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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

PETITIONER'S BRIEF ON THE MERITS

Gary D. Sowards (Bar No. 69426)
Jennifer Molayem (Bar No. 269249)
HABEAS CORPUS RESOURCE CENTER
303 Second Street, Suite 400 South
San Francisco, California 94107
Telephone: (415) 348-3800
Facsimile: (415) 348-3873
E-mail: docketing@hrcr.ca.gov

Attorneys for Petitioner Kenneth Earl Gay

DEATH PENALTY

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Attorneys for Petitioner Kenneth Earl Gay



TABLE OF CONTENTS

Table of Authorities	ii
Introduction	1
Procedural History	6
I. Factual Background.	11
A. What Actually Happened at the Scene of the Shooting.....	11
B. The Eyewitness Accounts and Prosecution’s Theory.	13
C. Defense Counsel, Daye Shinn.	20
II. Daye Shinn’s Prejudicially Deficient Performance Deprived Mr. Gay of His Right to the Effective Assistance of Counsel at the Guilt Phase.	24
A. The Evidence and Findings at the Reference Hearing Demonstrate that Daye Shinn Failed to Conduct Any Constitutionally Adequate Guilt-Phase Investigation.	27
B. But For Daye Shinn’s Constitutionally Deficient Performance, There Is a Reasonable Probability that the Result of the Proceeding Would Have Been Different.....	42
C. Shinn’s Unreasonable and Prejudicial Performance Entitles Mr. Gay to Relief.....	111
III. Daye Shinn Was Burdened by Actual Conflicts of Interest That Adversely Affected His Purported Representation for Mr. Gay.	113
A. Conflicts Arising Between Attorney’s and Client’s Interests.....	113
B. Shinn was Burdened by Multiple Conflicts.....	116
Conclusion.....	136
Certificate As To Length	137

TABLE OF AUTHORITIES

Cases

Baylor v. Estelle,
94 F.3d 1321 (9th Cir. 1996) 31

Bourjailey v. United States,
483 U.S. 171 (1987)..... 127

Brady v. Maryland,
373 U.S. 83 (1963)..... 60

Brown v. Myers,
137 F.3d 1154 (1998) 113

Bruton v. United States,
391 U.S. 123 (1968)..... 67

In re Cordero,
46 Cal. 3d 161 (1988) 129

Correll v. Ryan,
539 F.3d 938 (9th Cir. 2008) 42

Cuyler v. Sullivan,
446 U.S. 335 (1980)..... 114, 115, 129

Duncan v. Ornoski,
528 F.3d 1222 (9th Cir. 2008) 31

Elmore v. Osmint,
661 F.3d 783 (4th Cir. 2011) 88

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

Glasser v. United States,
315 U.S. 60 (1942)..... 127

In re Hall,
30 Cal. 3d 408 (1981) 35

<i>Harris By & Through Ramseyer v. Wood</i> , 64 F.3d 1432 (9th Cir. 1995)	33
<i>Harris v. Superior Court</i> , 225 Cal. App. 4th 1129 (2014)	127
<i>Holloway v. Arkansas</i> , 435 U.S. 475 (1978).....	114, 128, 133
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986).....	79
<i>Larsen v. Adams</i> , 718 F. Supp. 2d 1201 (C.D. Cal. 2010).....	33
<i>Lord v. Wood</i> , 184 F.3d 1083 (9th Cir. 1999)	46, 51, 56
<i>Mickens v. Taylor</i> , 535 U.S. 162 (2002).....	114, 115
<i>People v. Almanza</i> , 233 Cal. App. 4th 990 (2015)	127
<i>People v. Andrade</i> , 79 Cal. App. 4th 651 (Cal. Ct. App. 2000).....	98
<i>People v. Aranda</i> , 63 Cal. 2d 518 (1965)	67
<i>People v. Cox</i> , 53 Cal. 3d 618 (1991)	115
<i>People v. Cummings</i> , 4 Cal. 4th 1233 (1993)	<i>passim</i>
<i>People v. Doolin</i> , 45 Cal. 4th 390 (2009)	114, 115, 133
<i>People v. Gay</i> , 42 Cal. 4th 1195 (2008).....	<i>passim</i>
<i>People v. Gonzales</i> , 52 Cal. 4th 254 (2010)	126, 127

<i>People v. Hung Thanh Mai</i> , 57 Cal. 4th 986 (2013).....	114, 127
<i>People v. McDonald</i> , 37 Cal. 3d 351 (1984).....	131
<i>People v. Nation</i> , 26 Cal. 3d 169 (1980).....	130
<i>People v. Pope</i> , 23 Cal. 3d 412 (1979).....	28
<i>People v. Shaw</i> , 35 Cal. 3d 535 (1984).....	31
<i>Reyes-Vejerano v. United States</i> , 276 F.3d 94 (1st Cir. 2002).....	128
<i>Reynoso v. Giurbino</i> , 462 F.3d 1099 (9th Cir. 2006).....	33
<i>Richardson v. Marsh</i> , 481 U.S. 200 (1987).....	67
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005).....	34
<i>Smith v. Cain</i> , 132 S. Ct. 627 (2011).....	45
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	<i>passim</i>
<i>Thomas v. Chappell</i> , 678 F.3d 1086 (9th Cir. 2012).....	42
<i>United States v. Cronic</i> , 466 U.S. 648 (1984).....	114
<i>United States v. Edelmann</i> , 458 F.3d 791 (8th Cir. 2006).....	128
<i>United States v. Ellison</i> , 798 F.2d 1102 (7th Cir. 1986).....	127

<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140 (2006).....	115
<i>United States v. Levy</i> , 25 F.3d 146 (2d Cir. 1994)	128
<i>United States v. Lopesierra-Gutierrez</i> , 708 F.3d 193 (D.C. Cir. 2013).....	128
<i>United States v. McLain</i> , 823 F.2d 1457 (11th Cir. 1987).....	128
<i>United States v. Salinas</i> , 618 F.2d 1092 (5th Cir. 1980).....	128
<i>Wheat v. United States</i> , 486 U.S. 153 (1988).....	115, 128, 132, 133
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003).....	34
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	31, 112, 113
<i>In re Wilson</i> , 3 Cal. 4th 945 (1992).....	6

Constitutional Provisions

U.S. Const. amend. VI.....	<i>passim</i>
----------------------------	---------------

Statutes

Cal. Evid. Code § 240	107
Cal. Evid. Code § 402	4
Cal. Evid. Code § 1221	62
Cal. Evid. Code § 1223	67
Cal. Evid. Code § 1291	106
Cal. Penal Code § 987.9	40

Rules of Court

California Rules of Professional Conduct, Rule 3-310..... 116, 132

Other Authorities

Confronting the New Challenges of Scientific Evidence, 108
Harv. L. Rev. 1481 (1995)..... 90

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INTRODUCTION

On June 2, 1983, Los Angeles Police Department Officer Paul Verna was shot to death after making a traffic stop of a car driven by Pamela Cummings. The other occupants of the car were Pamela's husband, Raynard Cummings, and petitioner, Kenneth Gay.

There is no dispute as to several key facts: the car Pamela Cummings was driving was a two-door 1979 Oldsmobile Cutlass. Mr. Gay was seated in the right front passenger seat and Raynard Cummings was in the rear passenger seat, behind his wife's driver's seat. After the stop, the officer took Pamela to the rear of the car to discuss her lack of a license and photo-identification. The officer returned to the driver's side of the car and asked the two men if they had identification. Raynard Cummings responded by shooting the officer at least one time in the neck. As the stricken officer moved away from the car he was felled by a barrage of five more shots. A single gun was used in the homicide, and the question of Mr. Gay's guilt or innocence turned on whether only Cummings had fired all six shots, or

whether Mr. Gay had fired some as well.

The prosecution proceeded on the theory that Cummings had fired one or two shots at most, attempted unsuccessfully to get out of the car and, when he was unable to do so, “passed the gun” back to Mr. Gay who got out of the car and continued to shoot the officer. The principal distinguishing feature between the two men’s physical appearances was their skin tone. Mr. Gay was a relatively tall, thin mixed-race man whom witnesses described as either “light-skinned” or “White.” Raynard Cummings was taller, also thin, and a dark-complexioned African-American. Mr. Gay was wearing a white or light grey long-sleeve shirt, and Raynard Cummings was wearing a dark-colored burgundy shirt. The dispositive issue at trial, therefore, turned on conflicting eyewitness accounts of whether the “dark-skinned” suspect fired the gun from both inside and outside of the car, or whether the “light-skinned” suspect was the one who got out of the car and continued shooting.

One person who knew the answer was Pamela Cummings. While standing at the rear of the car, she saw her husband – the “dark-skinned” suspect – shoot the officer from the back seat, then ragefully spring from the car and continue shooting before throwing the emptied weapon onto the officer’s prostrate body. She also saw a panic-stricken Mr. Gay get out of his seat and crouch on the street behind the passenger door. Raynard ordered everyone back into the car and told Pamela to drive them from the crime scene. He then told her to make a u-turn and go back, where Mr. Gay complied with Cummings’s instruction to get out of the car and retrieve the gun.

Pamela did not disclose all of these exculpatory facts at Mr. Gay’s trial. Within hours of the crime, she reported what she had seen to the police, as well as to her sister, Deborah Cantu. But, instead of identifying

her husband, Raynard Cummings, as the lone shooter, she named Milton Cook. Pamela knew that Cook, a tall, thin, dark-complexioned African-American man who strongly resembled Raynard, would easily match the description of the shooter given by any neighborhood witnesses who might have seen Raynard outside the car, shooting the officer.

After Pamela's arrest she learned that Milton Cook had an airtight alibi: at the time of the shooting he was home with his broken foot in a cast. He could not have been the nimble, dark-skinned suspect who leapt from the car and shot the officer. Pamela agreed to become a prosecution witness and testify that Mr. Gay was the outside shooter. Even though the prosecutor knew Pamela was lying to exculpate her husband, he relied on her testimony to support the "pass the gun" theory.

Someone else also witnessed what Pamela had seen. Irma Esparza, a neighborhood resident, gave investigating officers a statement that tracked Pamela's initial report to her sister and the police: a dark-skinned suspect shot the officer once in the neck, then got out of the car and shot him repeatedly; the car left the scene and then returned, and a light-skinned suspect got out only to retrieve a gun near the officer's body before the car and suspects drove off again. Ms Esparza thus provided the information that Pamela, and the prosecution, refused to acknowledge – Raynard Cummings was the one and only shooter.

Naturally, given the detailed, exculpatory nature of Ms. Esparza's police statement, which convincingly disproved the "pass the gun" theory, the prosecution did not call her to testify at trial. Inexplicably, Mr. Gay's defense counsel did not even interview her.

Several other neighborhood residents corroborated Ms. Esparza's description of the crime and suspects. Walter Roberts told the police that the shooter outside the car was a "male Negro" with a dark-colored shirt,

and described the physical appearance of a dark-skinned black man who appeared in a line-up conducted days after the shooting as looking “the same” as the shooter. Martina Jimenez told the police and prosecutor that the shooter was a “male black, tall, young looking, thin and ugly.” Ejinio Rodriguez also saw a “black man who had dark skin” shooting the police officer. He then watched as the suspect’s car left the scene, returned and a “man with much lighter skin” who was “not the man who actually shot the officer” got out of the car to retrieve a gun.

Again, somewhat understandably, the prosecution did not call any of these witnesses to testify at Mr. Gay’s trial. Again, incomprehensibly, although Mr. Gay’s defense attorney was aware of each of these witnesses, he did not even interview them.

The record, including the evidence and findings made after the most recent reference hearing ordered by this Court, shows that Mr. Gay’s attorney did not do many things typically done by counsel in capital cases. Viewed most favorably to defense counsel, his pre-trial “investigation” consisted, at most, of reading the discovery provided by the prosecution (or his investigators summaries), reviewing the prosecutor’s file, attending the preliminary hearing and reading the transcript of that and the grand jury proceedings. He did not interview any witnesses, did not follow up on his investigator’s suggestions, and did not consult, let alone retain, any guilt-phase expert witnesses. Even after listening to a Deputy Sheriff testify at an Evidence Code section 402 hearing that Raynard Cummings admitted that he was the one who shot and killed the officer, defense counsel neglected to call him to repeat his testimony to Mr. Gay’s jury. As respondent has conceded, counsel thereby passed up the opportunity to “present the readily available, reliable, credible and persuasive testimony of” a law enforcement witness “who affirmatively exculpated petitioner,

and inculcated co-defendant Cummings.” Return at 41¶ 94.

Compounding the harm of defense counsel’s inaction, he also did things that capital defense attorneys typically do not do. Foremost among these was inducing Mr. Gay to make a tape-recorded confession to charged and uncharged robberies, after assuring him the tape would not be used against him at trial. The prosecution did, indeed, use the taped confession to devastating effect as evidence of Mr. Gay’s purported motive for killing the officer to avoid arrest.

Mr. Gay’s attorney, Daye Shinn was not a typical capital defense counsel. He perpetrated fraud on the trial court to engineer his appointment in Mr. Gay’s case, apparently to obtain the funds he needed to repay money he stole from one set of clients to repay the money he had stolen from another set of clients. Among the things he did not disclose to the trial court when he fraudulently secured his appointment was that he was the target of an embezzlement investigation being conducted by the same District Attorney’s Office that was then prosecuting Mr. Gay. Although Shinn ultimately avoided successful prosecution only because the statute of limitations on his criminal activity expired, he was disbarred for his “misappropriation” (*i.e.*, theft) of hundreds of thousands of dollars of his clients’ money – but only after he had assisted the District Attorney as “a second prosecutor” in getting Mr. Gay convicted and sentenced to death. *In re Gay*, 19 Cal. 4th 771, 794 (1998).

There is abundant evidence that Shinn’s abysmal, prejudicial conduct in the Los Angeles District Attorney’s prosecution of Mr. Gay was an adverse effect of the conflict of interests he had in attempting to curry favor with the prosecutorial agency that also was pursuing his own criminal investigation. His failings also constitute the more conventional, if jaw-dropping species of prejudicially-deficient performance that is cognizable

as ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) and *In re Wilson*, 3 Cal. 4th 945 (1992).

In either or both events, as respondent also has conceded, Shinn's conduct "demonstrated the accuracy of his reputation in the legal community as an unethical, unsavory blowhard who would promise his clients anything just to make a dollar, and for not understanding the rudimentary elements of the law." Return at 28. As set forth below, knowledge of Shinn's disreputable and incompetent failings in this case precludes having any confidence in the verdict convicting Mr. Gay of capital murder and rendering him eligible for the death penalty.

PROCEDURAL HISTORY

First Automatic Appeal: *People v. Cummings*, 4 Cal. 4th 1233 (1993). Based on the record that defense counsel, Daye Shinn, allowed the prosecution to create at trial, this Court concluded on direct appeal that the evidence against Mr. Gay was so "overwhelming" that any errors were harmless. *People v. Cummings*, 4 Cal. 4th 1233, 1295 (1993). That record contained the testimony of only "four eyewitnesses" who collectively made it "clear . . . that Gay as well as Cummings took part in the shooting." *Id.* at 1288 and n.27. The charged and uncharged robberies to which Mr. Gay had confessed at Shinn's instigation provided evidence to prove the prosecution's theory "that fear of arrest for the robberies was a motive for murder," *id.* at 1257; and that such motive was also "circumstantial evidence of premeditation and deliberation, both of which are elements of first degree murder," as well as "an element of the special circumstance of murder." *Id.* at 1284. The Court reversed the robbery convictions for instructional error, and otherwise affirmed the judgment of conviction and sentence of death. *Id.* at 1343.

In dissent, the late Justice Stanley Mosk concluded that the judgment nevertheless was infirm in light of “what trial counsel did not do.” *Id.* In Justice Mosk’s view, even the limited appellate record revealed that “[t]he failings of Gay’s counsel were ‘pervasive and serious,’ and ‘resulted in a breakdown of the adversarial process at trial,’” which mandated “reversal of the judgment even in the absence of a showing of specific prejudice.” *Id.* (citation omitted).

First Habeas Corpus Proceedings: *In re Gay*, 19 Cal. 4th 771 (1998). The evidence and findings adduced in an evidentiary hearing ordered by this Court limited to penalty-phase issues began to illuminate the extent of Shinn’s incompetence and corruption. As a result of these proceedings, the Court learned that Shinn had “defrauded both the court and his client” and “engineered both his initial retention and subsequent appointment” to represent Mr. Gay “by fraudulent means.” *In re Gay*, 19 Cal. 4th at 780, 795. After securing his appointment, “Shinn himself did no investigation of penalty phase evidence and the investigation undertaken by Shinn’s investigator, who was given inadequate guidance, failed to discover” significant mitigation. *Id.* at 781. Following a familiar pattern, “[n]either Shinn nor his investigator ever interviewed [Mr. Gay’s] parents,” and Mr. Gay’s “mother did not meet Shinn until the day she testified at the penalty phase of the trial.” *Id.* at 782.

The evidence also confirmed that Shinn misled Mr. Gay to confess to charged and uncharged robberies by telling him “that it would be in his own best interests to cooperate with the prosecution,” and “that the statement could not be used against him if the prosecutors decided not to use him as a witness.” *Id.* at 791. The Attorney General conceded that “the evidence established that neither Shinn nor petitioner had any indication from the prosecutor or investigator that any agreement existed.”

Id. at 792.

Respondent's counsel also acknowledged that Shinn's action constituted "incompetent performance." *Id.* at 792. The Court found that the prejudice of such incompetence "cannot be understated." *Id.* at 793. Shinn "acted as a second prosecutor," and enabled the prosecution to present a "devastating" portrayal of Mr. Gay "as an admitted serial robber who killed a police officer to avoid arrest and prosecution for the robberies." *Id.* at 793-94.

The factors that may have led Shinn effectively to join forces with the State were not clear. The Court noted that Shinn's purported representation of Mr. Gay was burdened by two undisclosed potential conflicts of interest: (1) he had fraudulently secured his appointment through a capping operation that required him to use the services of only an inept mental health professional; and (2) Shinn was being investigated for embezzlement of client funds by the Los Angeles District Attorney's Office at the same time that office was prosecuting Mr. Gay for capital murder. *Id.* at 783, 828.

On the record before it, however, the Court could not discern whether or to what extent either conflict led to Shinn's deficient performance and, therefore, concluded that the *per se* prejudice arising from an actual conflict of interest was not applicable. *Id.* at 828. The existence of the conflicts, however, were among the factors undermining the Court's confidence in the penalty verdict, and resulting in reversal of the death judgment.

Second Automatic Appeal: *People v. Gay*, 42 Cal. 4th 1195 (2008). Following the remand ordered in *In re Gay*, 19 Cal. 4th at 830, Mr. Gay was again sentenced to death after a penalty retrial. On the automatic appeal, this Court determined that the trial court had erroneously proceeded on the theory that Mr. Gay could not present evidence raising any lingering

doubt as to his guilt for the capital murder. *See People v. Gay*, 42 Cal. 4th 1195, 1228 (2008). As a result, the trial court limited eyewitness testimony to only those witnesses who had been selected by the prosecution to testify at Mr. Gay's first trial. The trial court also excluded the admissions of guilt that Cummings made to jailers and inmate witnesses, and precluded expert testimony proffered by the defense to explain discrepancies in eyewitness accounts of the events. *Id.* at 1214-16.

Because the defense made detailed proffers of the excluded evidence, this Court was able to determine its relevance and likely impact as mitigating evidence of lingering doubt. The Court was thereby apprised that there had been four additional eyewitnesses "who were also present" at the crime scene "and who would have described the shooter's complexion as inconsistent with defendant's but consistent with Cummings's." *Id.* at 1224. In particular, the Court noted that eyewitness Irma Esparza "would have testified that the man with Raynard's complexion shot the officer and that a light-skinned male subsequently retrieved the gun." *Id.* The likely "potency" of such testimony was clear "given the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing descriptions given by the prosecution eyewitnesses." *Id.* at 1226.

The Court concluded that if the jurors had been permitted to hear the eyewitness testimony excluding Mr. Gay as the shooter, and explaining his actions in retrieving the gun, and to consider such testimony in the context of Cummings's statements that he was the sole shooter, there was a reasonable possibility they would not have voted for death. *Id.* at 1227. The judgment of death was again reversed and remanded. *Id.* at 1228.

Current Habeas Corpus Proceedings. Following the Court's decision in *People v. Gay*, 42 Cal. 4th 1195 (2008), it stayed penalty retrial

proceedings in the Los Angeles Superior Court pending resolution of Mr. Gay's companion petition for writ of habeas corpus challenging his underlying conviction of capital murder. *See Gay (Kenneth Earl) on Habeas Corpus*, California Supreme Court Case No. S130263, Amended Order to Show Cause, filed August 4, 2008.

The Court ordered respondent to show cause why Mr. Gay was not entitled to relief on the ground that trial counsel's conflict of interest prejudicially affected his representation at the guilt phase, and on the ground that trial counsel's failure to adequately investigate and present evidence tending to show that Mr. Gay did not participate in the murder of Officer Verna constituted ineffective assistance of counsel. *Id.* Following the parties' filing of the Return and Traverse, the Court ordered an evidentiary hearing at which the Honorable Lance Ito was requested to take evidence and make findings in answer to five questions:

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?

2. What additional evidence supporting that 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?

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?

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.

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

Beginning on September 15, 2014, the referee conducted a hearing at which the parties presented 29 witnesses. The referee thereafter requested post-hearing briefing and heard oral argument on August 17-19, 2015. On November 16, 2015, the referee issued the Referee's Report and Findings of Fact.

As discussed below, Mr. Gay presented, *inter alia*, all four of the additional, exculpatory eyewitnesses discussed by this Court in *People v. Gay*, 42 Cal. 4th 1195 (2008), each of whom testified consistently with the proffers summarized in this Court's opinion. *Id.* at 1224.

I. FACTUAL BACKGROUND.

A. What Actually Happened at the Scene of the Shooting.

At different times and in different settings, the three participants in the events of June 2, 1983 – Pamela Cummings, Raynard Cummings and Kenneth Gay – gave remarkably similar accounts of what actually happened, with all three confirming that Raynard Cummings was the only shooter and that Mr. Gay did not participate in committing the homicide.¹

¹ Before Pamela became a prosecution witness, she described the events to the police and her sister, Deborah Cantu, but substituted a man named Milton Cook in the role of her husband Raynard as the dark-skinned, lone shooter. In all other respects Pamela's description accurately reflected the events. Raynard Cummings confirmed Pamela's version of events, and admitted his role as the lone shooter, in multiple statements to other inmates in the Los Angeles County Jail. Mr. Gay recounted the events, and his innocence, during a statement to the prosecutor, which Daye Shinn misled

According to all three, Officer Verna stopped their car and then directed Pamela to accompany him to the rear of the vehicle when she was unable to produce a valid driver's license. Pamela Cummings, who was 5' 4" tall, drove with the seat in an extreme forward position. Once she got out of the car, the empty driver's seat would have enabled Raynard Cummings easily to exit the back seat of the two-door car merely by pushing the back of the driver's seat forward.²

While Pamela Cummings remained standing at the rear of the car, Officer Verna returned to the driver's side and asked Raynard Cummings and Mr. Gay if they had identification. Raynard Cummings, who was hiding a .38 caliber pistol between his legs, said words to the effect "here's your I.D.," and began shooting the officer. Raynard continued shooting as he got out of the car. Officer Verna had managed to turn and take steps in the direction of his motorcycle before one of Raynard's shots severed his spine, causing him to drop to the pavement.

The murderous assault terrified Mr. Gay. At the sound of the initial shots he scrambled out of his seat and took refuge on the street behind the passenger-side door. After shooting the officer, Raynard angrily ordered everyone back in the car so they could flee the scene. As they pulled away Raynard Cummings realized he left the murder weapon – with his fingerprints – next to Officer Verna's body. He told Pamela to make a u-turn and ordered Mr. Gay to get out and retrieve the gun. Mr. Gay complied, walked over to the fallen officer, picked up the gun and returned to the car.

him to believe might result in his being used as a prosecution witness. Rpt. at 5-6.

² The movement was particularly easy because "there was no latch or locking mechanism obstructing the free movement of the back of the driver's seat." *People v. Gay*, 42 Cal. 4th at 1207.

B. The Eyewitness Accounts and Prosecution's Theory.

Consistent with the three principals' description of events, any eyewitnesses who accurately observed the shooting and its aftermath would have seen four individuals in different positions at different times: a uniformed police officer, a white adult female, a dark-skinned adult male and a light-skinned or "white" adult male. When the first shot was fired, the officer was at the driver's side of the car, then proceeded to turn and attempt to walk in the direction of the rear of the car. The adult female was standing outside of the car. The dark-skinned adult male was in the back seat of the two-door car, on the driver's side, and then got out through the driver's door as he continued to shoot at the officer. The light-skinned adult male was in the right-front passenger seat and got out of the passenger side of the car, where he remained during the shooting.

After the shooting, the dark-skinned adult male threw the gun at the officer and then he, the adult female and the light-skinned adult male got back into the car and drove away. When the car returned, the light-skinned adult male got out of the car and picked up the gun next to the slain officer before getting back into the car.

The difficulty for the prosecution was that any witness reporting this version of events would tend to prove the guilt of only Raynard Cummings as being the shooter. Lacking evidence of a conspiracy or that Mr. Gay aided and abetted Cummings, the prosecution needed to show that both men had actually shot the officer – a necessity that gave rise to the "pass the gun" theory.

1. Prosecution's Selected Eyewitnesses at Trial.

At the guilt phase trial in 1985, the prosecutor presented seven eyewitnesses, four of whom identified Mr. Gay as the shooter, but none of

whom was without vulnerability from the prosecution's perspective.

Oscar Martin. Martin, a twelve-year-old neighborhood resident saw the shooting from his living room window and consistently identified *only* Raynard Cummings as the person who shot the officer and then emerged from the backseat of the car to continue shooting. The prosecutor argued that Martin had seen only the first part of the shooting, when Cummings *attempted* to get out of the car, but missed seeing Mr. Gay because Martin had run to report the shooting to his mother.

Rose Perez. Perez was riding in a passing car through the intersection of Hoyt Street and Gladstone Avenue when she looked up Hoyt Street and observed Mr. Gay on the passenger side walking around the back of a car while the officer was falling on the driver side of the car, but did not see anything in Mr. Gay's hands.

Shequita Chamberlain. Chamberlain was also a passenger in a car that drove through the same intersection. She heard a shot, saw a dark-skinned black man near a police officer on the driver side of the car, and saw the officer fall. Then the dark-skinned man got into a car and drove off. She did not identify Cummings because she thought the shooter may have been more dark-skinned than Cummings, but admitted his complexion was close to that of the person she saw. Mr. Gay's complexion was lighter than the suspect she saw.

Robert Thompson. Thompson was working on a nearby house when he heard a shot and saw the medium-black complexioned arm of the rear seat passenger holding a gun. After hiding behind a bush he saw Mr. Gay get out of the car via the driver door and approach the fallen officer with a smoking gun. His testimony was diametrically opposite to his statement on the night of the offense when he told police that only the dark-skinned passenger in the rear seat shot the officer, and got out of the car to continue

shooting.

Shannon Roberts. Roberts, an eleven-year-old neighborhood resident identified Mr. Gay as the shooter, but identified Cummings as the person who picked up the gun after the suspects returned to the scene.

Gail Beasley. Beasley was a neighborhood resident who saw the traffic stop from inside her home. She heard two shots and looked up to see a tall, thin light-skinned black man in a burgundy shirt shoot the officer four times. She reported to the police that while the suspect was shooting the officer, she saw a black man in a white shirt get out of the car and then get back in the car. Beasley's description of the two men's clothing transposed the clothes that were worn by Cummings and Mr. Gay at the scene.

Marsha Holt. Holt was in the same house as Beasley at the time of the shooting and testified to seeing Mr. Gay shoot the officer and then pick up his gun and get into the suspect vehicle. Gail Beasley, however, testified that Holt was unaware there had been any shooting until Beasley informed her of it. Holt also testified that she did not see Mr. Gay get into the car after the shooting until after the car had left the scene and then returned.

Thus, only Robert Thompson's trial testimony unequivocally supported the prosecution's pass the gun theory and conflicted with the exculpatory version of events described by Pamela and Raynard Cummings, and Mr. Gay. Oscar Martin and Shequita Chamberlain actually identified the dark-skinned suspect as being the shooter; and Martin explicitly identified Cummings. Rose Perez's brief observations were consistent with Mr. Gay being on the opposite side of the car from the officer with nothing (including a gun) in his hands. Shannon Roberts and Gail Beasley identified Mr. Gay as the shooter, but evidently transposed the roles of the two men at the scene: Beasley had them wearing each other's