

SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Kenneth Earl Gay,

On Habeas Corpus.

Case No. S130263

CAPITAL CASE

Los Angeles County Superior Court
Case No. A392702

SUPREME COURT
FILED

SEP 19 2016

Frank A. McGuire Clerk
Deputy

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO REPORT OF THE REFEREE AND BRIEF ON THE MERITS

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DEATH PENALTY

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**PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS
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INTRODUCTION

The overarching issue framed by the parties' briefing is whether this Court can express its confidence in a capital murder conviction that was rendered against a defendant whose attorney: (1) perpetrated fraud on the trial court to secure his appointment in the case; (2) concealed from the court and his client the fact that he was under criminal investigation for embezzlement by the same agency that was prosecuting his client; (3) acted as a second prosecutor by misleading his client to confess to charged and uncharged robberies, which provided the state with its strongest evidence of motive, as well as the *mens rea* necessary to prove capital murder; (4) failed to call *any* affirmatively exculpatory witnesses, including four independent eyewitnesses who identified the co-defendant as the perpetrator of the homicide, and several law enforcement officers to whom the co-defendant confessed his sole responsibility for the murder; (5) was observed by his investigator and co-defendant's counsel to sleep during frequent portions of

the trial; (6) called a homicide detective to give otherwise inadmissible opinion testimony that the client truthfully admitted committing the robberies but lied when he denied committing the homicide; and (6) emphasized the disastrously prejudicial testimony in closing argument. Mr. Gay respectfully submits that the Sixth Amendment jurisprudence of this Court, as well as of the United States Supreme Court, requires the question to be answered in the negative.

Respondent's efforts to salvage the guilt-phase verdict might be understandable, if still inexcusable, as the desire to uphold the conviction of a guilty perpetrator by any means necessary, if there were any reliable evidence of Mr. Gay's culpability. But, there is not. The results of the reference hearing now show what a reasonably competent defense counsel would have made evident to Mr. Gay's jury at the time of trial. There was no logic and no reason to suggest that Raynard Cummings needed to "pass the gun" once he began shooting Officer Verna. Ingress and egress in and out of the car was something familiar to Cummings, and easily achievable by an adult male of even greater size than he. If properly presented, the testimony of no fewer than nine witnesses would have shown that the dark-skinned suspect (Cummings) rather than the light-skinned suspect (Mr. Gay) was the sole shooter: (1) Pamela Cummings's initial statements to Crimestoppers and Deborah Cantu that a dark, African-American "look-alike" of Cummings was the only shooter; (2) Irma Esparza's report to Officer Moreno the day after the offense detailing the actions of the dark-skinned shooter and light-skinned male passenger, who only retrieved the gun after the shooting; (3) Oscar Martin's description of the dark-skinned, African-American male, who emerged from behind the driver's seat and shot the officer 4 times; (4) Walter Roberts's statements to police describing the dark-skinned shooter, who shot the officer once from inside the gray car

and then got out and continued shooting; (5) Shequita Chamberlain's description of the dark-skinned suspect who was standing outside the car, by the falling officer, after she heard the initial shot, and then saw the same dark-skinned suspect get back into the car after all of the shots had been fired; (6) Martina Jimenez's description of the shooter as an ugly, young-looking African American male, who was outside of the car and shooting the officer; (7) Rose Marie Perez, who saw the officer falling on the driver side of the car and the light, "dusky" skinned suspect walking on the passenger side of the car with nothing in his hands, which were at his side; (8) Robert Thompson's initial descriptions of a dark-skinned black male in the rear passenger seat who shot the officer from inside the car and then got out to continue shooting the officer, and of a "White" passenger who remained in the right front passenger seat; (9) Raynard Cummings's multiple confessions to sheriff's deputies and fellow inmates that exculpated Mr. Gay. Minimal investigation also would have led to other exculpatory witnesses, such as Ejinio Rodriguez, who was named in the police reports, and described a black man with dark skin, wearing a dark shirt, as the outside shooter.

By contrast, in order to ensnare Mr. Gay, the prosecution had to rely on substantially weaker witnesses: Pamela Cummings's later, clearly self-serving versions of events; Robert Thompson's subsequent versions of events that were altered after his "walk-through" with the police; Marsha Holt's purported eyewitness testimony, which was impeached by prosecution witness Gail Beasley; and Beasley's and Shannon Roberts's internally inconsistent descriptions of the suspects' actions, which likely transposed the actions of Mr. Gay and Raynard Cummings.

Thus, as demonstrated at the reference hearing, the prosecution discovery alone disclosed voluminous exculpatory evidence that any

competent attorney could and would have used to prove Mr. Gay's innocence, and certainly to raise a reasonable doubt as to his guilt. The record, therefore, demonstrates that the failings and affirmatively prejudicial actions of Mr. Gay's attorney, Daye Shinn, show him to be an outlier even among attorneys whose performance would be deemed ineffective at trial. As set forth in Petitioner's Brief on the Merits and discussed below, neither the interests of justice nor the dignity of this State's criminal justice system would be served by endorsing Shinn's performance as meeting the standard necessary to permit the forfeiture of another individual's life or lifetime liberty.

**I. MR. GAY WAS DENIED EFFECTIVE ASSISTANCE OF
COUNSEL DUE TO DAYE SHINN'S FAILURE TO
INVESTIGATE AND PRESENT AVAILABLE
EVIDENCE THAT MR. GAY DID NOT PARTICIPATE
IN THE SHOOTING OF OFFICER VERNA.**

At the reference hearing, the referee found that Daye Shinn could have, but failed to, investigate and present: (1) four eyewitnesses who described the physical appearance of the outside shooter as consistent with Raynard Cummings; (2) sheriff's deputies and inmate witnesses who heard Cummings admit sole responsibility for the shooting; (3) witnesses who would have impeached the prosecution's case; and (4) expert witnesses who would have given Mr. Gay's jury necessary tools to challenge the prosecution's "pass-the-gun" theory. Rpt. at 25-36. Respondent would have this Court hold that Shinn's failure to investigate these exculpatory leads, pursue impeachment evidence, or consult expert witnesses is unchallengeable because Shinn knew some rudimentary facts about the weaknesses in the prosecution's case. To the contrary, Shinn's knowledge about the additional evidence, which was provided to him in discovery, did

not support a reasonable professional judgment to forego guilt-phase investigation, but rather should have prompted further investigation. See *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (reasonableness of investigation depends on “not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further”); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (failure to present favorable evidence cannot be justified as “tactical decision” where “trial counsel did not fulfill their obligation to conduct a thorough investigation”).

Rather than confront the question of whether Shinn’s failure to investigate and present additional compelling evidence of Mr. Gay’s innocence undermines confidence in the jury’s verdict, respondent advances facts that are not in the record, ignores parts of this record that support Mr. Gay’s claims, and attempts to divert attention away from the complete lack of investigation by discussing selected aspects of Shinn’s substandard performance at trial. Because Shinn’s performance at trial does not absolve his failure to investigate in the first instance, and because Shinn failed to investigate or present whole swaths of additional, compelling evidence to Mr. Gay’s jury, Mr. Gay is entitled to relief.

A. Respondent’s Purported Examples of Shinn’s Effective Performance Are Contradicted by the Factual Record.

Respondent relies on several factual assertions that are contradicted by the record. Although respondent’s *Letter re Notice of Errata*, filed on June 27, 2016, corrected other errors, substantial factual errors remain:

1. Respondent represents that part of Shinn’s approach at trial was to argue, *inter alia*, that Pamela Cummings “admitted to her sister Debbie [sic] Cantu that Cook had not been involved in Officer Verna’s murder,

[and] she also admitted that petitioner had told her to falsely accuse Cook.” Resp. Br. at 10. Shinn, however, never made any such argument or adduced any such evidence at trial. Deborah Cantu was called as a prosecution witness twice during Mr. Gay’s trial about ancillary issues, including testimony about seeing stolen jewelry. *See* 61 RT 6685 *et seq.*; 78 RT 8886 *et seq.* She was never asked about Pamela Cummings’s multiple statements exculpating Mr. Gay. Shinn’s *failure* to present Deborah Cantu’s powerful, exculpatory testimony is a significant part of Mr. Gay’s claims before this Court. *See* Pet. Br.¹ at 34, 73-77 (argument regarding Shinn’s failure to present Cantu).

2. Respondent also highlights Shinn’s closing argument as purported evidence of his effectiveness, and avers:

Shinn reminded the jury that Oscar Martin had said, “I saw Mr. Cummings get out of the car and shoot the policeman.” [citation omitted]. Robert Thompson, **Irma Rodriguez**, Pamela Cummings and **Walter Roberts** told police that the shooter emerged out of the car from the driver’s side. By contrast, Shannon Roberts, Gail Beasley and Marsha Holt told police that he driver exited the passenger side of the car. [citation omitted].

Resp. Br. at 20 (emphasis added).

Shinn never made any such argument synthesizing the witness statements about who exited which door. Neither did Shinn make any argument about Walter Roberts or Irma Esparza (née Rodriguez), nor could

¹ “Pet. Br.” refers to Petitioner’s Brief on the Merits, filed on June 24, 2016. “Pet. Exceptions” refers to Petitioner’s Exceptions to Referee’s Report and Findings of Fact, filed on the same date. “Resp. Br.” refers to Respondent’s Exceptions to Report of the Referee and Brief on the Merits, filed on June 24, 2016. Post-hearing briefing in the Los Angeles Superior Court is cited as “Pet. Post-Hearing Br.” and “Resp. Post-Hearing Br.”

he have done so: Walter Roberts and Irma Esparza never testified in the 1985 trial. Rather, both witnesses testified for the first time in 2014, along with the other witnesses Shinn *should* have presented if he had acted competently since both witnesses saw a dark-skinned black man emerge from the driver side to shoot the officer. *See* Pet. Br. at 31-33, 49, 54-55 (argument regarding Shinn's failure to present this evidence).

3. In discussing eyewitness Martina Jimenez, respondent asserts that "Shinn was aware of this information from police reports, and knew that [Martina Jimenez] had told him she did not want to testify in petitioner's presence." Resp. Br. at 35. The record does not contain any support for respondent's assertion. Martina Jimenez never spoke with any member of Mr. Gay's defense team at the time of trial; indeed, respondent admitted this fact in the Return. *See* Return at 48-49, ¶ 108. Ms. Jimenez was anxious about testifying at the reference hearing and asked undersigned counsel – not Daye Shinn – if she could testify outside the presence of Mr. Gay. 11 EH RT 1372. The referee agreed, and Ms. Jimenez tearfully identified a photograph of Raynard Cummings as the man who shot Officer Verna. 11 EH RT 1382:18-19. Thus, Shinn's *failure* to speak with Ms. Jimenez is a basis of the ineffective assistance of counsel and conflict of interest claims before the Court. *See* Pet. Br. at 31-33, 51-52 (argument regarding Shinn's failure to present Martina Jimenez); *see also* Rpt. at 12:20-21 (Shinn did not request funding for out-of-state travel or interpreters).

4. Respondent bullets the trial witnesses who described the outside shooter as being a mixed race or light-skinned black man (Mr. Gay). Resp. Br. at 60, n.34. Two of these characterizations – attributed to Rosa Martin and Oscar Martin – are sharply contradicted by the trial record. Rosa Martin's observations of seeing a light-skinned man (Mr. Gay) pick up a gun was *not* a description of the outside shooter as respondent suggests, but

an innocuous fact upon which all parties agree: after the car sped away and U-turned, Mr. Gay got out of the car and retrieved a gun. *See also* 91 RT 10408:2-5 (prosecutor conceding that Rosa Martin only saw Mr. Gay retrieve the gun after the car made a U-turn); *see also People v. Gay*, 42 Cal. 4th 1195, 1224 (2008) (Rosa “looked outside only after the shooting had ended”).

Perhaps even more critical, respondent’s characterization of Oscar Martin’s descriptions as “overwhelmingly” pointing to Mr. Gay and away from Raynard Cummings, is a serious mischaracterization of the record. *See Resp. Br.* at 60, n.34. At trial, Oscar Martin identified Raynard Cummings as the sole shooter, which forced the prosecutor to argue to Mr. Gay’s jury in closing argument that Oscar Martin only identified “one man,” Raynard Cummings, as the shooter, because he “never saw Mr. Gay [shoot] . . . he saw a dark black man shoot the officer.” 95 RT 10886-87; *see also People v. Gay*, 42 Cal. 4th at 1224 (this Court recognizing the same).

Oscar Martin’s multiple descriptions of the shooter “overwhelmingly” point to Raynard Cummings, not Mr. Gay. Hours after the shooting, Oscar Martin identified a black male in the backseat who exited the driver side as the shooter. *See Ex. A36* at 1.² A few days later at the line-ups, Oscar

² Respondent erroneously describes Officer Paniagua’s testimony at the 1985 trial as stating that Oscar Martin agreed with Shannon Roberts’s description of the shooter as a “Mexican or light-Black dude.” *Resp. Br.* at 60, n.34. Paniagua (who was called as a *defense* witness for Raynard Cummings) was unequivocal in his testimony, 89 RT 10171:21-25:

the way they said it wasn’t exactly like they were in agreement on the man who shot the officer because they made it sound like – or the way it sounded to me – is that one of the guys who was there at the shooting was a light black dude or Mexican, as he put it.

Martin identified a dark-skinned black male #3 in Line-up #9 as a possible shooter. Ex. A36 at 4. The “erased” identification respondent highlights was Oscar copying off his mother’s witness card at the lineups. As Rosa Martin testified, Oscar copied and then erased his identification of Mr. Gay because he was insistent that the shooter was not light-skinned, like Mr. Gay, but a “really dark” black man who shot the officer. 67 RT 7460-64; *see also People v. Gay*, 42 Cal. 4th at 1210 (Oscar Martin copied off his mother’s card because he did not know what to do). At the grand jury, Oscar Martin affirmatively identified Cummings as the sole shooter, 1 Supp. CT 255, and was consistent at the preliminary hearing when he again identified Cummings, 3 CT 629-32. Respondent’s suggestion that Oscar Martin’s contemporaneous eyewitness statements “overwhelmingly” point to Mr. Gay as the outside shooter is flatly wrong.

5. Respondent cites a litany of ways in which the prosecution eyewitnesses were impeached, which respondent mistakenly attributes to Shinn: “On direct appeal, this Court, repeatedly, albeit impliedly, recognized the degree of Shinn’s efforts to discredit the prosecution’s case.” Resp. Br. at 18, n.13. Respondent then summarizes how the prosecution witnesses were impeached, implying that Shinn’s efforts to discredit the prosecution’s case were evidence of his effectiveness. The examples respondent cites of this impeachment, however, were not the work of Shinn, but Ken Lezin, who represented Mr. Gay in his 2000 retrial. Resp. Br. at 18, n.13 (Daye Shinn never impeached Marsha Holt with her mother, Celester Holt’s testimony; neither did Shinn impeach Holt’s line of sight with a defense expert). Shinn’s *failure* to impeach prosecution witnesses with this evidence is another basis of the claims before this Court. *See* Pet. Br. at 98-111 (argument on Shinn’s failure to impeach prosecution witnesses).

6. Respondent urges this Court to find that Shinn performed effectively because Shinn highlighted how Robert Thompson's initial descriptions of the outside shooter changed between the time of his original statements to the police and his trial testimony. According to respondent: "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." Resp. Br. at 17. Shinn did no such thing. It was counsel for *Raynard Cummings* who uncovered information on cross-examination that Thompson's 180-degree change in testimony (from dark-skinned Cummings to light-skinned Mr. Gay) was a result of a "walk through" with Detective Holder shortly before trial. See 68 RT 7608:8-15. Because Thompson's newly manufactured memory identified Mr. Gay as the outside shooter (and was helpful to Cummings's defense), Cummings's counsel stopped eliciting details about the walk-through and transitioned back to Robert Thompson's testimony at the preliminary hearing. 68 RT 7611 *et. seq.*

Contrary to respondent's representations to this Court that Shinn "introduced" evidence of the walk-through, when it was Shinn's turn to cross-examine Thompson, he inexplicably asked Thompson *no* questions about his walk-through with Detective Holder. See 68 RT 7641-55 (cross-examination); 69 RT 7663-91 (cross-examination); 69 RT 7697-99 (Shinn voir dire); 69 RT 7737-41 (re-cross-examination). Shinn asked no questions about the details of the walk-through, no questions about what pictures the detective showed Thompson at the walk-through, and no details about what precisely happened at the walk-through that led Thompson to change his descriptions of the outside shooter from a dark-skinned black man to the white-skinned Mr. Gay. Therefore, it is Shinn's *failure* to ask Thompson a single question about the walk-through that

supports Mr. Gay's ineffective assistance of counsel and conflict of interest claims. *See* Pet. Br. at 99-103 (argument on Shinn's failure to competently cross-examine Robert Thompson).

B. Respondent Ignores the Referee's Finding of the Exculpatory, Readily Available Evidence that Shinn Unreasonably Failed to Investigate and Present.

Respondent asks this Court to find Daye Shinn performed effectively under the Sixth Amendment without addressing the serious ways in which Shinn failed to actually investigate a guilt-phase defense. Respondent's brief is striking in its almost total failure to address the magnitude of Shinn's errors in this case. Ignoring the referee's findings regarding the availability and ease in presenting the additional evidence detailed in Question 2, respondent regurgitates Shinn's performance at trial to argue Shinn did not perform deficiently. Respondent belabors this point by detailing Shinn's opening and closing arguments and Shinn's cross-examinations of prosecution witnesses at trial.

Mr. Gay does not dispute, and indeed, has never disputed that Shinn may have made attempts – albeit half-hearted ones – at trial to point out the inconsistencies in the prosecution witnesses' statements and highlight those inconsistencies to Mr. Gay's jury. These efforts were limited to Shinn's use of information the prosecution handed to him in discovery. Indeed, Shinn's performance at trial was fully consistent with the observation of Douglas Payne, Shinn's investigator, that Shinn was just “going through the motions.” 3 EH RT 299:25-300:4. Therefore, this performance cannot salvage Shinn's inept failure to conduct a guilt-phase investigation. *See Kimmelman v. Morrison*, 477 U.S. 365, 385-86 (1986) (attempt to “minimize the seriousness of counsel's errors by . . . urg[ing] defense

counsel's vigorous cross-examination, attempts to discredit witnesses, and effort to establish a different version of the facts" does not "lift counsel's performance back into the realm of professional acceptability"). By focusing nearly exclusively on Shinn's arguments at trial, respondent completely ignores Shinn's failure to undertake investigation of the readily exculpatory evidence in this case, which is the basis of Claim Three and the subject of this Court's Order to Show Cause.

Claim Three in Mr. Gay's Petition pled that beyond Shinn's desultory attempts to impeach prosecution witnesses with their prior statements, Shinn did little else. *See, e.g.*, Pet. at 60 (Claim 3). This Court has already found that Mr. Gay's factual allegations that Shinn failed to interview numerous exculpatory eyewitnesses, failed to interview witnesses who heard Cummings's custodial confessions, failed to consult and retain appropriate experts, and failed to interview critical impeachment witnesses established a prima facie case of deficient performance. This Court's first reference question sought precisely this information: what specifically did Shinn do (or not do) leading up to Mr. Gay's trial. Thus, the findings relevant to this question – including who Shinn interviewed and when – aid the determination of whether Shinn performed effectively. *Cf. In re Lucas*, 33 Cal. 4th 682, 699-700 (2004) (similar reference question and findings regarding the witnesses counsel interviewed, the topics of interviews, and nature of pre-trial contacts counsel had with potential witnesses).

The underlying record and the referee's findings confirm the factual allegations in Claim Three: Shinn never interviewed critical, exculpatory eyewitnesses, ignored impeachment evidence, failed to uncover other exculpatory evidence, did not consult any guilt-phase expert witnesses, and failed until mere weeks before trial to authorize a canvass of the crime scene neighborhood, which predictably yielded no guilt-phase witnesses.

See Pet. Br. at 29-42 (detailing Shinn’s deficient performance). Given that the referee found that the sum of Shinn’s “actions” in investigating a guilt-phase defense was limited to reading police reports and pre-trial statements of prosecution witnesses and a last-ditch effort authorizing Payne to canvass the crime scene, the deficient performance prong is easily met here. In addition to the arguments in Mr. Gay’s Opening Brief, which he incorporates here with respect to Shinn’s deficient performance, Pet. Br. at 27-42, Mr. Gay makes two brief points in response to respondent’s arguments.

1. Respondent’s Briefing Does Little to Dispute the Plain Fact that Shinn Conducted No Independent Guilt-Phase Investigation.

The substantial evidence and the referee’s findings make it clear that Shinn failed to do minimal pre-trial investigation beyond reading police reports and pre-trial witness statements and authorizing Payne to canvass the crime scene four weeks before opening statements (and some eighteen months after the shooting). Courts have overwhelmingly held that counsel cannot rely on inconsistencies in the prosecution witnesses’ statements alone; there is an independent duty to investigate the case, including interviewing witnesses with potentially favorable information. *See In re Hardy*, 41 Cal. 4th 977, 1020 (2007) (finding counsel was deficient because counsel, *inter alia*, failed to interview witnesses with favorable information who were reasonably available); *Avila v. Galaza*, 297 F.3d 911, 918-20 (9th Cir. 2002) (holding, in an attempted murder case in which the defendant was accused of shooting at two individuals, that the defense attorney rendered deficient performance because he failed to interview a number of potential eyewitnesses to the shooting); *Harris v. Wood*, 64 F.3d 1432, 1435-36 (9th Cir. 1995) (citing as deficiencies counsel’s failure to retain an

investigator and failure to interview 29 out of 32 people identified in police reports); *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) (a lawyer has a duty to “investigate what information . . . potential eye-witnesses possess[], even if he later decide[s] not to put them on the stand”); *Hoots v. Allsbrook*, 785 F.2d 1214, 1220 (4th Cir. 1986) (“Neglect even to interview available witnesses to a crime simply cannot be ascribed to trial strategy and tactics.”); *see also Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (“[a] lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrate[s] his client’s factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.”).

At the reference hearing, Mr. Gay conclusively proved and the referee found that Daye Shinn failed in this basic duty. No one on the defense team interviewed eyewitnesses Irma Esparza, Martina Jimenez, or Walter Roberts, who all described the shooter to the police in the hours and days after the shooting as a black man consistent with Raynard Cummings. Rpt. at 26-29; *id.* at 36:24-37:2; Pet. Br. at 31-33. No one on the defense team interviewed Ejinio Rodriguez, who described the outside shooter as a black man who had dark skin. Rpt. at 27:18-28:5; *id.* at 37:2-6. No one on the defense team interviewed Deborah Cantu, who heard Pamela Cummings’s earliest accounts of the shooting in which she blamed a man, (Milton Cook) who closely resembled Raynard Cummings, as being the lone shooter. Rpt. at 32:24-33:11; *id.* at 37:19-22. No one on the defense team interviewed Sergeant Deputy William McGinnis, Sergeant George Arthur, James Jennings, Norman Purnell, Jack John Flores, or David Elliott, who all heard and reported Cummings’s six, separate inculpatory admissions that he shot Officer Verna. Rpt. at 29:19-32:14; *id.* at 37:7-15.

Respondent does not mention and cannot dispute evidence that, in a