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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

Case No. S130263

Kenneth Earl Gay,

CAPITAL CASE

On Habeas Corpus.

Los Angeles County Superior Court
Case No. A392702

PETITIONER'S EXCEPTIONS TO REFEREE'S REPORT AND FINDINGS OF FACT

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DEATH PENALTY

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INTRODUCTION

On December 31, 2002, this Court appointed the Habeas Corpus Resource Center to represent Petitioner, Kenneth Earl Gay, in capital habeas corpus proceedings.

On December 28, 2004, Mr. Gay, through counsel, filed a petition for writ of habeas corpus (“Petition”) presenting guilt-phase claims challenging his conviction of capital murder.

The Court ordered informal briefing on the Petition, on December 29, 2004. Informal briefing was concluded approximately two and one-half months later, with the filing of Mr. Gay’s Reply to the Attorney General’s Informal Response on March 14, 2005.

On August 4, 2008, the Court ordered the Director of the Department of Corrections and Rehabilitation to show cause “why petitioner is not entitled to relief on the ground of trial counsel’s conflict of interest that prejudicially affected his representation at the guilt phase of petitioner’s trial, and on the ground of trial counsel’s failure to adequately investigate and

present evidence at the guilt phase tending to show that petitioner did not participate in the murder of Officer Verna.” *Gay (Kenneth Earl) on Habeas Corpus*, California Supreme Court Case No. S130263, Amended Order to Show Cause, filed August 4, 2008.

On January 23, 2009, Respondent filed a Return and exhibits.

On October 19, 2010, Petitioner filed his Amended Traverse.

On May 18, 2011, the Court filed its Reference Order, directing the selection of a judge of the Los Angeles Superior Court to take evidence and make findings regarding several questions. Questions 1-3 addressed Claim Three in the Petition, which alleged trial counsel’s failure to investigate and present evidence that Petitioner did not participate in the commission of the murder:

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?

Questions 4 and 5 addressed the conflict of interest arising from the embezzlement investigation:

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?

On June 26, 2013, the Court appointed the Honorable Lance Ito, Judge of the Los Angeles County Superior Court, to serve as the Court's referee in the proceedings.

Beginning on September 15, 2014, Judge Ito 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.

In reviewing a referee's findings of fact, this Court generally defers to factual findings that are supported by "substantial evidence." *In re Bacigalupo*, 55 Cal. 4th 312, 333 (2012). If the factual findings are not supported by substantial evidence, this Court retains the final decision-making authority and can decide the referee's findings are not binding on the Court. *In re Hardy*, 41 Cal. 4th 977, 993 (2007).

Although the Court affords deference to factual findings that are supported by substantial evidence, the Court will undertake an independent review of prior testimony as well as mixed questions of fact and law. *In re Hardy*, 41 Cal. 4th at 993. Thus, as relevant to the claims here, the Court ultimately assess *de novo* questions of prejudice, ineffective assistance of counsel and the existence of potential and actual conflicts of interest within the meaning of the Sixth Amendment. *In re Ross*, 10 Cal. 4th 184, 201 (1995).

On the whole, the referee's findings confirm the existence of the facts necessary to support a claim that Daye Shinn performed deficiently by failing to discover and present a wealth of exculpatory and impeaching evidence that Mr. Gay did not participate in the murder of Officer Verna. While the referee

did not find the existence of a conflict of interest, he did find or acknowledge the factual predicates upon which this Court may base its independent determination that such conflicts adversely affected trial counsel's representation of Mr. Gay.

EXCEPTIONS TO THE REFEREE'S FINDINGS

A. ***Question 1, Part 1. What Actions Did Petitioner's Trial Counsel, Daye Shinn, Take to Investigate a Defense at the Guilt Phase of Petitioner's Capital Trial That Petitioner Did Not Participate In the Murder of Officer Verna?***

In response to this Court's Question 1, Part 1, the referee made the following specific findings:

Shinn's investigation consisted of reading and evaluating the materials generated by the police investigation and hiring an experienced defense investigator. Rpt. at 9:3-5 (footnote omitted). Shinn represented petitioner at the preliminary hearing which was conducted over an 8-day period in August of 1983 and gave Shinn the opportunity to personally question and evaluate many of the witnesses who would be called during the 1985 trial. *Id.* at 9:5-9. Shinn read the reports generated by the police investigation which included the incident report, witness statements, crime scene reports, reports of the surveillance of Robin Gay and Pamela Cummings, the arrest reports, medical treatment reports for Kenneth Gay, the autopsy report from the Los Angeles County Medical Examiner, reports from the live lineups, investigators' chronologies, etc. *Id.* at 9:21-10:4. The trial prosecutor, John Watson, noted Shinn had examined the District Attorney case file four times. *Id.* at 10:3-4. Shinn appears to have read the transcripts from the grand jury proceedings . . . *Id.* at 10:23-24. The only witness interview listed by Shinn is 3 hours for Robin

Gay. *Id.* at 13:11-12.

Shinn retained the services of an experienced investigator: Douglas Payne with whom he had worked on previous matters including capital cases. Although the Los Angeles Superior Court's records indicate the appointment of Payne on 18 July 1984, Payne's billing records [Petition Exhibit 120] indicate he began working on the case 1 May 1984. Payne's testimony at the 1996 reference hearing indicates Payne's involvement as early as August 1983, around the time of the preliminary hearing. [RT 240]. *Id.* at 11:18-24.

Payne testified Shinn directed him to obtain discovery materials, read and review those materials, create defense investigation books, index all the police reports, read and review the police reports, obtain and evaluate any tape recordings, and to present his findings to Shinn. [RT 198] At the first reference hearing Payne testified his duties were: ". . . *To formulate a witness list, to locate those witnesses, interview those witnesses where possible, to meet and confer with the client, basically what Shinn and I called client control.*" [People's Exhibit 709 at page 796] Payne canvassed the crime scene neighborhood for three days before the start of trial to locate any additional witnesses. He created a crime scene diagram indicating the location of witnesses. He analyzed the crime scene and the statement of Rose Marie Perez, and based upon his experience as a police traffic accident investigator, calculated the time period Perez could have observed the incident up Hoyt Street. Payne believed the reliability of the eyewitnesses was a significant issue [RT 198] but that the strength of the prosecution's case made a penalty phase likely. [RT 296] Payne testified the decision on what additional investigation was needed was a collective decision by Shinn, petitioner and Payne, and Payne would follow up as requested. [RT 199] Payne noted his main focus was field investigation and client control. [RT 202] Shinn placed no limits on Payne's efforts, although Shinn did not request the court's permission for out of state travel or spoken language interpreters. *Id.* at 12:1-21. Payne noted Shinn conducted witness interviews at

the courthouse, outside the courtroom, in the parking lot or cafeteria for the convenience of the witnesses who were mostly located in the North San Fernando Valley. *Id.* at 13:1-4.

Mr. Gay takes the following exceptions to the foregoing findings regarding Question 1, Part 1.

1. Mr. Gay takes exception to the finding that Douglas Payne's involvement in Mr. Gay's case began in August of 1983.

The referee finds that although Payne was appointed by the Los Angeles Superior Court on July 18, 1984, and his billing records indicate he had begun work on the case on May 1, 1984, his "involvement" in Mr. Gay's case began as early as August of 1983, which was around the time of the preliminary hearing. Rpt. at 11:18-24; 6 CT 1543 (Appointment Order). To the extent the finding suggests any *substantive* involvement in Mr. Gay's case at that early date or prior to May 1984, Mr. Gay takes exception.

The best and most direct evidence of when the investigation began is Payne's appointment order, his billing records, and Payne's own testimony about his pre-appointment involvement in the case. Payne testified that he opened the file with an initial contact card in 1983, but did not have and did not recall any billing until May 1984. 3 EH RT 281:12-17. Prior to May 1984, his only "involvement" in the case was simply to sit with Shinn at the preliminary hearing and, perhaps, assist with taking notes. 3 EH RT 281:12-283:4 ("the only recollection I would have [as to 1983] is I may have [sat] through the preliminary hearing with Mr. Shinn, assisted in taking notes"). Consistent with Payne's recollection, the referee found that Payne did not begin billing until May 1984, after which Payne's first detailed accounting submitted to the trial court indicated he conducted his "Initial File sort/review" in early May 1984. Rpt. at 12:21; Ex. A120 at 6.

Mr. Gay respectfully submits that this Court should adopt the referee's

finding that Payne did not begin investigating Mr. Gay's case until May 1984, and further find that any prior "involvement" in 1983 was limited to Payne observing the preliminary hearing with Shinn at counsel table.

2. Mr. Gay takes exception to the finding that Douglas Payne and/or Daye Shinn formulated a witness list and interviewed those witnesses with respect to guilt-phase investigation.

No evidence exists to support the referee's finding that Payne "formulate[d] a witness list" of *guilt*-phase witnesses and "interview[ed] those witnesses where possible." Rpt. at 12:4-8. The only evidence cited by the referee for this indicated finding was Payne's testimony at the "*first* reference hearing" in 1998, which was limited to his *penalty*-phase preparation. *Id.* at 12:4-5 (emphasis added). In the 1998 habeas corpus proceedings, this Court found that Payne formulated a penalty phase witness list consisting of Mr. Gay's family members and friends. *In re Gay*, 19 Cal. 4th 771, 788, 810 (1998) (Payne "formulate[d] a witness list" and "spoke to every witness that he could find based on information [Mr. Gay] and other family members provided"). There is no evidence to support the suggestion that Payne also formulated a similar *guilt*-phase "witness list" and interviewed those witnesses. The referee does not cite any evidence for such a finding other than Payne's testimony limited to his *penalty*-phase work.

Similarly, the referee's finding that "Payne noted Shinn conducted witness interviews at the courthouse, outside the courtroom, in the parking lot or cafeteria," is also based on Payne's 1998 testimony about his *penalty*-phase work. Rpt. at 13:1-4; *see also* 3 EH RT 253:12-26 (asking Payne "Did you testify [in 1998] . . . 'they would then be talked to by Mr. Shinn outside the courtroom in the hallway, wherever we were at over the lunch break, in the parking lot . . . ?'"). Because the only evidence the referee relies on to support this finding is based on Payne's 1998 testimony, it is no surprise that

the referee's language here echoes this Court's finding in 1998. *Compare* Rpt. at 13:1-4 ("Shinn conducted witness interviews at the courthouse, outside the courtroom, in the parking lot or cafeteria") *with In re Gay*, 19 Cal. 4th at 788 ("Payne testified that Shinn had spoken to *penalty phase witnesses* before their appearance . . . outside the courtroom . . . in the hallway, at his office, and at places where Payne could put them in touch.") (emphasis added).

Accordingly, there is no evidence to support a finding that Payne formulated a guilt-phase "witness list" and interviewed those witnesses, because the only evidence the referee cites to support this finding is Payne's testimony describing his penalty-phase work.

Mr. Gay respectfully submits that this Court should independently find that there is no evidence of a list of guilt-phase homicide witnesses who were interviewed by Payne or Shinn beyond the prosecution witnesses Shinn recalled in the defense case-in-chief. Payne testified that he and/or Shinn spoke only to "each and every witness *that was to be used*" in court. 3 EH RT 253:16-23 (emphasis added); *see also In re Gay*, 19 Cal. 4th at 788 (Shinn had no recollection of "interviewing any of the potential defense or prosecution witnesses other than those who were put on the stand").¹ At the guilt phase, Shinn "used" the testimony of only seven witnesses in the defense case-in-chief, five of whom were prosecution witnesses who were

¹ Shinn's own billing records support a finding that he did not interview any guilt-phase witnesses prior to trial. Shinn's pre-trial compensation requests filed pursuant to California Penal Code sections 987.2 and 987.9 reveal that Shinn did not interview a single lay witness nor consult a single expert witness. 4 CT 1122-23. As the referee found, the only guilt-phase witness Shinn interviewed was Robin Gay, which took place in jail on March 6, 1985 after the trial had already begun. Rpt. at 13:11-12; *see also* 7 CT 1875 (Shinn billing record).

recalled to essentially recite their same testimony that was mostly harmful to Mr. Gay. *See* 85 RT 9705-86 RT 9827. The remaining two witnesses were Billy Sims (who testified about a robbery) and investigator Douglas Payne himself. Beyond these seven witnesses, there was no other guilt-phase witness list or witness preparation.

Similarly, the record reflects that at no time before or during the 1985 trial did anyone from Mr. Gay's defense speak to any of the critical percipient witnesses who testified at the evidentiary hearing. *See, e.g.*, 13 EH RT 1733 (Irma Rodriguez), 9 EH RT 1274 (Walter Roberts); 11 EH RT 1381, Ex. A27 at 2 (Martina Jimenez); 10 EH RT 1336:22-28 (Ejini Rodriguez).

3. Mr. Gay takes exception to the finding that Daye Shinn placed no limits on Douglas Payne's Efforts.

Mr. Gay respectfully excepts to the referee's categorical finding that "Shinn placed no limits on Payne's efforts." Rpt. at 12:19.

First, Payne's testimony on this point explained that Shinn obtained funds from the trial court to compensate Payne for *his* services, but did not authorize or seek other ancillary expenses for out-of-state and foreign travel, or for the expert services Payne recommended. Thus, in response to the prosecution's narrowly-focused questions, Payne testified at the evidentiary hearing that Shinn repeatedly applied to the trial court for funds for *Payne's* compensation:

Q. Now, is it correct that whenever you exhausted the funds that had been ordered by the court *for you*, you made an application for new funds for additional hours?

A. That's correct.

Q. And is it correct that at no time was the question of funds or money available to pay for *your* activities, it was never an issue in the case; is that right?

A. No, sir, it was never an issue.

Q. Whatever you felt *you needed* that you told Mr. Shinn needed to be done, he went to court, filed the paperwork, *you got a grant* for more money until it ran out each time?

A. Yes, sir.

3 EH RT 244:24-245:9 (emphasis added).

Payne testified on re-direct, however, that in contrast to the absence of restrictions “on funds for [his] services,” if he “needed to take a trip, it had to be authorized,” and “[i]f there was going to be funds for an expert, it had to be authorized.” 3 EH RT 289:5-8, 20-22. There was, however, no authorization for out-of-state or foreign travel; nor any authorization to consult with the forensics laboratory or eyewitness expert whom Payne recommended to Shinn to investigate the “significant” issue of the reliability of eyewitness testimony. 3 EH RT 198:22-199:2; 200:24-201:8; 207:24-208:8.

Second, for similar reasons, the referee’s finding that “Shinn placed no limits on Payne’s efforts, *although Shinn did not request the court’s permission for out of state travel or spoken language interpreters,*” is internally inconsistent. Rpt. at 12:19-21 (emphasis added). As a practical matter, the failure to request out-of-state or foreign travel and interpreter services imposed a significant restriction on the ability to conduct an investigation that would have included interviewing Elizabeth Martina Jimenez Ruelas, a Spanish-speaking witness who had moved to Northern Baja California, Mexico shortly after observing the offense. As acknowledged by the referee, Ms. Jimenez’s “initial descriptions given to the police more strongly point towards Raynard Cummings than petitioner” as being the shooter. Rpt. at 26. In turn, her testimony at the evidentiary hearing confirmed her description of the shooter as “a black man” with “dark” skin. 11 EH RT 1379:22-28; *see also People v. Gay*, 42 Cal. 4th 1195, 1224 (2008) (Martina Ruelas (née Jimenez) was one of the eyewitnesses who “would have

described the shooter's complexion as inconsistent with [petitioner's] but consistent with Raynard Cummings's").

Third, Shinn also effectively placed limits on Payne's efforts by failing to follow up the avenues of investigation Payne suggested based on his review of the discovery, and consultation with Mr. Gay and Shinn. 3 EH RT 199:3-13. Payne testified that Shinn did "not necessarily" follow up on suggested investigation or tasks, and in fact Payne had no idea if Shinn "ever actually followed through." 3 EH RT 199:3-6, 200:16-23.

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

In response to this Court's Questions 1, Part 2, the referee made the following specific findings:

Shinn presented a multi-pronged defense: 1. The witnesses who have identified petitioner as the shooter have made inconsistent statements which call into question the credibility and weight of their testimony. Rpt. at 13:18-21. 2. Percipient witnesses have identified co-defendant Raynard Cummings as the person outside the vehicle who shot Officer Verna or as the person who resembles the shooter more than petitioner. *Id.* at 14:16-18. 3. There are no witnesses who observed the murder weapon pass from Raynard Cummings to petitioner, thereby undermining the prosecution's two shooter theory. *Id.* at 15:2-4. 4. Pamela Cummings is a liar who is lying to protect herself and her husband Raynard Cummings. *Id.* at 15:19-20. 5. Raynard Cummings had on several occasions claimed full responsibility for firing all six shots at Officer Paul Verna. *Id.* at 18:7-8.

Shinn's opening statement made on 26 February 1985 reflects his preparation of petitioner's defense that petitioner did not participate in the shooting of Officer Verna. [TT 6292-6399]. He began by reminding jurors what the lawyers say in their

opening statements is not evidence, and that the prosecution bears the burden of proof beyond a reasonable doubt. The defense has no obligation to prove a thing, “. . . *but nevertheless the defendant is going to show you that the events did not occur the way Mr. Watson has just suggested to you.*” Shinn told the jury that after the grand jury proceedings and the preliminary hearing the prosecution found it had a strong case against co-defendant Raynard Cummings and a weak case against petitioner. The decision to plea bargain with co-defendant Pamela Cummings was a desperate move because the witnesses against petitioner were weak. Shinn then identified five reasonable doubts. Rpt. at 19:17-20:5.

Shinn’s closing argument to the jury three months later on 28 May 1985 reflects the development of the defense theory that petitioner did not fire any of the shots at Officer Verna and also his adjustments for adverse and favorable developments. Shinn began by reminding the jury of the presumption of innocence and the burden of proof upon the prosecution. He advised the jury he would review the evidence presented and show them where there is reasonable doubt. He then produced a chart upon which he has listed eleven reasonable doubts, any one of which would justify an acquittal. Rpt. at 21:11-18.

Petitioner’s contention: “Shinn, having rested the entire defense theory on the fact that the police reports contained no evidence that any eyewitness actually saw the gun being passed, completely disengaged from any further guilt phase investigation,” [POB] is not supported by this record. *Id.* at 25:20-23.

Mr. Gay takes the following exception to the foregoing regarding Question 1, Part 2:

1. **Mr. Gay takes exception to the finding that the record does not support the contention that Daye Shinn disengaged from further guilt-phase investigation once he based the defense on the absence of reported evidence that any eyewitness saw the gun passed from Cummings to Mr. Gay.**

Mr. Gay respectfully submits that, contrary to the referee's finding, the record fully supports the conclusion that Shinn completely disengaged from the guilt-phase investigation once he determined the prosecution did not have a witness who could testify truthfully to seeing Cummings pass the gun to Mr. Gay.

First, it is only by characterizing Shinn's review of the discovery and transcripts of earlier proceedings – or his review of Payne's summaries of such materials – as constituting an "investigation" that Shinn can charitably be said to have had any involvement in the investigation at all. As reflected in the referee's findings above, the "results" of Shinn's purported investigation of the homicide consisted almost exclusively of his reliance on the contents of police reports and prosecution witnesses' prior testimony at the preliminary hearing, grand jury proceedings and trial. The only independent defense witness called by Shinn to defend against the homicide was Payne, after Payne fortuitously observed a prosecution investigator in the hallway at trial coaching a young witness to identify Mr. Gay in court. 86 RT 9827 *et seq.* As discussed below, Shinn did not investigate or present a single affirmative witness to identify Cummings as the shooter or to testify to Cummings's admission that he, alone, shot the victim. Indeed, the referee's Report cites the trial transcript over sixty-five times in describing the "results" of Shinn's investigation. Rpt. at 13-25. None of those citations, however, refers to an item of evidence uncovered as the "result" of Shinn's "investigation."

Second, Shinn testified in the earlier habeas proceedings that he

delegated the guilt-phase, as well as the penalty-phase investigations, to Payne. *See* Ex. A25 at 58 (Payne “would do all the investigations”); 1 EH RT (1996) 80 (Payne “did all the investigations, I myself did not”). His billing did not reflect a single pre-trial interview with a single lay witness or contact with a single expert witness. 4 CT 1122-23. His records further reflect that from the date of his fraudulently engineered appointment in Mr. Gay’s case until the start of jury selection he visited Mr. Gay in jail exactly twice. 4 CT 1122-23.

Payne’s testimony at the evidentiary hearing confirmed that it was his responsibility to review and summarize the discovery, present Shinn with his findings and make recommendations for next steps. 3 EH RT 198:5-26, 199:3-16, 200:16-23; Resp. Ex. 709 at 796:6-11. But, as noted above, Payne was unaware of any instance in which Shinn actually followed up any suggested line of investigation or expert consultation. 3 EH RT 200:16-23. Rather, it was Mr. Gay who provided Payne with “much more detailed notes, diagrams and suggestions,” based on review of the police reports and witness statements “than Mr. Shinn was doing.” 3 EH RT 283:22-284:2; *see also* 3 EH RT 208, 245; Ex. A155 (Mr. Gay became so desperate he handwrote a removal order for Donald Anderson to testify about Marsha Holt’s statement that she did not see the shooting). According to Payne, Shinn’s lack of follow-up was one of the most obvious indications that Shinn was just “going through the motions” at the guilt phase of the trial. 3 EH RT 299:25-300:4.

Shinn’s pre-trial guilt-phase inactivity thus reflected his same desultory performance that occurred in regards to the penalty phase: he “did none of the investigation for the penalty phase and gave his investigator no specific instructions regarding the evidence to be sought.” *In re Gay*, 19 Cal. 4th 771, 810 (1998). Similarly, as with the penalty phase, Shinn “could and should have given specific directions to and monitored his investigator,” but failed

to do so. *In re Gay*, 19 Cal. 4th at 814-15.

Mr. Gay respectfully submits that the substantial evidence shows that Shinn was not engaged in the guilt-phase investigation.

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

In response to this Court's Question 2, Part 1, the referee made specific findings as to five categories of additional evidence that Mr. Gay could have presented to show that he did not participate in the shooting of Officer Verna. *See Rpt.* at 26-36 (grouping the evidence into additional eyewitnesses, inmate witnesses, sworn peace officer witnesses, impeachment witnesses, and expert witnesses).

Mr. Gay will indicate any exceptions to each category in turn.

ADDITIONAL EYEWITNESSES

The Court has already identified 4 additional eyewitnesses present on 2 June 1983 who were not called during the 1985 trial whose descriptions of the shooter pointed more towards co-defendant Raynard Cummings and away from petitioner. *Rpt.* at 26:2-5 (footnote omitted).

Elizabeth Martina Jimenez Ruelas, then 9 years of age, was in the front yard of her family home at 12133 Hoyt Street, which is at the intersection with Gladstone Avenue. She was talking with Officer Verna from inside the fence of her front yard when he drove off on his police motorcycle to conduct a traffic enforcement stop. She observed Officer Verna walking up to the car when he was shot. When interviewed in 1985 she described the shooter as a male black, tall, young looking, thin and ugly. [Petition Exhibit 43] In 2014 she described the shooter as a male black with a dark complexion. [RT 1379] She was interviewed by the police on the evening of 2 June 1983 and several times since. She attended the live line up 6 June 1983 but was unable to make an identification. See Exhibits