v. Cummings, supra*, 4 Cal.4th at p. 1324, emphasis added.)

Pamela's husband, Raynard Cummings, was in the rear seat. He had earlier stolen the car at gunpoint with an accomplice. Petitioner was in the front passenger seat. Pamela had removed the license plates on the car prior to the time it was stopped by Officer Verna, replacing them with plates stolen from another car.

Pamela, who had no driver's license, stepped out of the car and offered other identification to the officer. Officer Verna approached the car and asked the occupants for identification. He was shot six times by the occupants of the car, all shots coming from a single handgun. The first shot, fired from the backseat by Cummings, knocked him backward and he staggered back toward his motorcycle. The coroner later labeled that first shot "Number 6." The remaining shots hit him as he was falling and lay on the street. The car drove off, but quickly returned and stopped by the fallen officer. Petitioner stepped out, picked up Pamela's identification card and the murder weapon, which had been dropped or thrown down at the scene. The officer's gun was also picked up, either at this time or earlier when he fell. The field identification card that Officer Verna had completed when he questioned Pamela was found at the scene.

An investigation led police to petitioner, who was located on June 3, 1983, in San Diego on his way to Arizona with his wife, Cummings and Pamela. Petitioner was lying on the floor behind the front seat of the car and Cummings was lying on the back seat. Officer Verna's gun was found on the floor under petitioner. At approximately the same time, the abandoned Oldsmobile Cutlass was located in Los Angeles. Fingerprints of Cummings, petitioner, and Pamela were identified in that car. In the days before the murder, Cummings had told a companion twice that he was not worried about being stopped by police while in a stolen car because he would not give the officer a chance to ask him any questions. Petitioner was present on one occasion when Cummings made this statement.

Eyewitnesses observed the shooting. Eight testified at trial. Their versions of the events and identification of the participants varied, but they consistently identified petitioner. And the witnesses supported the prosecution theory that Cummings fired the first shot from the rear seat before passing the gun to petitioner, who stepped out of the car and fired the remaining shots into the wounded officer. Both defendants relied on some of the same evidence, as well as forensic evidence, in their efforts to persuade the jury that the other man fired all of the shots. Pamela testified she heard a gunshot, saw the officer grab his shoulder, and simultaneously saw the barrel of a gun point straight across the front seat of the car between the head rests. She could not see who held the gun as the 6'6" tall Cummings, sitting in the back, obstructed her view. Petitioner then got out of the car, approached Officer Verna, and fired three shots into his back as he attempted to return to his motorcycle. The officer turned back toward his motorcycle, walked a few feet, fell to his knees, and then turned and fell on his back. Petitioner stood over the wounded officer, shot him two more times, threw the gun on his body, and picked up the officer's gun. Pamela and petitioner reentered the car through the driver's side door. Petitioner drove up the street, made a U-turn, came back, got out of the driver's door and retrieved the gun.

The case against petitioner also included evidence of admissions and confessions by both petitioner and Cummings which supported the prosecution theory at trial that each defendant had used the same gun to shoot Officer Verna. Pamela testified that on the night of the murder, petitioner and Cummings each reenacted the shooting, bragging how they each had shot the officer. Petitioner extended his arm as if holding a gun and said, "Pow, pow, motherfucker. Take this," and said that he "got him good."

Gilbert Gutierrez testified that in June 1983, while incarcerated on a murder charge, he talked to petitioner about the murder of Officer Verna. On the first occasion, petitioner said that Cummings shot the officer with the first shot coming from the back seat of the car, the second shots after Cummings got out of the car when Cummings shot Officer Verna twice, after which Cummings emptied the gun. Petitioner also told Gutierrez that petitioner fired the first shot while in the car, the second one when he stepped out and shot twice, and then emptied the gun into the officer who was on the ground, saying, "Here's your identification, motherfucker."

Petitioner portrays himself in his most recent brief as a victim, not a perpetrator, wrongly convicted by an unethical prosecutor who "knew" Pamela was lying to protect her husband, but nevertheless maintained a meritless "pass the gun theory." As for the eyewitnesses, petitioner maintains that other witnesses (primarily young children) also witnessed the crime, but "incomprehensibly" were not called or even interviewed by defense counsel. Those potentially exonerating eyewitnesses and other important witnesses were not called by defense counsel, according to petitioner, only because defense counsel was thoroughly incompetent and corrupt, and was merely an "unsavory blowhard who would promise his clients anything just to make a dollar . . . [and was unaware of even] the rudimentary element of the law." (PB 6.)

The reality of this case is not as colorful as petitioner's version. The facts of this case have been repeatedly reexamined in numerous post-trial proceedings, both on appeal and during extensive habeas corpus proceedings. Those inquiries, including all of the efforts to develop new evidence made by numerous counsel for petitioner, have never altered the basic evidentiary record in this case, or undermined the overwhelming strength of the evidence. In petitioner's original appeal, *People v. Cummings* (1993) 4 Cal.4th 1233, this Court examined the trial record and

recognized that the eight independent eyewitnesses testified variously and observed that eyewitness versions of events “varied greatly.”

Acknowledging that differing accounts were presented, the Court nevertheless concluded that “there was overwhelming evidence of [petitioner]’s guilt.” (*People v. Cummings, supra*, 4 Cal.4th at p. 1324.)

That evidence, which has been repeatedly evaluated by this Court during the last three decades, remains intact. With the benefit of 31 years of post-trial inquires into the evidence, the true portrait of the crime remains the same today as it was in 1985, as petitioner continues to debate the value of the same eye witnesses who were identified following the murder, and the eight trial witnesses.

Try as he might, even after three decades of challenges, petitioner cannot erase the clear evidence of his guilt. Nor can he (or does he attempt to) challenge all of the post-offense evidence that confirms his guilt. Specifically, the evidence showed that immediately after the shooting, petitioner retrieved the murder weapon from the street. He then fled with his crime partner Raynard Cummings, and remained at large until he was captured in San Diego. When apprehended, petitioner was lying on the slain officer’s gun. While handcuffed with his hands behind him in a police interview room, petitioner managed to cut his own throat. Petitioner later made statements contemplating suicide. When transported by police, he made statements reflecting his consciousness of guilt. All of this evidence is in addition to the overwhelming identification evidence that confirmed that petitioner was the “outside shooter” who got out of the car and finished off the wounded officer.

If petitioner had not been guilty of the murder, it is inconceivable that he would have behaved as he did in the immediate aftermath of the killing. If, as he insists, he was only the unwitting witness to Cummings’ unexpected crime, he would not have promptly taken the murder weapon



and continued to associate with Cummings. Instead, he would have immediately distanced himself from Cummings. Instead, the pair remained together. They were, as before, partners in crime. These facts, and not the alleged deficiencies of his lawyer, were the reason petitioner was convicted of capital murder.

Over three decades, multiple eyewitnesses continue to conform that petitioner was a shooter in the murder. Gail Beasley identified petitioner at the grand jury proceedings, the preliminary hearing (testimony which was read to the jury in 1985 following a finding that she was unavailable), the 2000 penalty retrial. Marsha Holt identified petitioner at the grand jury proceedings, at the preliminary hearing, at the 1985 trial, and at the 2000 penalty retrial. Robert Thompson identified petitioner at the preliminary hearing, the 1985 trial, and the 2000 penalty retrial, and Pamela Cummings identified petitioner at the 1985 trial and the 2000 penalty retrial. There was no question that petitioner was in the car stopped by Officer Verna. And petitioner re-enacted the shooting in a manner confirming his guilt.<sup>2</sup>

Even after being granted an evidentiary hearing and an opportunity to have his current counsel present his “better” witnesses to the Referee, petitioner fared no better, as the original trial witnesses reiterated their identification of petitioner. And following that extensive inquiry, during which the Referee considered the testimony of 29 witnesses, the Referee overwhelmingly rejected petitioner’s theories and version of events relative to proof of guilt. The Referee’s findings, in response to the five questions

---

<sup>2</sup> Respondent is mindful that this Court granted relief following the 2000 retrial, finding that the “combination of the evidentiary and instructional errors” presented an “intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt.” (*People v. Gay* (2008) 42 Cal.4th 1195, 1226-1227.)

posed by this Court, support the reliability of the original jury's determination of petitioner's guilt.

## ARGUMENT

### I. PETITIONER WAS NOT DEPRIVED OF THE ADEQUATE ASSISTANCE OF COUNSEL; THE REFEREE'S FINDINGS, WHICH ARE SUPPORTED BY THE RECORD, CONFIRM THAT COUNSEL ADEQUATELY INVESTIGATED THE CASE AND, EVEN ASSUMING OTHERWISE, ANY ERROR IS HARMLESS IN LIGHT OF THE OVERWHELMING EVIDENCE OF PETITIONER'S GUILT

Petitioner asserts that his allegations of defense counsel Daye Shinn's ineffectiveness as trial counsel in the guilt phase of the 1985 capital trial were endorsed by the Referee, who—according to petitioner—agreed with petitioner that Shinn performed virtually no meaningful investigation and thereafter performed incompetently throughout petitioner's trial. (PB 25-28.) Petitioner fundamentally misstates the Referee's conclusions.

The Referee explicitly found, following his lengthy analysis of the trial record and the evidence offered at the 2014 hearing, that petitioner's allegations that Shinn had completely disengaged from further guilt phase investigation and rested the defense theory entirely on an allegation that the prosecution evidence was lacking—were “*not supported by the record.*” (RR 25, emphasis added.) To the contrary, the Referee discussed at great length (RR 8-25), the extensive investigative efforts undertaken by Shinn and Shinn's adequate trial defense.

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>3</sup> from different distances, and different vantage points, including two witnesses who allegedly observed the shooting while traveling in cars through an intersection.<sup>4</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, and 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 before the grand jury or at the preliminary hearing. (58RT 6295-6298.)<sup>5</sup> He noted how Beasley had impeached Holt's identification. (58RT 6296.)

---

<sup>3</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>4</sup> Shequita Chamberlain (68RT 7512-7526) and Rose Perez (70RT 7836-7874) were in separate cars travelling quickly through the intersection.

<sup>5</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 issuing 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

(continued...)

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 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>6</sup>

---

(...continued)

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.)

<sup>6</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.)

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>7</sup> In his cross-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

---

<sup>7</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 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.)

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 related that Cummings explained that as some of the witnesses saw petitioner pick up the gun, they mistakenly 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 outside the car during the murder and her devastating testimony.<sup>8</sup> Shinn assailed Pamela Cummings's credibility from the outset of his cross-examination. He reminded her that his first question to her in the robbery trial had been whether she was an honest person—and that her answer had been yes. He then reminded her she had

---

<sup>8</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 toward his motorcycle, walked back a few feet, fell on his knees, and then turned and fell on his back. [Petitioner] stood over Verna, shot him two more times, threw the gun on his body, and picked up the officer's gun. She and [petitioner] reentered the car through the driver's side door. [Petitioner] drove up the street, made a U-turn, and retrieved the gun.

(*People v. Cummings, supra*, 4 Cal.4th at p. 1263, footnotes omitted.)

admitted stealing a license plate, she had admitted knowingly driving around in a stolen car, she had admitted her participation in approximately ten robberies, and she had lied when she falsely accused Milton Cook in the murder case—yet she still maintained she was an honest person. (73RT 8221-8222.) Shinn exposed her obvious bias. (73RT 8223.) He questioned her about her jail visits with Cummings in the year preceding her trial testimony. She admitted that she had made a deal with the prosecutor to testify and had visited her husband Cummings 10 or 12 times at the county jail before her trial testimony. Incredibly, she claimed they had never discussed the case. (73RT 8224.)

Before her deal with the prosecution, Pamela Cummings had also been charged, like Cummings, with all the robberies and the special-circumstance murder of Officer Verna. Shinn marked the grand jury indictment and had her identify it. She understood special-circumstance murder potentially triggered the death penalty. (73RT 8226.) Pamela Cummings denied Raynard Cummings ever got out of the car and shot the officer (73RT 8228), and also denied trying to help either Cummings or petitioner. Although she did not want to see either of them go to the gas chamber (73RT 8231), she admitted she had falsely accused Milton Cook of being the shooter.

Petitioner constantly dismisses Pamela Cummings as if she was not a vital part of the evidence against him. Simply claiming she was biased because she was attempting to protect her husband and therefore could not be a credible witness ignores the compelling and convincing force of her damning testimony against petitioner, not only in the 1985 guilt phase trial, but again in the 2000 penalty retrial. The 2000 penalty retrial judge made specific factual findings endorsing her credibility, including the finding that “Pamela Cummings, to my mind, is an exceptionally credible witness. . . .” (2000 Pen. RT 3441-3442.)

After the jury recommended death in the 2000 penalty retrial, the trial court denied the automatic motion for a new trial, concluding :

I further find that the defendant personally used a firearm to murder Officer Verna. This is beyond a reasonable doubt. I don't even find any lingering doubt. There is absolutely no doubt in this case that [petitioner] was the one that is responsible for firing the last of the six shots. He fired five shots into this officer that was just doing his job, trying to help and protect the community.

And as far as the credibility of witnesses is concerned, I have listened attentively to the evidence, and I will say it again: Pamela Cummings, although an accomplice as a matter of law in the robberies and the murder, was *breathtakingly credible*, and I think the jury could see it. I could see it. If they had not found her to be that credible, we might have had a different verdict in this case.

So I think that the witness' credibility—not just Cummings, but all of the witnesses who identify petitioner as the shooter—they were *highly credible*.

(2000 Pen. RT 4902-4904, emphasis added.)

Finally, taking into consideration of all of the evidence presented at the 2000 penalty retrial, including the identification witnesses against petitioner, the trial court reviewed the aggravating and mitigating circumstances present and stated unequivocally, “my view of the evidence is that [petitioner] was more culpable than Raynard Cummings.” (2000 Pen. RT 4904.)

At the 1985 guilt trial, Shinn used his cross examination of Oscar Martin to demonstrate that Cummings was the sole shooter.<sup>9</sup> Shinn had

---

<sup>9</sup> As this Court stated when summarizing 12-year-old eyewitness Oscar Martin's testimony, his trial and preliminary hearing testimony, and his statements to investigators, “differed in significant respects.” (*People v. Cummings, supra*, 4 Cal.4th at p. 1259.) Those differences were identified and highlighted by Shinn on cross-examination at trial.



Martin admit to the jury that he had previously identified Cummings at both the grand jury and the preliminary hearing and that he had testified to seeing Cummings shoot Officer Verna four times. (67RT 7428.) Martin confirmed that no one else shot the police officer and Martin did not see Cummings pass the gun to anyone else. (67RT 7429.) In response to Shinn's questioning, Martin admitted there was no doubt in his mind that Cummings was the shooter. (67RT 7435.)

Shequita Chamberlain, who saw part of the shooting as she drove through an adjacent intersection in her car, testified about seeing a dark man next to the officer but said it was not Cummings. (68RT 7522.)<sup>10</sup> Shinn attempted to eliminate the possibility that petitioner was the shooter by having Chamberlain testify that the man she saw was darker skinned than petitioner. (68RT 7526.)

Shinn was aware that Marsha Holt (whose trial testimony is summarized above) had identified petitioner at the grand jury, the preliminary hearing and again at trial. During his cross-examination, Shinn challenged her identifications by reviewing her prior inconsistent statements. Shinn cross-examined Beasley (whose testimony is summarized above) at the preliminary hearing and knew Beasley had testified that Holt had not known of the shooting until Beasley told her.

---

<sup>10</sup> Shequita Chamberlain was a passenger in a car which drove by the nearby intersection just after she heard a noise which she did not then recognize as a shot. She looked and saw a tall, dark-skinned Black man and a police officer. She thought they were talking. She saw a car stopped nearby and a police motorcycle. She then heard another shot, saw the officer fall on his back, and, after the car she was in turned and went back, she saw the man get into the car that was stopped next to the officer and drove off. Although Cummings's complexion, as depicted in a photograph, was close to that of the man she saw, Cummings was not that man. The complexion of petitioner, as depicted in a photograph, was lighter than that of the man she saw. (*People v. Cummings, supra*, 4 Cal.4th at p. 1261.)

(74RT 8330.) In response to Shinn's questions during cross-examination, Holt admitted she had seen petitioner's picture in the newspapers. (68RT 7564.) She conceded that her memory was "hazy" after so long and she could no longer remember some of the events. (68RT 7566.) She also conceded that she had been unable to identify petitioner in a live lineup only four days after the murder. (68RT 7568.)<sup>11</sup> Holt also testified that petitioner was not in the car when the female driver made a U-turn and came back and picked him up. (68RT 7572, 7588-7589.) A bush obstructed part of her view from the window. (68RT 7589.)

Shinn impeached Robert Thompson's testimony (whose testimony is summarized above) that petitioner was the outside shooter. Shinn confronted Thompson with his previous failures to identify petitioner at the lineup, before the grand jury, and at the preliminary hearing. Shinn introduced the theory that the police had gotten Thompson to change his mind about the identity of the outside shooter after a "walk through" of the scene with Detective Holder. Thompson admitted he had not identified anyone at the lineup, the grand jury or the preliminary hearing. (68RT 7642-7646.) He admitted his prior testimony at the preliminary hearing that the media had "distorted his mind (68RT 7647), and that he testified at the grand jury that the man who had exited the car with a gun was a "medium dark" and "medium shade black." (68RT 7649-7650.) He described the passenger in the front seat as Caucasian, not a "Negro with a light shade." (68RT 7651.) Thompson did not see anyone pass a gun and did not know if the gun he saw Cummings with was the same gun that petitioner had. (69RT 7738-7739.) Shinn effectively concluded his cross-

---

<sup>11</sup> Significantly, petitioner's appearance drastically changed within hours of the murder both due to his botched suicide attempt (resulting in conspicuous staples on his neck) and the lacerations on his cheek he sustained when struggling with police after his capture.