No. S130435

DEATH PENALTY

Related Automatic Appeal: No. S016683
(Superior Court of Marin County, Case No. 10467)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

SUPREME COURT
FILED
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Frederick K. Ohlrich Clerk
Deputy

PETITION FOR WRIT OF HABEAS CORPUS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of	No.
JARVIS J. MASTERS, Petitioner, on Petition for Writ of Habeas Corpus _____/	(Related Automatic Appeal Pending, No. S016883) (Marin County Superior Court Case No. 10467)

PETITION FOR WRIT OF HABEAS CORPUS
[RELATED AUTOMATIC APPEAL PENDING]

TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATES JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner Jarvis J. Masters, through his appointed counsel Joseph G. Baxter and Richard I. Targow, petitions this Court for a writ of habeas corpus and by this verified petition sets forth the following facts and grounds for issuance of the writ:

1. Petitioner is unlawfully confined by the Director of the California Department of Corrections and the Warden of the California State Prison at San Quentin under a judgment and sentence of death. Said judgment was imposed August 2, 1990 by the Superior Court of the County of Marin, in *People v. Masters*,

case number 10467 (CT 6723), and is now pending before this Court on automatic appeal in *People v. Masters*, No. S016883.

OVERVIEW

2. Petitioner and his co-defendants were charged with murder and conspiracy related to the June 8, 1985 killing of Correctional Sergeant Howell Burchfield in Carson Section at San Quentin. The prosecution's evidence tended to show that the killing was carried out by a prison "gang," the Black Guerilla Family ("BGF"); and that co-defendant Lawrence Woodard was the leader of the planning "commission" which planned and ordered the "hit" on Sergeant Burchfield; that co-defendant Andre Johnson was the BGF "soldier" who carried out the orders; and that petitioner was a principal planner and that he sharpened the "shank" which became the murder weapon.

3. Petitioner is, in fact, innocent. No reasonable jury would have convicted him if they had been presented with the evidence which he attempted to present, but which was excluded in derogation of his right to present a defense; and no reasonable jury would have convicted him if they were presented with the statements regarding his non-involvement now being made by the principal

witnesses against him and the other evidence now being offered of his actual innocence.

4. In particular, no jury would have convicted petitioner had they been presented at the time of his trial with the confession of fellow inmate Harold Richardson, who claimed responsibility for the acts for which petitioner was charged and who named the conspirators without naming petitioner; and had they known that Harold Richardson matched the physical description initially offered by the State's principal witness of Jarvis Masters; and had they known that Jarvis Masters did not match this description; and had they known that, contrary to the testimony of inmates Rufus Willis and Bobby Evans, petitioner had been excluded from the conspiracy, as well as other leadership aspects of the BGF, as a disciplinary measure by the then-BGF leader in Carson Section.

5. Moreover, petitioner's jury would not have convicted him if they had been allowed to hear the evidence, excluded by the trial court, of the *quid pro quo* offered to and given to Bobby Evans for this testimony, and in particular had they known of Evans' pre-existing status as a government snitch.

6. These and the other allegations set forth in this petition will show the very substantial and prejudicial violations of petitioner's

rights to due process, effective assistance of counsel, and a fair trial under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the analogous provisions of Article I of the California Constitution.

PROCEDURAL BACKGROUND

7. Petitioner was charged along with co-defendants Lawrence Woodard and Andre Johnson with first degree murder (Pen. Code § 187, subd. (a))[1] and with conspiracy to commit murder and assault on a correctional officer (§ 182). (CT 5121-23)[2]

8. Attorney Lester Rosen was appointed to represent petitioner on February 4, 1986. (2d Augmented CT 2) Michael Satris was associated into the case by Notice on February 4, 1986.

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[1] Unless otherwise noted, all statutory references are to the California Penal Code.

[2] Citations to the record will follow the usual format, using the following abbreviations:

1. "CT" refers to the Clerk's Transcript;
2. "RT" refers to the Reporter's Transcript;
3. "ACT" and "ART" to the Augmented Clerk's and Reporter's Transcripts (if preceded by a number, it refers to the edition of the augmented transcript);
4. "PHRT" to the Preliminary Hearing Reporter's Transcript;
5. A dated transcript (e.g., "1-10-88 RT") refers to a separately bound reporter's transcript.
6. "AOB" refers to Appellant's Opening Brief

(2d Augmented CT 199) Geoffrey Rotwein was appointed in place of Rosen on October 24, 1986. (2d Augmented CT 1125)

9. Prior to trial, co-defendant Johnson's case was severed from that of Woodard and Masters, and an amended information filed August 17, 1989 charged petitioner and Woodard with conspiracy to commit murder and aggravated assault by a prisoner on correctional staff (§ 4501); and murder with special circumstances for the murder on June 8, 1985, of Correctional Sergeant Howell Burchfield. (CT 4519)

10. Petitioner was arraigned and pled not guilty in the Municipal Court on December 10, 1985. (2 ACT 2) The preliminary hearing commenced before the Hon. Vernon F. Smith, Municipal Judge, on June 23, 1987 (2 ACT 1793), and petitioner was held to answer on November 30, 1987 (2 ACT 2685).

11. The trial of all three defendants commenced before dual juries on August 25, 1989. (CT 4633) On January 8, 1990, the Masters/Woodard jury returned findings of guilt on both counts as to both defendants. (CT 5124) The Johnson jury also found Johnson guilty. The juries made findings on the special circumstance that the victim was a peace officer, and the trial court set successive penalty trials, first of Woodard, then petitioner, then Johnson. (CT 5158)

12. The Woodard penalty phase trial ended in a hung jury (CT 6137), and the court imposed life without parole on Woodard. (See Woodard Clerk's Transcript) The Masters penalty phase commenced before the jury on April 2, 1990 (CT 6148), and the jury returned a penalty verdict of death on May 18, 1990. (CT 6553)

13. The court denied petitioner's motions for a new trial and modification of the sentence, and pronounced judgment of death on August 2, 1990. (CT 6719)

14. In 1993, attorneys Joseph G. Baxter and Richard I. Targow were appointed by the Court to represent petitioner in both his automatic appeal and his related state habeas corpus action.

15. Petitioner's opening brief ("AOB") in his automatic appeal was filed December 7, 2001. Respondent's brief ("RB") was filed on March 3, 2003, and petitioner's reply brief ("ARB") was filed November 24, 2003.

PRIOR PETITIONS

16. Two prior petitions challenging petitioner's death sentence were filed. Both related to recantations by penalty witness Johnny Hoze, who linked Masters to a prior uncharged prison murder. Masters was one of six inmates near to and therefore disciplined for, but never charged with, the prison-yard murder of

David Jackson. Hoze's trial testimony linked Masters to the Jackson murder by claiming that Masters boasted of killing Jackson in BGF training cadres. The two writ petitions provided evidence that Hoze had lied on the stand.

17. The first habeas petition was filed by trial counsel in the Marin County Superior Court on November 1, 1990 (Case No. 147681). A copy of that petition is attached hereto as Exhibit HC-23 for lodging in this Court.[3] It relied on evidence from a former cell-mate of Hoze who told him that Hoze had boasted of lying on the stand about the Jackson murder in order to get back at Masters. In addition, it raised arguments regarding intra-case proportionality, given that both Woodard and Johnson had received sentences of life without parole.

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[3] In addition to the two proceedings discussed in the main text, there were three additional petitions filed. Prior to trial, in July, 1986, Masters filed a petition for writs of habeas corpus and mandate in the Marin County Superior Court (No. 123830) regarding confiscations and searches of his legal materials. Following his conviction and sentence, in August, 1990, Masters filed a petition for writ of habeas corpus in the Marin County Superior Court (No. 147062), and in August, 1994, filed another habeas petition (No. SC 062669). The subject of both was access to counsel for the preparation of post-conviction proceedings. None of these proceedings challenged the judgment that is the subject of this petition.

18. The 1990 proceeding was filed prior to the decisions in *McCleskey v. Zant* (1991) 499 U.S. 467 and *In re Clark* (1993) 5 Cal.4th 750, announcing standards and limits on successive habeas petitions. For that reason, the successive-petition bar should not apply. (*In re Robbins* (1998) 18 Cal.4th 770, 788, fn. 9 [declining to rely on pre-*Clark* successiveness bar because rule not strictly or regularly adhered to before *Clark*])

19. Counsel, in any case, were faced with fresh and contemporary evidence which suggested the possibility of an immediate modification of death sentence without reference to any other possible claims. It was not their duty to present the claims presented herein – indeed, this Court's 1989 policies state that it is the duty of *appellate counsel*, not trial counsel, to investigate possible bases for filing the habeas petition (See Supreme Court Policies Regarding Cases Arising From Judgments of Death, adopted June 6, 1989, Policy 3, Std. 2-2) – nor could they have engaged in the detailed investigation and marshaling of facts which was required to present the claims presented in this petition.

20. To the extent that trial counsel should not have presented the single claim filed in 1990 because they should have known that doing so would make this petition a violation of

successive petition standards, their doing so constituted ineffective assistance of counsel. (*Clark*, *supra*, at p. 780 [petitioner represented by counsel when petition is filed has right to assume that counsel is competent and is presenting all meritorious claims])

21. If there remains any question regarding the 1990 petition precluding the claims of the instant petition, those questions are resolved in petitioner's favor by the facts that he is here claiming both factual innocence and a trial so fundamentally unfair that, absent the constitutional error, no reasonable jury or judge would have convicted him. (See *Clark*, *supra*, 7 Cal.4th at pp. 797-798)

22. The second writ petition was filed by petitioner *in propria persona*, on April 16, 1992. (See Petition for Writ of Habeas Corpus, and minute order denying the petition, in Case No. 153140, attached hereto as Exhibit HC-27 for lodging in this Court) This action was filed before appellate counsel were appointed, and arose from further recantations by Hoze. Petitioner, of course, could not have known of the successive-petition restrictions imposed by *McClesky*, and *Clark* had not yet been decided. Accordingly, as with the attorney-filed claim, it should not preclude the filing of this petition or any of the issues raised herein.

GENERAL CLAIMS

23. This petition is necessary because petitioner has no other plain, speedy or adequate remedy at law for the substantial violations of his constitutional rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and sections 1, 4, 6, 7, 8, 15, 16, 17, and 27 of Article I of the California Constitution, and Penal Code section 1473. Petitioner seeks relief in the Court because his automatic appeal is currently pending here, this petition relates to that appeal, and it is appropriate for this Court to consider or consolidate this petition with the automatic appeal so that all related claims for relief may be fully presented and determined at one time.[4]

24. Petitioner hereby incorporates all exhibits appended to this petition as if fully set forth herein. Petitioner also requests this Court to judicially notice petitioner's certified record on appeal and all pleadings, briefs, orders and exhibits on file before it in *People v.*

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[4] Contrary to this court's recent practice, this request for consolidation of the appeal and this petition is made advisedly and earnestly. The two mutually support each other, for the appellate issues regarding the exclusion of petitioner's defense are directly supported by the evidence presented herein; and that evidence is informed by and consistent with the evidence which petitioner was prevented from presenting at trial, as shown in the record on appeal.

Masters, No. S016883, and in the cases of his co-defendants: *People v. Woodard*, Marin County Superior Court No. 10467, and *People v. Andre Johnson*, Marin County Superior Court No. 10985, and their consolidated appeal, *People v. Johnson* (1993) 19 Cal.App.4th 778 [1st App. Dist. Case Nos. A051239/A052254].

25. Petitioner makes the following general allegations regarding each claim set forth in this petition:

26. Petitioner is factually innocent of the crimes of which he was convicted.

27. The State introduced evidence which it knew, or reasonably should have known, was inflammatory, unreliable, untrue and/or misleading. The intentional introduction of this evidence denied petitioner his right to due process and a fair trial and his right to a non-capricious and non-arbitrary verdict in a death penalty case.

28. The State withheld, concealed, delayed turning over, and destroyed material and critical evidence relevant to the guilt and penalty phases of the trial, and to the investigation and pre-trial phases of the case.

29. In addition to the prejudice caused by State misconduct, petitioner's trial was fundamentally unfair because of several critical preliminary examination and trial court errors, which seriously

undermine confidence in both the guilt and penalty verdicts. These include the failure to grant a motion for a lineup when the prosecution's principal witness could not describe petitioner before first seeing him at the preliminary hearing; the systematic exclusion of petitioner's evidence of his actual innocence; and the failure to disclose evidence and the exclusion of evidence that principal corroborating witness Bobby Evans, contrary to his testimony, received and expected favorable treatment in regard to pending sentencing matters and/or uncharged criminal matters in exchange for his testimony.

30. To the extent that any facts set forth herein, or not yet known without further discovery or investigation, could not reasonably have been uncovered by trial counsel, those facts constitute newly discovered evidence which casts fundamental doubt on the accuracy and reliability of the proceedings, and undermine the prosecution's case against petitioner such that his rights to due process and a fair trial have been violated so that collateral relief is appropriate.

31. To the extent that the error or deficiency alleged was due to defense counsel's failure to investigate and/or litigate in a reasonably competent manner on petitioner's behalf, petitioner was

deprived of effective assistance of counsel. Counsel had no informed tactical reason for any such failure or omission. To the extent that trial counsel's actions and omissions at the guilt and/or penalty phases of petitioner's trial were the product of purported strategic and/or tactical decisions, such decisions were based upon State interference, prosecutorial misconduct, inadequate and unreasonable investigation and discovery, and therefore, were not reasonable, rational, or informed.

32. Petitioner is presently aware of the facts hereinbelow set forth, establishing a prima facie case for relief. If respondent disputes any of the facts alleged below, petitioner requests an evidentiary hearing so that factual disputes may be resolved. After petitioner has been afforded discovery and disclosure of material evidence by the prosecution, the use of this Court's subpoena power, and the funds and opportunity to investigate fully, counsel requests the opportunity to supplement or amend this petition.

33. But for the misconduct of the state, the errors by the trial court, and the incompetence of trial counsel, petitioner would not have been convicted of the murders and the special circumstances would not have been found true; and petitioner would not have been sentenced to death.

34. Petitioner did not knowingly, voluntarily or intelligently fail to raise these claims at an earlier time or deliberately bypass any available state proceeding.

THE PETITION IS TIMELY

35. These claims are being made under the Supreme Court Policies Regarding Cases Arising From Judgments of Death (Policy 3, Std. 1-1.1), and *In re Clark* (1993) 5 Cal.4th 750.

36. For the reasons noted in the Declaration of Joseph Baxter filed herewith (Ex. HC-7), this petition is being filed at the earliest possible time. Despite extraordinary efforts of appointed counsel and their habeas investigators and paralegals, as of September 2002, a huge amount of work still needed to be done in conjunction with the habeas investigation. Counsel therefore negotiated with death penalty investigator, Melody Ermachild, to complete the habeas investigation in this case. Ms. Ermachild and her associates had already conducted over 100 hours of habeas investigations in this case by that time. In addition, as an investigator for the defense during the trial of Jarvis Masters, Ms. Ermachild was intimately familiar with the facts of the case and had already spoken to a number of the potential witnesses, and further

involvement by Ms. Ermachild was in the defendant's best interest. Ms. Ermachild volunteered to continue her work, but made it clear that she could not guarantee how soon she would be able to complete her investigation since she had many other matters she was already working on. Given the fact that further funds from this Court were not guaranteed at the time, counsel agreed to Ms. Ermachild's proposal. In addition, Ms. Ermachild's extensive knowledge of the facts and witnesses in this case made her the best choice as the investigator under almost any set of circumstances. (Declaration of Joseph Baxter, Ex. HC-7 at pp. 33-34, ¶ 18)

37. Between September 2003 – nine months prior to the petition's presumptive due date -- and April 15, 2004, Ms. Ermachild and her associate investigator expended approximately 100 hours of time in conjunction with the habeas investigation, although Ms. Ermachild for most of this period was still tied up with other, prior, case obligations. This work included obtaining files on one of the principal government witnesses, interviewing the co-defendants in this case at Corcoran State Prison, contacting one of the witnesses to the 1985 prison incident which is the subject of this case, and contacting an attorney for one of the witnesses. Investigative efforts also included numerous attempts to obtain useful information from

six trial counsel at the 1989 Marin County Superior Court trial, a further visit to Corcoran State Prison to obtain signatures from declarants, and a search for a former jail inmate who may have spoken with one of the State's witnesses. Additional efforts during this period also included fruitless efforts to make contact with a former District Attorney who may have worked with State witness Bobby Evans. (*Id.* at p. 7, ¶ 19)

38. Additional investigative efforts during this period also included a massive effort to locate many of the 38 men on the yard when San Quentin inmate David Jackson (the "David Jackson project") was murdered. This incident was used against petitioner during the penalty phase of this trial. (*Id.* at p. 7, ¶ 20)

39. By April 2004, however, it became absolutely clear that a habeas petition could not be filed within six months of the filing of Appellant's Reply Brief without sacrificing petitioner's rights. Nonetheless, counsel's efforts between September 2003 and April 2004, were beginning to produce new and useful information in support of petitioner's other habeas claims. Beginning sometime around September 2003, counsel's investigators noticed a new level of cooperation among the inmates and former inmates. Suddenly, the list of persons we needed to talk to was not only growing, but

growing exponentially, due to the level of cooperation of new and old witnesses. Counsel, therefore, in order to avoid a successive petition, elected to allow the investigation to continue until we felt confident that no new claims would be uncovered. (*Id.* at p. 8, ¶ 21)

40. Between April 15 and May 31, counsel's investigators expended 105 hours of time pursuing the habeas investigation. By the end of May 2004, however, it was clear that there were still many open leads and the habeas investigation was not complete. (*Id.* at pp. 8-9, ¶ 22)

41. Between June 1, 2004 and the middle of August 2004, counsel's investigators spent an additional 150 hours on this case. These efforts included continued work on the David Jackson project and continued efforts to find children, former wives, former associates, and informants of one of the State's principal witnesses. By the middle of August, however, it was clear that the habeas investigation was still not complete. (*Id.* at p. 9, ¶ 23)

42. Between mid-August 2004 and the middle of November 2004, counsel's investigators expended well over 100 hours of time in conjunction with the continued investigation of this case. This investigation included further work on the David Jackson project, further interviews of witnesses who had information concerning one

of the State's principal witnesses and further efforts aimed at locating witnesses who could corroborate some of the information being provided by one of our other witnesses. During this period counsel's investigators also began to interview members of the jury and began to work with a handwriting expert who is currently in the process of evaluating certain of the documents in evidence. (*Id.* at p. 9, ¶ 24)

43. While petitioner's huge habeas corpus investigation is still not complete, in the opinion of counsel there is little likelihood of any further new claims being uncovered at this time, and thus filing the petition at this time will not be prejudicial to petitioner's interests. Counsel are therefore filing the petition while the investigation continues. (*Id.* at 10, ¶ 25)

44. Petitioner's convictions and sentence, including the sentence of death, were obtained in violation of his most fundamental constitutional rights, including but not limited to, his right to a fair trial, effective representation of counsel, due process, and reliable guilt and penalty convictions in a capital trial. Under the imprimatur of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 1, 4, 6, 7, 8, 15, 16, 17 and 27 of the California Constitution, an order to show

cause must issue, the entire judgment must be reversed and the writ of habeas corpus granted.

CLAIMS FOR RELIEF

CLAIM I: EVIDENTIARY RULINGS BY THE MAGISTRATE AND TRIAL COURT DENIED PETITIONER HIS DUE PROCESS RIGHT TO PRESENT HIS DEFENSE

45. Petitioner hereby incorporates all of the foregoing allegations, as if fully set forth herein.

46. Petitioner was denied a meaningful opportunity to present his defense, and was sentenced to death, as a result of a series of erroneous rulings by the magistrate and the trial judge, rendering his conviction and sentence of death a violation of his rights under State decisional and statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and the analogous provisions of the California Constitution, in that petitioner was deprived of his liberty and sentenced to death in a trial prejudicially tilted in the state's favor by rulings that, separately and together, amounted to the deprivation of petitioner's right to present his defense. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 300; *Crane v. Kentucky* (1986) 476 U.S. 683, 687, 690-691)

47. The facts that support this claim, among others to be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigators and experts, and a hearing, are as follows.

A. THE MAGISTRATE'S REFUSAL OF A LINEUP FOLLOWING WILLIS' INABILITY TO DESCRIBE PETITIONER

48. Petitioner incorporates as if fully set forth herein the facts and arguments set forth in his briefs filed in the related appeal, and specifically at pages 49-59 of Appellant's Opening Brief, and pages 1-21 of Appellant's Reply Brief.

49. Before Rufus Willis testified at the preliminary hearing, defendants moved that they not be present in court during his initial testimony in order to test his identification of the defendants. (PHRT 8329-8330)

50. The magistrate agreed and when the examination of Willis commenced, the defendants were not present. (PHRT 8362) Willis, however, was unable to give either an accurate or a consistent description of Masters. Rather, Willis gave several contradictory — and as to Masters grossly inaccurate — descriptions: "Masters" was about 5'7" in height, 140-160 pounds,

without any tattoos on his face, wearing eyeglasses on the yard; and with short hair (PHRT 8383-84); he was in his early thirties (PHRT 8385); he was bald-headed at the time (PHRT 8386); he was kind of chubby, husky, heavy-like, had a stomach on him, about 175-180 pounds (PHRT 8386-87); he was bald, in the sense of keeping his head shaved of hair. (PHRT 8389)

51. Neither bald, pudgy, in his early thirties, nor 5'7" in height, Masters, was, at all times relevant here, slim, six feet one-inch tall (6'1"), 23, wore a mustache and goatee, had a distinctive tattoo on his left cheek,[5] had short hair, did not wear glasses, and never had been heavy or fat. (PHRT 8404-06; RT 13097, 13101-03, 13107-08; CT 694; People's Exhibit 1214 B)

52. Following the identification testimony, the court ordered a recess; upon resumption of the hearing, and before Willis was brought again into court, Masters moved for a lineup pursuant to *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625,[6] in light of Willis' gross misidentification of Masters. (PHRT 8404) The court denied

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5 When Masters was shown to him at the preliminary hearing, Willis was able to see Masters' facial tatoo from a distance of about twenty feet. (PHRT 9109)

6 "[D]ue process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pre-trial lineup in which witnesses to the alleged criminal act can participate." *Id.*

the motion, citing the delay in the bringing of the motion and the fact that Willis testified that he had seen Masters many times on the yard. (PHRT 8408)

53. The magistrate's decision betrays two striking failures of logic: First, according to Willis' testimony, Masters had never been introduced to Willis as "Masters" or "Jarvis Masters" (PHRT 8388-89), so that no matter whom he *thought* was Masters, the number of times he met that person was irrelevant to whether he had actually met Masters. Second, the delay in seeking a lineup arose directly from the fact that Willis, as he admits in his declaration (Ex. HC-1 at p. 9, ¶ 24), was carefully kept hidden from the defense right up until the time of the preliminary hearing, so that the defense had no opportunity to determine whether he could or could not identify Masters.

54. In addition, the State kept hidden from the defense (until near the end of the preliminary examination) the fact that Harold Richardson, who bore a striking resemblance to the person Willis described as Masters, had confessed in a prison "debriefing" to the role in the Richardson murder that the prosecution ascribed to Masters. In addition, in naming his co-conspirators, Richardson did not include Masters among them.

55. A chart comparing Willis' description of what he believed to be petitioner's actual physical characteristics appears in Appellant's Opening Brief at page 52 and is reproduced on page 20 herein, with its accompanying footnotes.

56. Given the fact that Willis testified that he sometimes saw the individual at a distance of one or two feet, and testified that the fourth co-conspirator was five feet, seven inches tall, weighed 175 to 180 pounds, was chubby, and had a bald/shaved head, and that the person looked old, wore glasses, and that he did not recall the person having a facial tattoo, it must be assumed that Willis would have identified a person bearing similar characteristics at a lineup. For the same reason, it cannot be assumed that Willis would have identified a 23-year-old slim, six foot one inch tall individual with a head of hair, who did not wear glasses, and who had a tattoo on his left cheek visible from twenty feet.

57. Had Willis failed to identify Masters at a lineup, more likely than not, the State itself would have dismissed charges against Masters. Asked what he would have done had Harold Richardson established that Masters was not a part of the conspiracy, the District Attorney testified that he would have dismissed the case against Masters:

> [I]f I believed that Mr. Richardson established, through corroborated evidence, that Mr. Masters was not part of this conspiracy, I wouldn't merely grant Mr. Richardson immunity, I would dismiss the case against Mr. Masters. (PHRT 14865)

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WILLIS' DESCRIPTION OF THE FOURTH CO-CONSPIRATOR CLOSELY MATCHES HAROLD RICHARDSON

	Willis' Description of Fourth Co-Conspirator ("Askari")	**Harold Richardson**	**Jarvis Masters**
HEIGHT	5' 7" (RT 12970; PHRT 8383)	5' 7½" (PHRT 14819)	6' 1" (People's Ex. 87; PHRT 9110; RT 13097)
WEIGHT & BUILD	175-180 lbs.* (RT 13104; PHRT 8387) Chubby/Heavy, Stocky/Husky, "Had a stomach" (PHRT 8282, 8386, 9107; RT 13104)	185 lbs. (PHRT 14819) At 5' 7½" and 185 lbs., Richardson would be stocky and heavy (See MetLife Height & Weight Tables)**	170 lbs. (People's Ex. 87) At 6' 1" and 170 lbs., (People's Ex. 87), Masters would be "slim." (See MetLife Height & Weight Tables)**
HAIR	Bald/shaved head (PHRT 8386, 8389, 9107; RT 13104-05)	Bald/shaved head (PHRT 14819)	Hair a little longer; head not shaved (RT 11055-56, 13097)***
FACIAL TATOOS	Doesn't remember any from being 1' to 2' away from him (PHRT 9107; RT 13101)	No information	Tatoo on left cheek visible from 20' (PHRT 9109; Def. Ex. 1214B; RT 11056)
AGE	Looked old: 30s to late 20s (PHRT 8385, RT 12970)	29 years old: DoB 8-24-56 (PHRT 14819)	23 years old: DoB 2-24-62 (People's Ex. 87; RT 21551)
FACIAL HAIR	Doesn't remember any (PHRT 9107; RT 13104)	No information	Moustache and goatee (RT 11056)
GLASSES	Wore glasses (PHRT 8384; RT 13101)	Richardson refused to testify as to whether he wore glasses in 1985 (PHRT 14819)	Did not wear glasses (RT 11056-57)****

* **See footnote 6 for chart notes**

58. Given the fact that Willis could not identify Masters,[7] and did not even know his name, and given the fact that his identification of the fourth co-conspirator closely fit Richardson, Willis' inability to identify Masters in a lineup would have corroborated Richardson's admission that Richardson was the fourth co-conspirator. Thus, taking the District Attorney at his word, the State would have dismissed the case against Masters.

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[7] **CHART NOTES**

* Willis gave varying descriptions of the weight of the Fourth Co-conspirator ("Askari"). His varying descriptions themselves suggest dissembling. The chart provides his principal description.

** People's Exhibit 87 (San Quentin records) indicates Masters' height as 73" (6' 1") and his weight as 170 pounds. Officer Joy McFarlane, who knew Masters in 1985, testified at trial that his appearance was basically the same in 1985 as it was as of the time of trial. (RT 11055-56) With this weight and height, he would be characterized as slim. See B. Bates, A Guide to Physical Examination and History Taking (5th ed. 1991), Table 5-1 (derived from 1983 Metropolitan Height and Weight Tables: Stat. Bull. Metrop. Life Found 64, No. 1:6-7, 1983). These same standardized charts indicate that someone who is 5' 7½" tall and weighs 185 pounds would appear to be heavy/off the charts for optimal weight for that height. (Also, see U.S. Dietary Guidelines for Americans.)

*** At trial, long after his ability to identify Masters had been thoroughly discredited, Willis, referring to a 1986 photo (i.e., one year after the Burchfield killing) of Masters without much hair on his head, said that Masters looked like that in 1985. (RT 13544-45)

**** Attempting to excuse inconsistencies in his testimony, Willis twice claimed some confusion of Masters with Woodard. Willis initially testified that Masters wore glasses. (PHRT 8384) When he realized that Masters, in fact, did not wear glasses, Willis admitted he may have confused Masters with Woodard. (RT 13102)

59. After Harold Richardson's confession had been disclosed and he had appeared briefly in court, the magistrate compounded the error by refusing to allow petitioner to cross-examine Willis further regarding his identification of Masters. (PHRT 14840-43; AOB 72-73)

60. The magistrate's denial of petitioner's request for a lineup was therefore a denial of petitioner's due process rights, as set forth in *Evans v. Superior Court* (1974) 11 Cal.3d 617, 625; did not take into account any of the factors set forth in *Evans*;[8] and resulted in a trial and conviction that most likely would not have taken place, absent this error.

B. EXCLUSION OF THIRD-PARTY CONFESSIONS AND ADMISSIONS

(1) Harold Richardson's Confession

61. Three third-party admissions and/or confessions were proffered by the defense and excluded by the trial court.

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[8] "We conclude . . . that due process requires in an appropriate case that an accused, upon timely request therefor, be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate. The right to a lineup arises, however, only when eyewitness identification is shown to be a material issue and there exists a reasonable likelihood of a mistaken identification which a lineup would tend to resolve."
(Evans v. Superior Court, supra, 11 Cal.3d at 625)

62. The first was the aforementioned confession by Harold Richardson. Richardson's confession occurred in the context of a gang debriefing. According to prison administrator Jeanne Ballatore, Richardson's confession was an opportunity to disaffiliate with the gang by providing information about the gang's activities. (CT 2519-20) If Richardson provided sufficient information about gang activities, corrections personnel would have taken steps to protect him. If, on the other hand, prison authorities determined that Richardson was lying, he would have been returned to the general prison population, where he might have been attacked and possibly killed by the BGF. (See AOB 99-101) Thus, the magistrate ruled that a reasonable man in Richardson's position "would not have made the statement unless he believed it to be true" and that Evidence Code section 1230 was satisfied. (PHRT 14892)

63. Further evidence of the reliability of Richardson's confession was also proffered by the defense and excluded – or at least ignored – by the court. The defense offered proof that Richardson told fellow inmate Roderick Adams,[9] in August, 1988, that the "K-9's [the prison guards] have me on a hot one trying to

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[9] Roderick Adams was mis-named "Broderick" in the record, and thus in the Appellant's Opening and Reply Briefs.

accuse me of that thing on a K-9 in '85 [the murder of Sergeant Burchfield]. I cleaned up my tracks and they got some other motherfuckers for it." (RT 15773)

64. Since Richardson refused to testify – and indeed, made every effort to block the use of his confession, including an unsuccessful writ petition – the defense sought to have his confession admitted under Evidence Code section 1230. Prior to trial, the court excluded the evidence as unreliable because Richardson made it more than a year after the Burchfield murder. (12-13-88 RT 7; see also 2-15-89 RT 25.)

65. In doing so, the trial court ignored the obvious indicia of reliability – that Richardson, having given the statement in the context of a debriefing, risked being returned to the general prison population with a "snitch jacket", and thus risked execution by the BGF, if the prison officials deemed that he had lied in making the statement. (See AOB 97-101, 103-04; RT 13066)

66. When the defense sought again during the trial to have the Richardson confession admitted, the court again denied the motion on the specious basis that Richardson's failure to name Masters among the co-conspirators he did name was a "non-

statement upon non-statement." (RT 14718-19; Ballatore report, Ex. HC-8, p. 40)

67. The trial court's refusal to admit the reliable evidence of third-party culpability violated petitioner's Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial. (*Chambers v. Mississippi*, *supra*, 410 U.S. at 294, 302; *Chia v. Cambra* (9 Cir. 2004) 360 F.3d 997, 1003 (due process violation to exclude hearsay when there is persuasive assurances of trustworthiness and it is critical to defense))

(2) Charles Drume's Confession

68. Inmate and BGF member Charles Drume, like Richardson, also made a statement against interest which was exculpatory for petitioner and which was erroneously excluded by the trial court.

69. Drume had been one of Willis' soldiers in D-section at San Quentin, where he carried out a hit under Willis' orders, and moved with Willis to C-section prior to the Burchfield murder. (RT 12963-64, 12966, 13181-82) Drume was under Willis' command. (RT 13182-83)

70. By letter addressed to the County Clerk, postmarked December 9, 1987, Charles Drume offered to talk about the "three inmates that you have for the murder of a sergeant at San Quentin." (CT 5044, 5052)

71. Drume promptly met with Deputy District Attorney Berberian, District Attorney Investigator Gasser, San Quentin Captain Everly, and San Quentin Lieutenant Watkins on December 23, 1987. Drume stated during the interview that he was a BGF member who wanted out of the BGF. (CT 1912) Drume represented that he was Head of Security in Carson Section in June 1985, the position Willis ascribed to Masters[10] (CT 1912, 1914, 5045) and correctly recited the BGF oath for the investigators. (CT 1912, 1914)

72. Drume claimed he was fully involved in the planning to kill Burchfield and met with three other ranking members on the yard to plan it, including Woodard and Willis, identified by their Swahili names. (*Id.*) Significantly, and both contrary to Willis and consistently with Richardson, Drume omitted Masters as one of the planners. Equally significantly, Drume claimed that it was he (and

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[10] San Quentin records establish that Drume held BGF weapon stock. (CT 5089-90)

therefore it was not Masters) who fashioned the weapon which killed Burchfield by cutting metal from his bed brace, sharpening it, and sending it to an inmate Wallace on the second tier for him to send on to Johnson for use in the murder. (*Id.*)

73. Drume, like Richardson, never mentions Masters as having been directly involved in the planning or execution of the murder (CT 1912-16), though it is clear that he knew Masters, having mentioned him by his Swahili name ("Askari Left Hand"[11]) when asked who among the BGF members he knew. (CT 1916; RT 14910)

74. Drume claimed he was motivated to come forward by his disenchantment with the BGF. (CT 1912) Drume's admission of involvement in the Burchfield murder, made without any predicates or promises, subjected him to the death penalty as well as the contempt of his fellow inmates, and was thus admissible under Evidence Code section 1230.

75. Drume also spoke freely with the defense. On February 23, 1988, Barry Simon, an investigator for Masters, interviewed Drume at San Quentin. (CT 5046) Drume re-affirmed and

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[11] Drume also identified Askari Left Hand as "Thomas," another nickname for Masters. (CT 1916, 5045, 5054)

expanded upon his disclosures. He confirmed that he was in charge of security in C-section ("Ulama Chief")[12] but that others, including "Woodie" (Woodard) and "Zulu" (Willis), were above him. (*Id.*) "Woodie" ordered him to make a knife at one of the meetings on the yard where the murder was planned. (*Id.*) Four prisoners were involved, including "Woodie."

76. Drume confirmed cutting the knife from his bed frame, sharpening it, and passing it to Wallace to pass to Drake (Johnson) after dinner on the night Burchfield was killed. (*Id.*) Drume said that he did not know that Burchfield was the particular officer to be hit. (*Id.*) Drume also filled in crucial details left out of the State's reports of his admissions:

(1) "Thomas," a BGF member from "down South" who had tattoos on his face, did not participate in any meetings where a plan to murder an officer was discussed, and as far as he knew, had nothing to do with the plan. (*Id.* at 5046-47) As mentioned, Masters was known by the nicknames "Thomas" and "Askari Left Hand." (RT 14910; CT 5046-47) Indeed, in his meeting with authorities Drume

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[12] This is consistent with the declaration of Woodard that Masters had been placed on discipline and removed from the leadership. (See ¶ 117, *infra*, and Declaration of Lawrence Woodard, Ex. HC-2, pp. 13-14, ¶ ¶ 3-4)

referred to "Thomas" as "Askari Left Hand." (CT 1916) Masters was also from Southern California and had a distinctive tattoo on his face. (PHRT 8405, 9109) Masters also had a "Thomas" tatoo on his hand. (RT 15339, 15347)

(2) Drume told defense investigator Barry Simon that shortly after the murder he contacted Lieutenant Amos to warn authorities that the BGF were trying to get the Crips to hit another officer. (CT 5047) The State did not contest this fact. According to Willis, this second wave was scheduled to take place one week after the Burchfield attack. (RT 12757-58) Thus, Drume first came forward within days of the murder to prevent a second murder.

77. As with the Richardson statement against interest, the trial court, during the pre-trial hearings related to severance of petitioner's case from Woodard's, excluded Drume's hearsay statement, despite clear indicia of reliability under Evidence Code section 1230, because, the court said, it had been made over a year after the incident. (12-13-88 RT 7)

78. During trial, the defense again sought its admission, asserting *inter alia* that its exclusion of Masters' name from the persons involved in the murder was supported by Drume's direct statement to Simon that, to his knowledge, Masters had no

involvement in the murder. (CT 5046-47) The court, however, refused to admit the statement. (RT 15347).

79. Significantly, Drume now confirms, by his declaration filed herewith, that Masters was not involved: "Jarvis Masters was wrongly convicted and sentenced to death. Because I was a participant, I know that Masters was not involved in either the planning or carrying out of the attack on Sergeant Burchfield." (Ex. HC-4 at p. 20, ¶ 3)

80. Charles Drume's declaration also makes clear that it was he, not Masters, who got the order from Woodard to sharpen the knife. (Declaration of Charles Drume, Ex. HC-4, p. 20, ¶ 2) Andre Johnson, who was housed directly below Masters, two tiers down, declares that he would have heard the sounds of the knife being sharpened on the cement floor if Masters had been the one doing it. (Declaration of Andre Johnson, Ex. HC-3, p. 18, ¶5)

81. The exclusion of competent, relevant, reliable evidence that exonerated Masters was in direct violation of his Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial, and his right to present a defense. (*Chambers v. Mississippi, supra*, 410 U.S. at 294, 302; *Crane v. Kentucky, supra,* 476 U.S. at 687, 690-691; *Chia v. Cambra, supra*, 360 F.3d 997, at 1003)

(3) Evidence That the Crips Had Motive and Took Credit for the Burchfield Killing in Inmate Communications

82. During trial, Correctional Officer Rick Lipton, who had been the gunrail officer tracking Burchfield's movements along the tier before the stabbing, testified that Burchfield fell near Andre Johnson's cell, cell 2 on the second tier. (RT 11349) The defense brought out, however, that in his initial reports, and even in his preliminary hearing testimony, Lipton was quite firm in his belief that Burchfield was felled in front of cell 4, in which resided Eric Ephraim, a member of the Crips. Immediately after the stabbing, Officer Lipton told Officer Hodgkin that Sergeant Burchfield was in front of cell four, heading toward cell three, when he was hit. (RT 11214) He told Officer McMahon the same thing. (RT 11280) On the morning after the crime, Officer Lipton unequivocally told Inspector Numark that Sergeant Burchfield was in front of cell four when he was hit. (RT 11362) Even at the preliminary hearing, Officer Lipton repeatedly testified that he saw Sergeant Burchfield hit next to cell four. (RT 11341-47) He testified this was his "firm belief." (RT 11343) "You could see that's the fourth cell." (RT 11341) He also testified that he never saw Sergeant Burchfield in front of cell two. (RT 11343)

83. In addition, although the prosecution's star-witness Rufus Willis claimed to be a member of the BGF, significant evidence showed that he was really a Crip and was trying to "bring down" the leadership of the BGF. (RT 14757-58, 15517-18, 15551)

84. Again this background of evidence of Crip responsibility for the crime, the trial court nevertheless excluded – as it already had repeatedly done with the Richardson and Drume evidence – this evidence to support petitioner's theory of third-party responsibility.

85. In order to prove that the Crips had a motive for killing Sergeant Burchfield, the defense sought to introduce evidence from Correctional Officer McKinney that inmate Montgomery – who had been killed a year earlier – was a Crips leader. (RT 11391) The trial court sustained the prosecution's relevancy objection. (RT 11391)

86. The defense then sought to support this theory by offering the testimony of Correctional Lieutenant George Kimmel. Kimmel had been involved in the collection of evidence following the killing, including a number of notes seized from prisoners in which different prisoners belonging to different prison gangs claimed responsibility for Burchfield's murder. (RT 15247-48; 15254) Kimmel specifically recalled one such note which was found in East Block that he believed was written by a Crip because of the

terminology used in the note (i.e., "cuz" and "we killed the dog") and based on his familiarity with prison gangs. (RT 15256-57) Kimmel recalled reviewing at least ten similar notes. (RT 15257) He turned those notes over to those responsible for the investigation. (RT 15248, 15258-59) Kimmel never saw those notes again (RT 15248, 15258-59), and they apparently all mysteriously disappeared. (RT 14247-48, 15262-63)

87. The defense argued that testimony about these notes in general, and the one Lieutenant Kimmel believed to have been written by a Crip in particular, were relevant as tending to show that a written admission of guilt by someone in prison for the killing of a guard was a common occurrence.[13] The fact that it was a common occurrence would tend to diminish the incriminating impact and persuasive force of the similar admissions of guilt purportedly written by Woodard and Masters – People's Exhibits 150C (Ex. HC-6), 151A (Ex. HC-9), 159C (Ex. HC-5), and 176W (Ex. HC-10).

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[13] When the defense argued that Lieutenant Kimmel's testimony was relevant to show that inmates generally claimed personal credit for criminal acts committed by others, the trial court challenged defense counsel: "You're going to have an expert come in to testify on that issue?" Counsel reminded the court that they had already tried to present such expert testimony, which the court had refused to allow. The trial court repeated, "I'm going to preclude it." (RT 15265)

88. The trial court refused to admit Kimmel's testimony regarding any of these notes, including the one which he believed was written by a Crip. Despite the fact that it was the State's incompetence which resulted in the destruction of the note, the court ruled that absent the note itself, or evidence as to which inmate had written that particular note, the defendants could not present any testimony about them. (RT 15251, 15262-63) It is difficult to imagine how refusing to allow testimony about exculpatory evidence destroyed by the State can be anything other than a deprivation of due process.

89. As set forth in Argument VIII of the Appellant's Opening Brief filed by petitioner in his related appeal, these rulings were legal error. (See AOB at pp. 228-239) In addition, as already noted, they also constituted additional violations of due process and petitioner's right to present a defense.

B. EXCLUSION OF EVIDENCE THAT BOBBY EVANS OBTAINED SENTENCING *QUID PRO QUO* IN EXCHANGE FOR TESTIMONY

90. The facts and argument related to Bobby Evans in Appellant's Opening Brief (AOB pp. 165-195) are incorporated as if fully set forth herein.

91. Former San Quentin inmate Bobby Evans provided the prosecution's principal testimonial corroboration of Willis' coconspirator testimony.

92. That this testimony was crucial to the prosecution even beyond the evidentiary requirement for corroboration is evident from the fact that the jury reached its guilty verdict very shortly after a read-back of Evans' testimony. (CT 5120-24; RT 16903, 17082, 17087-88, 17093)

93. Nevertheless, the trial court prevented the defense from presenting evidence that Evans, contrary to his testimony, received a *quid pro quo* from the State in exchange for his testimony.

94. Evans was paroled from prison in 1988, but in May of 1989 was charged with robbery and use of a firearm. (RT 13805-08) This brought about a revocation of his parole. On May 20, 1989, he accepted a deal to receive a year in prison for violating his parole. (RT 13829)

95. On June 1, 1989, Evans pled guilty to attempted robbery in exchange for a 16-month state prison sentence for the underlying offense. (RT 13671, 13808) While the commencement date of the one year on the parole violation was not clear, the one

year term and the 16-month term were supposed to run concurrently. (RT 13671, 13808, 16945-46)

96. It was at this point that CDC Special Services agent Hahn met with Evans. (RT 13863-64) For the first time, Evans allegedly told agent Hahn that he had information about the Burchfield killings. (RT 13865) Evans also said he did not want to go back to state prison. (RT 13864) He was concerned about threats on his life by the BGF. (RT 13864-65) Evans therefore was given several sentencing postponements so that he could do more local time. (RT 13883-84, 13960-62)

97. Evans testified in the guilt-phase trial on October 30th and 31st, 1989 (CT 4833-36). His Alameda County sentencing had been postponed in July, in September, and in October (RT 13809-10, 13884). When Evans' sentencing came up in November, Hahn contacted the prosecutor in the Evans case, William Denny, and asked that Evans be released with credit for time served. (RT 16942) When Denny said "no," Hahn sought the intervention of Deputy District Attorney Russell Giuntini, who specialized in BGF prosecutions and intervened with Denny. (RT 16948) On the same day, December 13, 1989, Evans' sentence was modified. His 16-

month state prison sentence was converted to felony probation and Evans was released with credit for time served. (RT 16947)

98. That represented a substantial reduction in Evans' 16-month sentence. Assuming good behavior, and credit for time served in county jail, a 16-month state prison sentence can be served in slightly less than eleven months. Evans, however, only served six and three-quarter months. Even by the trial court's calculation, Evans' 16-month sentence was reduced by four months. (RT 16891)

99. Hahn's work, however, was not done. Evans still had a parole hold on account of the one year on the parole violation. On December 14, 1989, Hahn sent a memorandum to the CDC requesting a rescission of the parole hold on Bobby Evans. (People's Exhibit 268, Ex. HC-11 herein) The Memo noted that Evans still had five and one-half months to serve on his parole violation. (*Id.*) Hahn, however, praised Evans for his crucial work in the Masters' trial, and "requested that EVANS' parole hold be rescinded and EVANS be released on parole for the remaining five and one-half (5 ½) months of his parole violation sentence." (*Id.* at 3) Evans was released on parole shortly thereafter. (RT 16901, 16951, 17070)

100. On January 4,1990, while the jury was deliberating guilt, defense counsel learned of Evans' early release. (RT 16878) Counsel immediately moved to reopen the case to present this information to the jury. At a hearing held while the jury was still deliberating, agent Hahn testified that contrary to the memorandum which had been furnished to defense counsel during discovery (Masters' Exhibit 1230, Ex. HC-12, herein [see p. 57, 8/7/89 supp. to 6/14/89 memo]), and contrary to Evans' testimony, he *had* promised Evans that he would postpone the Alameda county sentencing for as long as necessary to avoid a commitment to state prison. (RT 17014)

101. Similarly, in an *in camera* hearing outside of defense counsel's presence, trial counsel for Mr. Evans in the Alameda County case, John Costain, revealed that, contrary to Evans' trial testimony, he in fact believed he would *not* serve any time in prison. (See Ex. HC-13, Sealed RT of 1/5/90, at pp. 59-61.)

102. No rational juror presented with this information would have believed that there was "no deal." Based upon his communications with James Hahn, Evans believed that the two state prison sentences would be "taken care of." As soon as the

case was safely in the hands of the jury, the two state prison sentences, in fact, were "taken care of" by James Hahn.

103. The trial court denied the defense motion to reopen the case. With respect to whether the government and Evans failed to disclose Hahn's promise to postpone the sentencing hearing, the trial court made the startling statement that Evans' testimony should have alerted the defense to the possibility of an *undisclosed* promise to postpone the sentencing hearing. (RT 17090-91).

104. With respect to whether there was evidence to support a belief that Evans may have lied when he testified that he expected nothing in exchange for his testimony, incredibly, the trial court found that its *in camera* meeting with Mr. Costain had revealed "nothing new" and "nothing exculpatory." (RT 17046) This was plainly wrong, and refuted by Evans' testimony that absolutely no promises had been made and that he expected no reduction in his sentence. (RT 13672-73)

105. With respect to whether there was evidence that Hahn played a role in modifying the prison sentence, the trial court, incredibly, found that "Hahn had nothing to do with the ultimate sentence, nothing." (RT 17609) This is refuted by direct evidence that, in fact, Hahn's efforts secured Evans a five-month reduction in

his one year state prison term for violating his parole (People's Ex. 268, Ex. HC-11 herein; RT 16901, 16951, 17070); and that Hahn interceded through Deputy Alameda County District Attorney Giuntini in gaining for Evans a modification of his 16-month state prison sentence down to felony probation. (RT 16947)

106. The court's refusal to re-open testimony to present the jury with the facts regarding Evans' deal was based on false factual and legal premises and was a violation of petitioner's Fifth, Sixth, and Fourteenth Amendment rights to due process, a fair trial, and to present a defense.

107. Petitioner also incorporates herein allegations 167 - 181, *infra,* concerning the prosecution's misconduct in failing to disclose Evans' true status as a government snitch.

CLAIM II: PETITIONER IS FACTUALLY INNOCENT

108. Petitioner hereby incorporates all of the foregoing allegations, as if fully set forth herein.

109. Petitioner is factually innocent of the charges against him, rendering his conviction and sentence a violation of his rights under state decisional and statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to

the United States Constitution, and the analogous provisions of the California Constitution. As the evidence in support of this petition documents, petitioner was deprived of his liberty and sentenced to death on the basis of untrue and perjured testimony, mistaken inferences drawn from physical evidence, exculpatory evidence withheld by the State, and exculpatory evidence excluded by the magistrate and trial judges. The true facts, by contrast, establish petitioner's actual innocence.

THE STATE'S CASE

110. The state's case against petitioner rested on the theories that (1) he was an active and participating member of the BGF leadership "commission" in Carson Section of San Quentin Prison which planned, voted on, and ordered the murder of Sergeant Burchfield; and (2) he sharpened the "shank" which made its way to Andre Johnson and was part of the weapon which struck and killed Burchfield. (See AOB pp. 19-29.)

111. According to the prosecution's testimony by Rufus Willis and Bobby Evans, Masters was "head of security" in Carson Section in the period leading up to the murder, and one of four inmates who constituted the "Central Committee" or Commission in C-Section, the

others being Willis himself, inmate Rhinehart, and Woodard. Redmond was the commander (RT 12730-31), and Willis claimed that, during a C-section Central Committee meeting, Redmond brought up the subject of assaulting a correctional officer. (RT 12732) Masters had presented a paper with a strategy for an attack on the Aryan Brotherhood and the Mexican Mafia. (RT 12732-34, 13479) Redmond told Masters to re-do his plan to include a move on police. (RT 12735) Willis was going to try and learn which officers were meeting with members of the Aryan Brotherhood, a white supremacist prison gang. (RT 12737)

112. By Willis' account, Redmond suggested that they assault Sergeant Burchfield, because he was bringing weaponry to Aryan Brotherhood members. (RT 12738-39, 13223) Andre Johnson's name was thereafter suggested as the person who should do the assault. (RT 12741)

113. By Willis' account, Redmond was thereafter transferred out of C-section. (RT 12747) At the next meeting of the Central Committee, Woodard brought up the subject of assaulting a correctional officer. (RT 12748) Andre Johnson was once again suggested as the person to do the act, because it was dark on the second tier where he was located. (RT 12749-50) They agreed on

how the weapon to be used would be made, that Sergeant Burchfield would be the target and how they were to get rid of the evidence after the act. (RT 12760-63) Woodard instructed Rhinehart to write a note to Andre Johnson containing the order to attack Sergeant Burchfield. (RT 12766) The Central Committee expected that once the BGF attacked an officer, the Crips would attack one. (RT 12753-56) According to Willis, he and Masters met with several Crip leaders who agreed that one week after the BGF attack, the Crips would attack another correctional officer. (RT 12757-58)

114. Bobby Evans, the State's chief corroborating witness, testified that he was moved to the Adjustment Center at San Quentin in July, 1985, after the murder, and being a longtime BGF enforcer, attended a number of yard meetings at which the Burchfield murder was discussed. According to Evans, Masters admitted to having voted in favor of the plan. (RT 13715, 13721, 13725-26)

115. The State also introduced several "kites" (inter-inmate communications sent by "fishlines" from cell to cell). Two were in Masters' handwriting, and one of these, according to Willis (who was allowed to "translate" the kites for the jury after he had urged Masters to write it at the behest of the State), discussed the blade

used to kill Burchfield. (RT 13088-89, Trial Exhibit 150-C, reproduced at AOB 25-26) In another kite, in response to written questions from Willis to Johnson, the latter stated that "Askari" sharpened the knife while "Askari II" sent the knife that was used. According to Willis, *both* "Askari" and "Askari II" referred to petitioner. (Trial Ex. 153B, RT 12926, 12930)

PROOF OF ACTUAL INNOCENCE

116. As indicated in the accompanying declarations of Rufus Willis, Lawrence Woodard, Andre Johnson, and Charles Drume (Exhibits HC-1, HC-2, HC-3, and HC-4), petitioner was in fact neither an active planner nor involved at all in the carrying out of the "hit" on Sergeant Burchfield. These declarations, instead, show that petitioner (1) was on BGF discipline for opposing a hit on correctional staff; (2) was therefore excluded from both a leadership role in the Carson Section BGF and from the commission itself; (3) did not discuss the subject of a "hit" on Sergeant Burchfield at any BGF meetings; (4) took no active role in any matters relating to the "hit" on Sergeant Burchfield; and (5) did not sharpen the shank that killed Burchfield or any other shank involved in the conspiracy to murder Sergeant Burchfield.

1. The Woodard Evidence

117. According to the declaration of convicted co-defendant Lawrence Woodard, who was a leader of the BGF in Carson Section leading up to and during the conspiracy to carry out the Burchfield murder, Masters opposed the plan to hit correctional staff in the first commission meeting at which it was brought up, and refused to go along with the plan. (Declaration of Lawrence Woodard, Ex. HC-2, p. 13, ¶ 3) Masters was thereafter demoted by Woodard and stripped of his responsibilities. Woodard knew that the prosecution's charge against Masters that he sharpened the weapon was untrue, because Masters had never been a knife-maker, was not good at sharpening metal, and was given no responsibilities at all regarding the Burchfield murder. (Declaration of Lawrence Woodard, Ex. HC-2, pp. 13-14, ¶ 4; p. 15, ¶ 9)

118. Woodard also declares that at least two of the "kites" (inter-inmate communications) introduced by the prosecution to support their case were untrue. They contained information that Masters would not have had. These kites were manufactured by Willis to shift responsibility and were copied by Masters to bolster his standing in the BGF. (*Id.* at pp. 2-3, ¶¶ 6-8)

2. The Johnson Evidence

119. Masters' innocence is also confirmed by his convicted co-defendant Andre Johnson, who declares that, to his knowledge, Masters had no knowledge and took no part in the killing of Sergeant Burchfield. Masters did not communicate with him via note or kite, or verbally or in any other way about the crime. Nor did any other inmates tell Johnson that Masters was involved in any way. (Declaration of Andre Johnson, Ex. HC-3, pp. 17-18, ¶¶ 3, 6, 7)

3. The Drume Evidence

120. As for who sharpened the knife, Charles Drume's declaration makes clear that it was he, not Masters, who got the order from Woodard to sharpen the knife. (Declaration of Charles Drume, Ex. HC-4, p. 20, ¶ 2) Indeed, this evidence was available at the time of trial, but was excluded by the trial court. (Herein at ¶ 77 and AOB at pp. 82*ff*) Andre Johnson, who was housed directly below Masters, two tiers down, declares that he would have heard the sounds of the knife being sharpened on the cement floor had Masters been sharpening the knife. (Declaration of Andre Johnson, Ex. HC-3, p. 18, ¶ 5)

121. Drume declares that Masters was not involved: "Jarvis Masters was wrongly convicted and sentenced to death. Because I

was a participant, I know that Masters was not involved in either the planning or carrying out of the attack on Sergeant Burchfield. (Ex. HC-4 at p. 20, ¶ 3)

4. The Willis Evidence

122. Most tellingly, Rufus Willis, the state's star witness, has recanted his testimony against Masters. (See generally the Declaration of Rufus Willis, Ex. HC-1.) Far from being an active participant, Masters opposed the hit on Burchfield: "Masters and I talked privately on the yard once before the Burchfield killing and he told me that he did not agree with doing this hit. He told me 'I'm not with this.'" (*Id.* at p. 8, ¶ 18) Willis, however, admits that in a series of meetings with District Attorney's Investigator Numark, he "worked with [Numark] to *create* evidence for the arrest of Woodard and Johnson *and Masters*." (Ex. HC-1, p. 00, ¶ 3; emphases added.) Masters "had nothing to do with the planning of the Burchfield killing," and was only included later at the insistence of Numark. (*Id.* at ¶¶ 3-4)

123. Numark was able to design the case as he wanted because he promised Willis both immunity from prosecution for the Burchfield murder and release from prison. Numark trapped Willis,

however, by telling him not to mention the deal to the lead prosecutor, Deputy District Attorney Ed Berberian during the preparation of the case, and it was only later that Berberian said he was rescinding Willis' release deal. (*Id.* at pp. 1-2, ¶ 3) (RT 13065, 13067, 13169, 13171, 13431, 13558; People's Exhibit 205)

124. Willis wanted to stop cooperating, but Berberian told him that if he did not testify as to what he had already told them, he would be returned to San Quentin. This was tantamount to a death threat because Willis knew he would be killed immediately. Willis' lawyer, James Reilly explained the "lose-lose" situation that Willis was in, and Willis felt he had

> to testify . . . the way . . . Numark and Berberian wanted: to implicate Masters along with the others though [he] knew that Masters had nothing to do with [the] planning and killing of Sgt. Burchfield, and [Willis] had no knowledge of his having sharpened a knife."
>
> (Declaration of Rufus Willis at pp. 8-9, ¶ 20)

125. Willis also now admits that he lied on the stand about threats against him: "When asked if there were any threats against me, I testified no because I knew if I said yes, I would no longer be protected and I'd be put in San Quentin and killed." His objective

had changed by the time of trial, from getting out of prison to staying alive. (*Id.* at p. 9, ¶¶ 21-22)

126. While Willis declares that Masters was present for "at least" one of the planning meetings, Masters "had nothing to say at them" because he was not high enough in the gang hierarchy and, at most, learned about the plan. (*Id.* at p. 3, ¶ 8)

127. Willis admits that his "creation" of evidence against Masters included ordering him to write the "kites" which provided corroboration of Willis' testimony. Numark told Willis that his stories of what had happened were not enough and he had to get another member of the BGF to put things in writing. Numark told Willis the questions to write down for Andre Johnson, and also told him to get in writing from Masters a complete account of what happened with the Burchfield killing (at least in Willis' telling). (*Id.* at p. 3, ¶ 10) Thus, one of the kites "was written by Masters under my orders as requested by Numark." "Masters would have been trying to impress Woodard at all times, and this kite reflects how he had to prove himself by bravado . . . [and] took credit for a lot of things he did not do." However, this kite, People's Exhibit 159-C (Ex. HC-5 herein), refers to the situation *after* the Burchfield murder, while at trial Willis testified otherwise, "conforming my answers to what I had previously

told Numark in various interviews in which I gave various interpretations." (*Id.* at pp. 4-5, ¶ 12; and see RT 13088, 14245, 14389 [testimony of Willis re: this kite].)

128. The first of these kites, which seems to implicate Masters in the making of weapons, People' Ex. 150-C (Ex. HC-6 herein), was written after Willis met with Numark. According to Willis, however, "there were no kites telling [Willis] or anyone to send metal to Masters, or to have Masters sharpen any weapon." Indeed, "We did not give him any role in conjunction with the killing of Burchfield." (Ex. HC-1 at p. 5, ¶ 14)

129. Since this kite was not enough to implicate Masters, Numark told Willis to go back and tell Masters to write about how certain events occurred, and this explains how Masters came to write the Usalaama report kite. (Ex. HC-5 [People's Ex. 159-C below]) The kite, however, was compiled at Willis' direction, from reports provided by Willis. Willis told Masters that the Usalaama report was designed to give Masters a role, so as to put him back in good standing with the leadership. The kite is simply a summary that Masters copied over, giving himself a role he never had. (Declaration of Rufus Willis, Ex. HC-1, pp. 5-6, ¶ 15)

130. Exacerbating the constitutional violations inherent in the manufacture, at the prosecutor's investigator's request, of evidence against appellant, was the court's error in qualifying Willis as an expert on the BGF. (See CT 1738-45; 2364-60 [motion pleadings]; 2396-97 [court denies motion to exclude Willis as expert]) As a result, Willis was allowed to testify to the meaning of some of the words and phrases in the allegedly-incriminating kites. The due process problem with this is that, to the extent that BGF code and prison patois had to be interpreted for the jury, by allowing Willis to do so, the trial court allowed him to provide the required corroboration for his own testimony.

131. Willis also confirms that Masters did not sharpen the knife that killed Burchfield: Masters "would not have been involved in the manufacture of the murder knife. He was not fully trusted and not considered reliable. Another reason is that Usalaama [Masters' position before being put on discipline] would not have been making weapons." (Declaration of Rufus Willis, Ex. HC-1, at p. 5, ¶ 13)

5. The Richardson Evidence

132. Willis testified that there were four principal co-conspirators: himself, Woodard, Johnson, and a fourth inmate. As

noted above (*supra* at ¶¶ 50-54), Willis' preliminary hearing and trial testimony provided the description of the fourth co-conspirator; the description closely matched inmate Harold Richardson, but did not match Jarvis Masters. As also noted, Harold Richardson admitted his role in the killing of Sergeant Burchfield. (See Ex. HC-8, and herein, at ¶¶ 54, 59, 62-63)

6. Admissions by Bobby Evans

133. In a meeting in 1999 with appellate counsel Joseph Baxter, prosecution witness Bobby Evans, who supplied the main testimonial corroboration of Willis' testimony, admitted to Baxter that he knew that petitioner did not have anything to do with the killing of Sergeant Burchfield, and that Masters was not a member of the BGF commission, and that, contrary to Evans' trial testimony, Masters never told Evans that he voted for the killing of Burchfield. (Declaration of Joseph Baxter, Ex. HC-7, p. 30-31, ¶¶ 9-10)

134. Evans also told Baxter that the "Usalama Report" kite was engineered by Willis and the State to implicate Masters, and was bogus. (*Id.* at pp 3-4, ¶ 13)

135. As all of the foregoing evidence shows, Masters is factually innocent, and was convicted by lies suborned – indeed,

created – by and at the behest of the State. Further facts to support this claim will be developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigators and experts, and hearing.

CLAIM III: THE PROSECUTION COMMITTED REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT

136. Petitioner hereby incorporates all of the foregoing allegations, as if fully set forth herein.

137. Petitioner was convicted, despite his innocence, in part because of a series of incidents of prosecutorial misconduct, rendering his conviction and sentence a violation of his rights under state decisional and statutory law and his constitutional rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and the analogous provisions of the California Constitution. Petitioner was deprived of his liberty and sentenced to death in a trial rife with prosecutorial coercion of witnesses, manufacture of evidence, withholding of evidence favorable to petitioner, and subornation of perjury.

138. The facts that support this claim, among others, that will be further developed after full investigation, discovery, access to this Court's subpoena power, adequate funding for investigators and experts, and a hearing, are as follows.

A. COERCION OF WILLIS, MANUFACTURE OF EVIDENCE, SUBORNATION OF PERJURY, AND VIOLATION OF PETITIONER'S *MIRANDA* RIGHTS

139. Willis Rufus was both the prosecution's chief witness and the prosecution's principal source of evidence manufactured for the specific purpose of implicating Masters in a crime that the prosecution *knew* Masters did not commit.

140. As set forth in the Declaration of Rufus Willis – and described above in allegations 122-129, which are hereby incorporated as if fully set forth herein – Willis was coerced by the prosecution into implicating petitioner, even though he told them Masters was not involved. (See Ex. HC-1, pp. 0-1, ¶¶ 3-5; pp. 7-9, ¶¶ 20-23)

141. As has been described, Willis was coerced by being lured into becoming a snitch by District Attorney's investigator Gasser's assertions that Willis would be granted immunity, coupled with admonitions against discussing this with prosecutor Berberian.

When Berberian ultimately refused to grant the immunity, Willis faced the Hobson's Choice of continuing to cooperate with the prosecution and thereby gaining protective custody, or, already having given the prosecution his confession and substantial information about the conspiracy, facing prosecution and, worse, a "snitch jacket" which would almost certainly lead to his death at the hands of his fellow inmates. Faced with this choice, Willis had no choice but to cooperate, and to testify falsely to implicate Masters. (See Dec. of Rufus Willis, Ex. HC-1, pp. 0-2, ¶¶ 3-5; pp. 7-9, ¶¶ 20-23)

142. Willis' implication of Masters at the behest of the prosecution constituted prosecutorial misconduct of the most grievous sort, including coercion of a witness, the manufacture of evidence, and subornation of perjury, all in violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial.

143. Significantly, after Willis had been seduced into talking to the State and then not offered immunity, the State also sought to have Willis create evidence against Masters and his co-defendants that would implicate Masters. (*Id.* at pp. 3-5, ¶¶ 10-12, pp. 6-7, ¶15)

144. Willis testified that Masters would regularly write him two to three kites a day before the assault on Sergeant Burchfield. (RT 13092) Willis also testified that some of these kites dealt with the planned murder of Burchfield. (RT 13093) Willis, however, destroyed these numerous kites, along with 200 to 300 other notes. (RT 13091) He also destroyed his own reports on the yard meetings. (RT 13092-93) According to Willis' declaration, some of the destroyed kites would have helped petitioner:

> Before I went to the police, I destroyed a lot of old kites in my cell, perhaps hundreds of them, many from Masters. They could have contained information that might have helped Masters' defense. I had reported on every meeting and action that took place prior to Burchfield's death. The destroyed kites would have shown the minor role played by Masters, and the fact that there were no kites about Masters sharpening weapons or ordering anyone else to do so.
>
> (Declaration of Rufus Willis, Ex. HC-1, at p. 7, ¶ 17)

1. The "Oh we to change codes" Kite

145. According to Willis' testimony at the trial, Charles Numark, a District Attorney's investigator, told Willis he needed a detailed admission from Masters. (RT 13088) Willis, thereupon, wrote Masters a letter. (*Id.*) According to Willis (RT 13089), People's Exhibit 150-C (Ex. HC-6) represented Masters' response.

It is laden with code, prison-speak, and BGF-speak, and Willis was allowed to interpret it for the jury, thereby in essence providing self-corroboration.

146. Willis testified falsely that this kite showed that Masters was guilty as charged. Thus, Willis testified that "Dray" and "the Younger" referred to Andre Johnson, "kisu" referred to the knife or weapon used to kill Burchfield, the "C-notes" referred to the Crips. (RT 12708, 12855-59), and "Saturday live jump off," referred to the hit on Burchfield. (RT 12859-60, 14839) The kite, by its terms, however, does not lend itself to Willis' interpretation. Thus, while Willis testified that it was sent to and received by him (RT 12853-54, 12856, 13083), the kite was written to L-9, i.e., Rhinehart. (RT 12719) The letters "L-9," moreover, are unexplainedly in a different handwriting and appear to have been inserted into the letter. At the preliminary hearing, Willis admitted that he himself inserted the "L-9" on the document. (RT 13127)

147. Willis also implied that the double-edge kisu referred to in the note ("could have chopped a T-Bone stake") was the weapon used to kill Burchfield. (RT 12857) The kite, however, by its own terms, is generally about "stock material left" of different size and

color from the light grey metal weapon allegedly used to kill Burchfield. This stock material is described as "flats," an odd description for a spearhead. (RT 11266; People's Exhibit 118-B) The injunction "check the razor double edge I put on that black," speaks in the present tense, suggesting that the recipient of the letter should look closely at a weapon he apparently possesses. *It could not refer to the light grey metal spear, since the prison had already seized and was in possession of that weapon.* (RT 11261-62 , 11266, 11307, 11608, 11611) Finally, the note is signed by "L/2U," (Masters was allegedly "U-1," RT 12867) suggesting that the note, although transcribed by Masters, was authored by someone else.

148. Willis, in his declaration filed herewith, admits that the kite (People's Exhibit 150-C, Ex HC-6 herein) does not implicate Masters in the Burchfield murder. Thus, Willis declares:

> 11. At first, I met with Numark at the prison hospital and then went back to my cell in Carson Section to get writings from Masters. Later, I was put in the Adjustment Center to get writings from Andre Johnson.
>
> 12. The "kite" that starts out, "Oh, we to change codes for everyone, full alert, semi alert," etc. [Ex. 150-C, HC-6] was written by Masters under my orders as requested by Numark. Woodard had told us to change

all codes. Part of that kite, I know, was written in conjunction with a kite Woodard sent, and parts of it are copied from a kite Woodard sent. The top of it, about the codes, is from Woodard's kite, and other parts are also. Masters wrote this because he feared Woodard, and he knew I was reporting to Woodard, therefore he wrote this kite when I told him to. I was Akili, the chief of intelligence, and I was over him. Masters would have been trying to impress Woodard at all times, and this kite reflects how he had to prove himself by bravado. Masters took credit for a lot of things he did not do. The entire kite refers to things that happened after Burchfield had been killed. Many things about this kite were confusing to me when I testified about it. I did not know why it says "L-9". The kite is about the situation with metal and knives afterwards, not before Burchfield was killt. [*sic*] It refers to Andre Johnson – "Dre" – being in the Adjustment Center, so it definitely is about what was going on after Burchfield was dead. It is not about the murder weapon. I do not know what the word "Black" refers to. As far as I know, the Burchfield murder weapon was not black, or ever referred to as black. The kite refers to Andre Johnson as "Dre." I do not recall who "Younger" referred to, but it is not Andre Johnson. "Younger" could have been a number of different people. When I testified about my interpretation of this kite, I was conforming my answers to what I had previously told Numark in various interviews in which I gave various interpretations. At the time, I was baffled as to what the kite meant by "black" and by "younger."

. . . .

> 14. The kite, that starts out, "Oh, we to change codes" was written after I met Numark. Though it seems to implicate Masters in making weapons, the truth was, when someone was needed to make a knife to use to attack Burchfield, Vaughn was chosen. I suggested Vaughn – "Chicken Swoop" – who I had known in Donner Section. I had been over Chicken Swoop there and I'd torn off a pipe from a light conduit and sent it to Chicken Swoop and he had made knives from it. He was good at it, and I said he should make a knife to use for Burchfield. He was on the 3rd deck in Carson Section. The metal for the knife was supposed to come from a bed frame. To the best of my knowledge Chicken Swoop and perhaps Ingram (Tabari) played roles in sharpening knives and passing knives in conjunction with the plan. I never had any knowledge of Masters ever sharpening the murder knife, ever having had it, ever even having seen it. We did not give him any role in conjunction with the killing of Burchfield. Prior to when I met with Numark, there were no kites telling me or anyone to send metal to Masters, or to have Masters sharpen any weapon. Any such kites would have been sent to me, as Akili. On the contrary, the Daily Reports I was getting were telling me that Chicken Swoop was sharpening the murder weapons.
>
> (Declaration of Rufus Willis, Ex. HC-1 at pp. 3-5, ¶¶ 12, 14)

149. Co-defendant Lawrence Woodard also confirms in his declaration filed herewith that this same kite was misinterpreted by the State at the trial:

6. I first saw the two notes, or "kites" that the prosecution used against Jarvis Masters, during preparation for the trial. I knew that the first kite, which begins with the words, "oh, we to change codes" was untrue, and that the interpretations of it offered by the prosecution was [*sic*] wrong. That kite includes a portion that says, "I'm not sure as to what report you are requesting. If it's the beginning stages of the stregery [*sic*] to the which the Saturday live jump off. Give a yes and I drew it for you." I know that this refers to the early planning stage in which the BGF was planning to attack members of the Aryan Brotherhood (ABs) and the Mexican Mafia in C-Section. That is the only "early stages" of any plan that Masters was present for or knew about. After the plan changed, he knew nothing about the plans as he was excluded and isolated from the BGF. This kite is about weapons and papers held by the gang after the Burchfield killing and that Masters was reporting on to Willis. I read this kite, based on my experience with hundreds of such kites, and my knowledge of what Masters knew and did not know, as a transparent attempt by Masters to give Rufus Willis a kite that would be read by the leadership of the BGF and that would exonerate Masters for having opposed the Burchfield killing. Willis told me that all kites were going to North Block to Redmond. Masters was motivated to give Willis a kite that would exonerate him with the BGF because it was dangerous for Masters to be out of favor with the BGF.

(Declaration of Lawrence Woodard, Ex. HC-2, at pp. 14-15, ¶6)

150. Willis also notes in his declaration filed herewith that District Attorney investigator Numark was not satisfied with this kite:

> 15. Numark looked at the "Oh, we to change codes" kite and told me it was not enough to implicate Masters. He told me to go back and tell Masters to write about how certain events occurred. This is how Masters wrote the Usulaama report kite, that begins, "Salutations and rage to you."
>
> (Declaration of Rufus Willis, Ex. HC-1 at pp. 5-6, ¶ 15)

2. The "Usalama Report" Kite

151. Willis also testified that he was not satisfied by Masters' response to his request for a report. Thus, Willis sent Masters another letter, asking for more details. (RT 13088) People's Exhibit 159-C (Ex. HC-5 herein), in Masters' handwriting and bearing his fingerprints, represents Masters' response. (RT 13088, 14245, 14389)

152. Willis, in his declaration, admits that this kite was purely and simply a fabrication, based upon a compilation of false reports which Willis forwarded to Masters:

> 15. . . . . I ordered Masters to write out a complete history of the Burchfield killing. He did not compose it from his personal knowledge. Masters compiled it from many reports I had written and sent to him. These reports, however, were not actually factual. I knew Masters was in trouble with

> Woodard for being incompetent and insubordinate. I told Masters I thought the police were onto me and I was sure I was about to be sent to the AC. I told Masters that I would keister the report to the BGF leadership, and that the report was designed to give him a role to put him in good standing, but it couldn't be in my handwriting. This is why the Usalaama [*sic*] report mentions U-1's role at various places. He did not really play this role. Masters had no way of knowing the information in the Usalaama [*sic*] report on his own, because he was on the fourth tier. For example, the reference to "leadership of the ABs": Masters had no access to information about that except what I or Woodard told him in notes. Also, where it says Somo – Johnson – was recommended by A-1, who is me, and approved by U-1, who was Masters, that's just "bullshit." Masters had no say-so to approve anything. The decisions about Burchfield had already been made by me. I didn't need Masters or Richardson or anyone. Most of the "Usalaama [*sic*] Report" is copied from my own writings. Numark told me to get Masters to write about how certain events occurred, and to get a layout of everything that happened. I was the only one that had this information. It was gathered from months of information and the kite is just a summary that Masters copied over.
>
> (Declaration of Rufus Willis, Ex. HC-1, at p. 6, ¶ 15)

153. A close examination of the two Masters kites also makes it evident that they were not actually composed by the same

person. Thus, words misspelled in People's Exhibit 150-C (Ex. HC-6), the first kite handwritten by Masters, are spelled correctly in the second kite. (RT 13088) While the first note describes a kisu as 7½ "inche" long, the second note spells "inch" correctly. While the first note writes "stregery" for strategy, the second note spells "strategy" correctly. In the first note, the sender writes "Let me *no* what report you are talking about. . . ." The second note spells "know" correctly. While the first note proclaims "Right*ie*ous on the floor safe," the second note spells "righteous" correctly.

154. Lawrence Woodard, in his declaration filed herewith, also affirms that the second kite is untrue. Thus Woodard declares:

> 7. The second note, or kite, the one that begins, "Usalama" is untrue. I know that Masters was not privy to the information it contains.
>
> 8. I know that kites were frequently written by BGF leaders and then re-copied, under orders, by inmates lower in the hierarchy, to conceal who had written them. Willis had the power to order any BGF member in C-Section at that time to copy a kite, or report or to send a kite that he had written himself and order someone to copy it word-for-word. It is my opinion that this "Usalama" kite was written by Willis and copied, because Masters had no knowledge of the attack on Sgt. Burchfield. Masters was motivated to obey Willis in order to

> ingratiate himself with the BGF in general and with me in particular.
>
> (Declaration of Lawrence Woodard, Ex. HC-2, at p. 19, ¶¶ 7-8)

155. At the trial, moreover, Willis admitted that kites were sometimes written by several people as a cover-up. (RT 13086-87) State witness Bobby Evans also admitted that BGF leadership never wanted their handwriting on any documents. (RT 13917) Defense witness Thurston McAfee testified that Willis had others writing kites for him. (RT 14905) Indeed, Willis described himself as a BGF "transcriber" to San Quentin officer Ollison. (RT 11749) The trial court itself noted that one of the kites was an obvious transcription. (RT 13297)

3. The Johnson Kite

156. The final kite used to connect Masters was People's Exhibit 153-B, written by co-defendant Andre Johnson. (Ex. HC-14) Contrary to the State's argument to the jury, People's Exhibit 153-B, Johnson's answers to Willis' questions, does not implicate Masters as a central figure in the conspiracy. Thus, Johnson wrote that "Askari II" sent the knife "to put on the pole" and that "Askari" sharpened the knife. Willis testified that *both* "Askari" and "Askari II" referred to appellant Masters. (RT 12926, 12930) While there is

substantial evidence in the record that Masters used the Swahili title "Askari," along with Woodard and Johnson (RT 13727, 13745) and a large portion of black prison population in 1985 (RT 13916, 14802, 14906, 14921), there was absolutely no evidence of Masters' use of the name "Askari II." It also makes absolutely no sense that Johnson would refer to Masters both as "Askari" and "Askari II" in one and the same letter.

157. Andre Johnson notes in his declaration, filed herewith, that this note was actually dictated by Rufus Willis:

> 8. After the killing of Sgt. Burchfield, Rufus Willis forced me to write notes about it. He ordered me to do it, again under threat of death if I were to disobey orders. Willis dictated the notes I wrote. Willis wrote out the questions and also the answers for the notes, then I copied them.
>
> (Declaration of Andre Johnson, Ex. HC-3, at p. 18, ¶ 8)

158. Johnson likewise confirms that he has no knowledge of Masters' involvement in the death of Sergeant Burchfield:

> 2. To my knowledge, Jarvis Masters had no knowledge of any involvement in the killing of Sgt. Burchfield. He did not participate in making plans or in telling me what to do in regards to attempting to attack Sgt. Burchfield or any other officer. Masters did not communicate with me via note or kite, or verbally or any other way

about this crime, nor did other inmates tell me that Masters was involved in any way.
. . . .

5. The blade used to attack the officer was passed to my cell on a line. I have no idea who passed the knife or who made it. I am sure the blade was not made above or near me, as I would have been sure to hear it being sharpened, and officers also would have heard the sound of scraping on the cement floor. Masters was housed two tiers up, directly above my cell.
6. Masters never relayed to me any order to strike at Sgt. Burchfield or any other officer.
7. I never formed the impression that Jarvis Masters was among the leadership of the gang in C-Section, or that Masters was someone whom I had to obey or fear. He gave no orders of any kind. I did not even know he was in the BGF.

(Declaration of Andre Johnson, Ex. HC-2, at pp. 13-14)

159. In addition to being fabrications and false testimony, the two kites were direct violations of Masters' testimonial rights under the Unites States and California Constitutions. The communications between Masters, in custody, and Willis, an agent of the prosecution, including Willis' instructions to Masters to copy "kites" in his own hand, without counsel or *Miranda* warnings, constituted a violation of Masters' Fifth, Sixth, and Fourteenth Amendment rights under *Miranda v. Arizona* (1966) 384 U.S. 436.

160. Accordingly, the kites constituted manufactured and intentionally misrepresented evidence obtained in violation of Masters' testimonial rights. To the extent that the kites provided a part of the necessary corroboration for Willis' testimony and the prosecution's theory, their admission was prejudicial.

B. COERCION AND ATTEMPT TO SUBORN PERJURY FOR THE PENALTY PHASE

161. As a part of the same pattern, investigator Gasser and prosecutor Berberian attempted to coerce perjured testimony from Robert A. Brewer regarding the murder of Jackson. This was one of the two uncharged murders introduced at the penalty phase.

162. Brewer was one of several inmates who were, along with Masters, disciplined for the stabbing by virtue of their proximity to Jackson when the gunrail officer "froze" the yard. (Declaration of Robert A. Brewer, Ex. HC-15, pp. 67-68, ¶ 3)

163. In October of 1988, D.A.'s Investigator Gasser came to interview Brewer at the state prison in Tehachapi. Gasser wanted him to testify the Masters had killed Jackson, but Brewer told Gasser that he did not see who did it. Gasser then began accusing Brewer of bringing knives onto the yard, and, as he was leaving, told Brewer that he had several reliable witnesses that Brewer had stabbed

Jackson. "We (sic) got three witnesses that say you're involved (in killing Jackson) – think about it." (*Id.* at pp. 3-4, ¶¶ 6-7)

164. A month or two later, Gasser returned to see Brewer, accompanied by prosecutor Berberian. In the taped interview, Mr. Berberian repeated the charge that they had three witnesses that said the Brewer killed Jackson, but after the tape was turned off, they told Brewer they believed that his story, that their informants were unreliable, and that they had concluded that Masters had killed Jackson with another man, Hobbs, who had since died. (*Id.* at p. 5, ¶¶ 8-9)

165. Then, repeating their pattern for obtaining witnesses, Berberian and Gasser offered Brewer "protection" for him and his mother if he would testify in court against Masters and tell the jury that Masters had killed Jackson with Hobbs. (*Id.* at pp. 5-6, ¶ 9)

166. Thus, despite repeated and unwavering claims by Brewer that he did not know who killed Jackson, the prosecution was still asking Brewer, in return for being moved out of state and his mother being placed in the witness protection program, to testify that Masters had done it. This is nothing less than subornation of perjury and a violation of petitioner's due process rights.

C. THE COERCION OF AND FAILURE TO DISCLOSE THE BENEFITS RECEIVED BY BOBBY EVANS FOR HIS TESTIMONY

167. The prosecution also committed misconduct by concealing its deal with Bobby Evans, the principal corroborating witness for the prosecution. His importance to the prosecution is underscored by the fact that the jury returned a verdict of guilt against Masters shortly after a read-back of the Evans testimony. (CT 5120-24; RT 16903, 17082, 17087-88, 17093)

168. The allegations regarding the trial facts related to Evans, set forth above in allegations 91 to 106, are incorporated as if fully set forth herein.

169. Evans testified under oath in three unrelated judicial proceedings: On April 25-26, 1996, in Yolo County preliminary examination proceedings in *People v. Williams*, Case No. 95-8640 (Ex. HC-16); on March 18, 1998, in San Joaquin County Grand Jury proceedings in *People v. Defendant A* (CR No. 97-60419) (Ex. HC-17); and on June 10, 1998, in Yolo County Superior Court proceedings in *People v. Bailey,* No. 98-0029 (Ex. HC-18).

170. This testimony under oath establishes that:

(1) Since at least 1988 (before his testimony in the Masters trial), Evans was doing undercover drug buys for San

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Joaquin County (*People v. Williams,* Ex. HC-16, p. ~~270~~, Ex. HC-17, pp. 87-89);

(2) He was not prosecuted for 15 to 20 shootings because he was "granted immunity in Court, in State Court for testifying on a prison murder" of a prison guard at San Quentin. (*People v. Williams,* Ex. HC-16, pp. 82-83)

(3) He got probation following his April, 1989 Alameda County charges as a result of having testified "in a prison homicide" of a prison guard, "a Sergeant" – undoubtedly this case – and for testifying for the federal government on a large drug case (*People v. Bailey,* Ex. HC-18, pp. 94-95); and

(4) He was in the process of being indicted under the RICO Act when he decided to break the BGF oath and testify against the BGF. (*People v. Bailey,* Ex. HC-18, p. 96)

171. Thus, not only was Evans already a government snitch before the 1989 Alameda County arrest which led to his testimony against Masters – a fact not disclosed to Masters' attorneys or, of course, the jury – but he was granted probation in the Alameda County case *because* of his testimony against Masters, *which the government went to great lengths to conceal from the defense.* The

State also concealed the fact that Evans was in the process of being indicted under the RICO Act when he agreed to testify against Masters.

172. These State concealments, moreover, are on top of the concealments discovered during the 1989-1990 trial of this case, which the trial court chose to ignore. Thus, during the trial it was discovered that the State concealed:

1. That James Hahn promised to postpone Evans' sentencing until a commitment to state prison could be avoided. (RT 13672-73, 13799, 13832, 13931, 17014; Masters Trial Exhibit 1230)
2. That Evans anticipated that his robbery and parole violation sentence would be modified. (Sealed RT of 1-5-90 at 2-4; RT 13673,16987)
3. That James Hahn interceded to obtain Evans' early release. (RT 16942, 16947-48, 16891, 16901, 16951, 17070; People's Exhibit 268)

173. Evans, moreover, has himself admitted a massive coverup by the State in conjunction with the prosecution of Jarvis Masters. At least as early as 1999, Evans was the target of a Yolo County Public Defenders' investigation as a result of his work as an

informant for the State of California during the '90s. According to a *Sacramento Bee* editorial, Bobby Evans committed perjury in conjunction with many of the cases on which he had worked as an informant. (Exhibit A attached to Declaration of Joseph Baxter, Ex. HC-7.) Indeed, over a hundred cases were thrown out by the Yolo County and Butte County prosecutors because of the taint of Bobby Evans' perjury as an informant. (*Id.*) Bobby Evans has now admitted his own perjury in this case.

174. On October 21, 1999, Evans admitted to attorney Joseph Baxter that he was basically told what the prosecution wanted him to say when he testified against Masters and his co-defendants. For example, the prosecution would show him a piece of paper with an outline of his proposed testimony and say something like, "take a look at this and see if you can say this." According to Evans, contrary to his testimony at the Masters trial, Woodard, Johnson, and Masters never spoke to him about the Burchfield matter. That, he said, was something the DA's office just made up. (*Id.* at p. 3, ¶ 9)

175. According to Evans, Masters was the principal victim of this misconduct. He said he told the prosecutor his concern about testifying against Masters since he felt that Masters was not really

involved, but they said things like, "We need all three," and led Evans to believe that Masters had to be included in his testimony because that's the way the rest of the testimony would go, and that's the way it all needed to go down. They said it would work best that way. (*Id.* at pp. 3-4, ¶ 10)

176. On October 30, 1999, Bobby Evans met with appellant's counsel Joseph Baxter, CAP attorney Patricia Daniels, Yolo County Public Defenders Bob Spangler, Barry Melton, and Jim Egar, and Yolo County Public Defender Investigator Bob Samaniego, at the Yolo County Public Defender's office. Upon questioning, Evans admitted that misrepresentations had been made to the defense regarding the benefits received by him. He also admitted that he had been threatened with prosecution of various crimes if he didn't testify against Masters and that this was not disclosed to the defense. (Declaration of Joseph Baxter, Ex. HC-7 at p. 31, ¶ 11)

177. Evans also met privately with attorney Joseph Baxter on October 30, 1999 and provided further details. Evans said he knew that Jarvis Masters didn't really have anything to do with the killing of Sgt. Burchfield. The responsibility, he said, was Johnson's, and to some extent Woodard's. He said that he knew that Masters was not a member of the BGF commission, that he was nothing in the BGF,

and that Masters never told him he voted for the killing of Sgt. Burchfield. (*Id.* at p. 4, ¶ 12)

178. Evans also revealed new information regarding the question- and-answer kite written by Willis and Johnson. The kite, used by the prosecution in the trial, contains handwritten questions in Willis' handwriting and incriminating answers in Johnson's handwriting. (Ex. HC-14 [People's Ex. 153-B]; RT 12926, 12930) Evans said he knew that the kite was bogus; the entire scheme was engineered by the State. Willis, he said, also gave Johnson the answers to the questions which he told Johnson to insert as his own answers on the questionnaire written out by Willis. (*Id.* at pp. 4-5, ¶ 13) Thus, Evans corroborates Andre Johnson's declaration, attached hereto as Exhibit HC-3 (at p. 18, ¶ 8).

179. As for the "Usalama Report" kite in Masters' handwriting relied upon by the prosecution at trial, that, he said, was also engineered by them. Willis now also corroborates all of this. (Declaration of Rufus Willis, Ex. HC-1 at pp. 1-2, ¶ 6) Co-defendant Lawrence Woodard also now corroborates this. (Declaration of Lawrence Woodard, Ex. HC-2 at pp. 14-15, ¶ 6)

180. Finally, Evans admitted that he had been threatened with prosecution of numerous crimes if he didn't testify against

Masters and that this was not disclosed to the defense. Corroborating his testimony in *People v. Bailey* (HC-18, p. 96), Evans admitted to Baxter that the government threatened him with prosecution under the RICO Act if he didn't testify against Masters. Indeed, Evans stated that the government also threatened to prosecute him for three homicides if he didn't testify against Masters. (Declaration of Joseph Baxter, Ex. HC-7 at p. 32, ¶ 15)

181. Accordingly, in addition to the trial court's errors in excluding the evidence which *was* admitted to by the government, the prosecution concealed further evidence which the defendant and the jury had a right to know regarding Evans' rewards for testifying against Masters, as well as engaging in subornation of perjury, and manufacture of bogus evidence, all in violation of petitioner's Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial.

D. CONTINUING THREATS AND COERCION OF EXCULPATORY WITNESS CHARLES DRUME

182. According to inmate Charles Drume, he was attacked on a number of occasions in California prisons as a result of his coming forward for Masters, but against the BGF. (Declaration of Charles Drume, ex. HC-4, p. 21, ¶ 7) Instead of helping with this

dangerous situation, prison authorities told Drume that if he wanted their protection, he needed to change his story that he was involved in the manufacture of the knife in the Burchfield murder. (*Id.*) Indeed, prison authorities would not let Drume disaffiliate from the BGF and debrief unless he changed his story about his involvement in the Burchfield killing. (*Id.*) Prison authorities also told Drume that if he did not change his story, he would never get out of the Security Housing Unit and that he would stay there forever, and would be housed with the BGF. (*Id.*) In addition, when Drume finally agreed to change his story, and authorities took his tape recorded statement for the first time, they turned the recorder on and off because Drume failed to say exactly what they wanted. (*Id.*)

E. THE PERVASIVE AND SYSTEMATIC WITHHOLDING AND DELAY IN DISCLOSING EVIDENCE FAVORABLE TO THE DEFENSE

183. Petitioner hereby incorporates all of the foregoing allegations, as if fully set forth herein.

184. The State, by its incompetence, perpetual desire for security, and lack of interest in defense exculpatory evidence, thwarted and befuddled the defense investigation of the Burchfield

murder. This malfeasance and misfeasance touched every major aspect of this case during its first two years.

(a) The State's loss and destruction of physical evidence

185. At the very outset, investigating officers lost chain of custody of the alleged spearhead. Although a second spear had allegedly been created, investigating officers either did not find it or destroyed it. (RT 11614, 11765-66, 13023, 13035, 15641)

186. According to the People's case, the light grey metal weapon (which bore no traces linking it to the crime) came from a bed brace belonging to BGF member Donald Carruthers, celled in 2C8. Carruthers' bed brace, however, was not the only bed brace missing in Carson section. (RT 11123, 11125) Photographs required by prison rules of the missing bed braces could not be found. (RT 11123; People's Exhibit 1201 [subpoena duces tecum]) Officers also could not locate their handwritten reports. (RT 11128) Prison logbooks were ambiguous as to whether the alleged bed brace actually came from 2C8 or from 2C4. (RT 16077)

187. According to the State's witnesses, many stabbing instruments were secreted throughout Carson section. (RT 11592, 11598-11600, 11613, 13031, 13038-39, 13188, 13412) Evidence

which could not be tied to a particular person or cell, however, was destroyed. (RT 15286-93, 15640-42; People's Exhibit 1225 [prison policies on destruction of contraband])

188. Officer Arzate was a central figure in the State's investigation. Immediately following the stabbing. Arzate collected the blood samples from the second tier landing including a sample from the Crips-occupied cell four, but the blood samples and control samples were reversed. (RT 11554-56, 11901) Arzate destroyed the "U-Save-Um" envelope McMahon used to carefully seal and mark the alleged spearhead. (RT 11264, 11267, 11281, 11282) The "plain old white envelope," which he allegedly used to preserve the weapon evidence disappeared. (RT 11612) It was also Arzate who seized three state-issued shoes from the Crips' occupied cell four, Ephraim's cell which was the one that Lipton originally claimed was Burchfield's location when he was stabbed. (RT 11592) Those also disappeared, along with the important shoe found atop the Carson security screen – important because it was thrown onto the security screen at the same time as all of the weapons, right after the murder, and contained metal matching the spear that was found. (RT 11528, 11591, 12010, 14975-80, 14991, 15637) This rendered impossible the fitting of suspect Ephraim with his shoe, as well as a

comparison of the three shoes found in Ephraim's cell with the shoe in which the metal matching the spear that was found.

189. This negligent and willful destruction and loss of evidence violated petitioner's Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial.

(b) The State's loss, destruction and concealment of potentially exculpatory evidence

190. Petitioner hereby incorporates the allegations contained in ¶¶ 185 -189, above, as if fully set forth herein.

191. Officer Kimmel collected and reviewed approximately ten notes claiming responsibility for the death of Sergeant Burchfield. (RT 15247-48, 15251, 15254-65) All of these notes were apparently destroyed. (RT 15248, 15258-59)[14]

192. James Hahn, a CDC Special Services Unit agent who played a key role in developing the State's principal informants, elected not to report exculpatory information he learned from

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[14] The trial court refused to admit Kimmel's testimony regarding any of these notes, including the one which he believed was written by a Crip. Despite the fact that it was the State's incompetence which resulted in the destruction of the note, the court ruled that absent the note itself, or evidence as to which inmate had written that particular note, the defendants could not present any testimony about them. (RT 15251, 15262-63)

informants and others until he forgot what he had been told. (PHRT 10116, 10120, 10123-24, 10126-31)

193. The State's informants also participated in the wholesale destruction of evidence. Star witness Rufus Willis destroyed two to three hundred BGF kites, including kites written by Masters and information relating to co-defendant Johnson. (RT 12913-14, 13089-95, 13424) Bobby Evans, the State's other prime informant, admitted having destroyed the kite in which co-defendant Johnson allegedly admitted his role in the death of Sergeant Burchfield. (RT 13762)

194. The State also successfully claimed privileges with respect to the identities of many of its confidential informants. Thus, despite diligent efforts in both the Municipal and the Superior Courts, the defense never learned the identity of many of the State's informants. One of these *undisclosed* informants was interviewed by Deputy Warden Myers on June 11, 1985, three days after the stabbing of Sergeant Burchfield. (CT 212, 222, 475-78) According to Myers' June 12, 1985, memorandum, the informant "claim[ed] to be the second in command for the BGF at San Quentin Prison." This *undisclosed* informant provided information regarding the attack on Sergeant Burchfield and advised the deputy warden that a further

attack was planned on June 22, 1985. (*Id.*) A second *undisclosed* confidential informant claimed that he possessed information regarding the assault which had been provided to him by one of the defendants. (CT 216, 585)

195. This wholesale destruction of evidence, some of it explicitly and some of it implicitly exculpatory as to petitioner, resulted in a wholesale violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process and a fair trial.

(c) The State's concealment of second tier informant evidence and other BGF evidence

196. It must also be remembered that the murder of Sergeant Burchfield occurred on the second tier of C-section. Harold Richardson was celled there, along with many of the individuals with whom Willis carried out the conspiracy: inmates Johnson, Ingram, Carruthers, Daily (Wawa), Vaughn (Swoop), Rhinehart (Aso), and Gomez (Cisco). (*See, e.g.*, RT 12744, 12748-49, 12760-61, 12765-67; CT 4945-46) Jarvis Masters, by contrast, was housed two floors above. (RT 12751) During the first two years of its investigation, the State, in addition to everything else it did, unlawfully withheld BGF informant evidence arising out of the

second tier, making it that much more difficult or impossible for Masters to fathom Richardson's true role.

(1) The State's concealment of the Carruthers evidence

197. For example, on April 24, 1986, second tier inmate Donald Carruthers confessed to Deputy District Attorney Berberian. (2 ACT 1434) A two-hour tape recording was made of his confession. (2 ACT 1448) Carruthers admitted his role in the BGF conspiracy to kill Sergeant Burchfield. By Willis' account, Carruthers provided the bed brace used to fashion the spearhead. (RT 12748, 12761-63) For nearly a year thereafter the District Attorney maintained total silence concerning the Carruthers confession. It was not until March 20, 1987, that the District Attorney released the two-hour tape recording. (2 ACT 1506) During the next forty (40) days the District Attorney turned over a transcript of the tape recording and other documents relating to the confession. (2 ACT 1434)

(2) The State's concealment of BGF evidence

198. Obtaining relevant evidence from San Quentin and the California Department of Corrections proved even more difficult. Masters' attorneys first served a subpoena and discovery requests

on the California Department of Corrections in February 1986. (2 ACT 310 *et seq.*, 348 *et seq.*, 1433) It was not until 13 months later, in March and April 1987, however, that CDC provided defense counsel with two thousand pages of responsive documents, all the while claiming privileges with respect to all BGF materials in central files. (2 ACT 1434, 1444, 1453-54)

(3) Lieutenant Spangler's false testimony

199. As a result of the State's unwillingness or lack of interest in providing the defense with exculpatory evidence, the case erupted during the 1987 preliminary hearing. (8-10-88 RT 231) Concerned about whether all the San Quentin documents had been provided to the defense, the magistrate ordered Lieutenant Spangler, the San Quentin officer in charge of the Burchfield investigation, to go back to his office and examine all his files and determine whether everything had been turned over. (8-10-88 RT 295) District Attorney Investigator Gasser went to Lieutenant Spangler's office at San Quentin to conduct an audit. (*Id.* at 231-232) Lieutenant Spangler, thereafter, testified under oath to the magistrate that everything had been turned over. (*Id.* at 296)

200. Lieutenant Spangler testified falsely. Some six months after Lieutenant Spangler testified, on January 21, 1988, a previously undisclosed letter written by inmate James Lawless was mysteriously discovered in the inside pocket of an Officer Levey's coat at San Quentin. (8-9-88 RT 122-23, 129-30, 243, 282) Among other matters, Lawless' December 11, 1985 letter averred that Lawless knew the details of the murder from an informant. (Exhibits C [Ex. HC-19] and H to August 8-10, 1988 hearing)

(4) Lawless leaves Masters out

201. Discovery of the letter caused District Attorney Investigator Gasser to interview Lawless on January 29, 1988. Lawless said that prior to writing the letter, he was housed next to BGF member Ingram. (8-10-88 RT 244-45, 247, Exhibit I [HC-20]) According to Lawless, Ingram told him that the knives were cut out of a bed brace from cell 2C8. Lawless stated that the stock was then sent to Ingram who cut the stock into sections and sent them to inmate Johnson who sharpened them. (Exhibit I from 8-10-88 hearing [Ex. HC-20])

202. Lawless' information matched Willis' in everything but one particular. Willis had identified Ingram as a member of the

conspiracy. (*See, e.g.*, RT 12760-61) Willis also testified that the knives were cut out of a bed brace by Carruthers, housed in cell 2C8. (*See, e.g.*, RT 12760-63) Unlike Willis, however, Lawless did not include Masters as having a role in the fashioning of the spear. (Exhibit I from 8-10-88 hearing [HC-20])

203. Lawless' information also made greater sense than Willis' version of events. "Lawless said the section of the second tier, 2C2 through 2C10, were all in on it." (Exhibit I at 8-10-88 hearing [Ex. HC-20]) According to the State's evidence, Johnson was housed in cell 2C2, Ingram in cell 2C12, and Caruthers in cell 2C8. (CT 4945) Inmate Daily, credited by the State with disposing of the spear, was housed in cell 2C6. (*Id.*) Willis' testimony placing Masters, a foot soldier housed on the fourth tier, in charge of physical movements two tiers below his cell, made little practical sense.

(5) San Quentin's absolute disinterest in exculpatory evidence

204. Although Lawless told investigator Gasser that in addition to writing his December 11, 1985 letter, he also wrote a December 12, 1985 letter to Warden Vasquez (Exhibit I to 8-10-88 hearing [HC-20]), no effort was made by San Quentin to find an

investigative file concerning Lawless. A copy of the December 11, 1985 letter was immediately provided to the District Attorney, but not the defense. (8-10-88 RT 242) The warden conducted no investigation into the appearance of the letter. (8-10-88 RT 312) While no one knew where the letter had been for two and one-half years, San Quentin simply sat on the mystery. (8-10-88 RT 325; CT 1413)

205. The other shoe fell on February 24, 1988. San Quentin Investigative Lieutenant Watkins, to his complete surprise "found" a Lawless file in the front section of the top drawer of the filing cabinet immediately next to his desk. (*Id.* at 262-264) Watkins claimed that he wasn't looking for the Lawless file at the time. (*Id.* at 266) Inside the file was a photocopy of the original of the letter found inside Officer Levey's jacket, along with the originals of other letters: an original December 10, 1985 letter to Jean Ballatore, Lawless' correctional counselor; and an original December 15, 1985 letter to Chief Deputy Warden Myers. Both letters made explicit references to Ingram's admissions. (*Id.* at 266, 276; Exhibits F [HC-21] and G admitted at 8-10-88 hearing) A copy of the "Lawless file" was not made available to the defense until March 1, 1988, over two years after the defense discovery request. (8-10-88 RT 324; CT 567)

(6) Still unexplained

206. Still missing to this day is Lawless' December 12, 1985 letter to Warden Vasquez about Ingram's admissions. (8-10-88 RT 313) While Officer Haack remembers receiving that letter and processing its delivery to Warden Vasquez (8-9-88 RT 163-64, 177-78), Warden Vasquez had no recollection of the matter. (8-10-88 RT 313) That letter to the warden was also not found in the "Lawless file" which mysteriously surfaced on February 26, 1988. *The "Lawless file" also inexplicably contains no evidence of any 1985-1987 investigation into Lawless' allegations. Thus, to the extent that such an investigation took place, evidence of the investigation was destroyed.* Alternatively, San Quentin simply had no interest in evidence which conflicted with the District Attorney's case. (8-10-88 RT 325; CT 1413)

207. Confronted with the "Lawless file," Lieutenant Spangler, the San Quentin officer who testified under oath that he had turned over all files related to the murder of Sergeant Burchfield, admitted that he had known about Lawless' notes and letters to various individuals at the institution prior to the mysterious appearance of one of the letters in Officer Levey's jacket. (8-10-88 RT 295, 298) He also knew that Lawless had provided information about the

Burchfield case. (*Id.* at 298) After making these admissions, Lieutenant Spangler feigned a lack of recollection of Lawless' letters but admitted that he had prepared the file and that the file had his handwriting on the outside. (8-10-88 RT 299-301)

208. At the August 10, 1988, hearing, it was also disclosed that Lawless possessed other information which might be used to impeach Willis. Thus, Lawless told a transportation officer that Willis himself planned the hit on Sergeant Burchfield. (8-10-88 RT 315-16) Lawless also reported that the CDC Special Services Unit promised Willis a parole within two years of a conviction in this case. (8-10-88 RT 328)

209. The trial court, therefore, found that all of the concealed Lawless evidence was relevant:

> We have impeaching testimony as to the facts, we have information impeaching Mr. Willis on the facts, information that bears and describes his motive for giving testimony against the defendant, and we have evidence exonerating to Mr. Masters.
>
> (*Id.* at 328-29)

210. The court's admission of the Lawless evidence, however, does not relieve the State of its responsibility for the State's pervasive and systematic concealment, withholding and delay in disclosing evidence favorable to the defense in derogation of petitioner's constitutional rights, and for denying petitioner a fair trial.

(d) The concealment of the Richardson confession

211. Significantly, the crucial document which would have alerted the defense that Richardson might have been the one that Willis identified as Masters — Richardson's confession made in the context of debriefing and disaffiliating from the BGF — was also not timely disclosed to the defense. (See ¶ 54, *supra*, and PHRT 14840-43.) Rather, the Department of Corrections litigated its disclosure; it was the subject of a secret writ by Richardson; and the defense was not given Richardson's confession until near the *end* of the preliminary hearing, long after the magistrate denied appellant's request for a lineup. Indeed, the State successfully opposed the motion for a lineup even while the State *secretly knew* of Richardson's admission, and presumably knew that Richardson fit Willis' description of "Askari." (See the uncontradicted statement of defense counsel Michael Satris in the hearing on Masters' 995 motion, 8/8/88 RT 73.)[15]

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[15] During the hearing on Masters' Penal Code section 995 motion, Masters' attorney Michael Satris made the following statement about the effect of the magistrate's denial of Masters' request to reopen cross-examination after counsel found out about Richardson: "We didn't have that information at the time [of Willis' initial testimony] because the state, through the person of the Department of Corrections kept it from us. They claimed a privilege that was

(continued...)

212. Thus, the State – by its incompetence, perpetual desire for security, and lack of interest in defense exculpatory evidence – thwarted and befuddled the defense investigation of the Burchfield murder in violation of petitioner's rights to due process and a fair trial. Indeed, the trial judge so found on more than one occasion. The trial judge declared "I have never seen a police authority do the kind of evidence collection that was done in this case." (RT 13283) On another occasion the court described the State's chain of custody technique as "I took it from a bag." (RT 13312) The judge described the Lawless concealments as "truly remarkable" and "gross negligence by the government." (8-10-88 RT 325, 329) "I mean I would like to cite the whole prison in here for why . . . they shouldn't be held in contempt, and it's outrageous. . . ." (*Id.* at 325) The trial court's failure to truly act on this constituted a further deprivation of petitioner's rights, and to the extent that defense counsel did not make the appropriate motions to exclude evidence,

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[15](...continued)
litigated secretly, we had no knowledge of it until right at the end of the preliminary hearing, it's disclosed to us, so the State has kept this information from us." (8/8/88 [Palisi] RT 73) A little later, Satris said again: "In fact, the reason we didn't have that information when Mr. Willis was on the stand is because of state action . . . ." (*Id.* at 75) The record is entirely devoid of any contradiction of the facts as stated by Satris.

impose sanctions, or dismiss the charges against petitioner, that failure constituted ineffective assistance of counsel.

CLAIM IV: JURY MISCONDUCT

213. All of the foregoing allegations are hereby incorporated as if fully set forth.

214. Petitioner is aware of information from a retired correctional officer, Keith Lucas, that he was engaged during trial in the transportation of prisoners from San Quentin, and assisted a bailiff in escorting jurors to lunch, where he (1) overheard them discussing the case, in direct contradiction to the trial court's admonitions that they were not to do so; and/or (2) was asked by one of the jurors what he thought about the case.

215. Petitioner's counsel pursued investigation of this matter when it first arose, but was unable to identify the correctional officer. With the funds to do so and, in particular, this Court's subpoena power that would accompany an Order to Show Cause granted on this issue, petitioner would pursue further investigation of this claim, which, if proven, would constitute a violation of petitioner's Fifth and Sixth Amendment rights to due process and a fair trial.

216. In the course of said investigation, petitioner may well uncover further instances of juror misconduct, and will seek to amend this petition accordingly.

217. Specifically, if the above-mentioned allegations are true, it raises the very real possibility that jurors also ignored the court's admonitions during the 18-day holiday break in deliberations described in Appellant's Opening Brief at pp. 275-291, incorporated here by reference. If so, the potential misconduct is even more striking, as it would have taken place not simply among jurors, but with outside third parties, which would constitute a further violation of petitioner's Fifth and Sixth Amendment rights to due process and a fair trial.

CLAIM V: CRUCIAL PENALTY PHASE WITNESS JOHNNY HOZE HAS MADE REPEATED WRITTEN RECANTATIONS OF HIS TESTIMONY

218. One of the two prior uncharged murders introduced by the State during the penalty phase hearing was the murder of an San Quentin inmate, Harold Jackson. Petitioner was in a group of six inmates near Jackson when he was stabbed in the neck. There was no eyewitness evidence as to who the actual killer was. Petitioner was, instead, tied to the Jackson murder by the testimony

of a former BGF member, Johnny Hoze, who was not even present. (RT 20180-94)

219. Hoze was a member of the BGF, and the gang security chief in the AC unit from 1981 to 1985. (RT 20354) Hoze testified that when Masters was assigned to the AC, he told Hoze that he was assigned to the AC for killing Jackson and described leaving the weapon in Jackson's neck. (RT 20362) During the ensuing year, Masters allegedly bragged many times to Hoze about the Jackson killing, without mentioning the victim's name (RT 20366-67) and told Hoze both individually and in the presence of other BGF members in a "hit cadre" that the adrenaline rush "was better than having sex." (RT 20367, 20371)

220. The defense presented the testimony of the officer who did an unclothed body search of Masters right after the killing, and found on him no contraband, blood, cuts or abrasions. (RT 20529) Moreover, three fellow inmates, Lester Lewis, Ronnie Dubarry, and Howard Williams, testified that Masters was not near Jackson at the time of the murder. (RT 20640, 20690, 20721, 20728-20729) In addition, defense investigator Melody Ermachild testified that Hoze hated the BGF for an attempted hit on him and threats to him and his family ((RT 20817, 21021, 21024), and that the first time she

interviewed Johnny Hoze, he said he wanted Masters dead, and if he were allowed to, he would kill Masters himself instead of having the State kill him. (RT 21027)

221. Nevertheless, the Hoze testimony had a pivotal effect on the jury. In interviews with three of the jurors by Melody Ermachild, the defense investigator, they all said that the Jackson murder was central to their decision in favor of death. (2/25/1991 Dec. of Melody Ermachild for habeas proceeding, *In re Masters*, Marin County Super. Ct. No. 147681, Ex. HC-22, p. 110)

222. In addition, the trial court, in explaining its denial of the motion to modify the sentence and imposing death, stated that the other prior uncharged murder, the Hamil murder, had not been proved beyond a reasonable doubt (RT 23483), leaving only the Jackson murder of the two alleged uncharged murders to influence her decision to uphold the death sentence.

223. On September 24, 1990, Attorney Rotwein received a letter from an inmate at Corcoran, LeRoy Patton, who said he had important information about petitioner's case. On October 17, 1990, Patten signed a declaration in which he stated that he had been a cell-mate of Johnny Hoze from January to April 1990, and that Hoze had said that he had a vendetta against the BGF because they had

threatened his family, and that he would testify falsely against Jarvis Masters. (The testimony before the jury described above in ¶ 219 took place on April 26, 1990.) Hoze also told Patton that he was receiving a deal from the government in exchange for his testimony. Hoze told Patten after his testimony how he had lied and that he had made a deal to get transferred to a lighter institution. (Amended Petition for Writ of Habeas Corpus, *In re Masters*, Marin County Super. Ct. No. 147681, November 1, 1990, Ex. 23, pp. 117-118)

224. Rotwein had written to Hoze, telling him of petitioner having received the death penalty and asking him, *inter alia*, if he had received a deal for his testimony. Hoze showed the letter to Patton and laughed about the death penalty sentence. (*Id.*)

225. Patton turned over to Rotwein pages of his daily diary corroborating the conversations with Hoze (*Id.*), but Hoze denied those conversations, and further denied that he lied, and as a result the court denied the petition. (See Declaration of Johnny Hoze in Case No. 147681, Ex. HC-24; Order Denying Petition for Writ of Habeas Corpus, Marin County Super. Ct. No. 147681, Ex. HC-25)

226. In December of 1991, Hoze wrote to an associate warden of the California Training Facility (Soledad), stating that "everything I said at the Burchfield Murder trial WAS A Complete Lie,

the whole testimony." (Capitalization in original; Letter from Hoze to E.D. Perez, Associate Warden, CTF, Central, Ex. HC-26.) It was this letter which triggered the second, 1992, writ petition filed by petitioner in pro. per. (See herein, ¶ 22; Ex. HC-27)

227. Then, in May 1994, Hoze wrote to the Marin County District Attorney, again recanting his testimony at petitioner's trial: "[T]he testimony I gave in the penalty phase . . . was not the truth." Hoze said he lied about each of the damning specifics, and in particular that Masters had told him that he had been involved in the Jackson murder. (Letter from Hoze to Marin District Attorney, dated May 29, 1994, Ex. HC-28.) On May 4, 1994, a Rules Violation Report from Corcoran State Prison suggested that Hoze's recantation was motivated by a desire to manipulate prison staff. (Rules Violation Report dated May 3, 1994, Ex. HC-29.)

228. On June 28, 1995, however, Hoze wrote to trial counsel Michael Satris, authorizing him to send to local newspapers an attached "confession" in which Hoze again stated that his "testimony was an outright lie . . . made up of bits and peeices [*sic*] of information any member of the Black Guerrilla Family could have put together." He was driven, Hoze said, by anger and rage at Masters, because he had threatened Hoze's family in a heated argument.

When Masters did not apologize for the threat, "I worked on my testimony day and night, until I was sure that I could convince any jury that I was telling the truth." (Document, dated June 28, 1995, entitled "Confidential Legal Mail" addressed to M. Satris, Attorney at Law, Ex. HC-30.)

229. On May 27, 1997, in a handwritten letter addressed to the Chief Justice of this Court, Hoze repeated his recantation. (Letter from Hoze to California Supreme Court, Ronald M. George, Chief Justice, dated May 27, 1997, Ex. HC-31.)

230. On November 19, 2002, Hoze wrote another letter, addressed "To Whom It May Concern," again "to let all concerned [know] that the testimony I gave against inmate J. Masters was false and mostly made up form (sic) hearing others talk about the case and from information that I personally knew about inmate Masters from being in some of the same classes with him in the San Quentin Adjustment Center." In direct contradiction to his testimony at the penalty phase, Hoze acknowledged that Masters had never admitted to killing Jackson; rather, Hoze "did hear bit and pieces of information about this assault and it was enough for me to make up the rest." It was also untrue that Masters had talked Andre Johnson into spearing a correctional officer; rather, he had heard Masters

speak of how killing a correctional officer might increase one's status in the BFG. Also untrue was Hoze's testimony that Masters had told him that he had made the spear and the weapon used in the Burchfield killing.

231. The reasons for sending this 2002 letter, Hoze said, were several: first, "all of the lies have been very hard to live with." In addition, however, the Department of Corrections, the Marin District Attorney's Office, and the Board of Prison Terms "have done nothing but disrespect me and my family since the day I got off of the Stand (sic)." It should be noted that Hoze closed the letter with an offer to submit to a polygraph examination. (Letter dated Nov. 19, 2002, "To Whom It May Concern," Ex. HC-32)

232. This theme was repeated in Hoze's March 11, 2004 Board of Prison Terms parole hearing, when Hoze, without disavowing the contents of the November, 2002 letter, suggested that the *reason* he sent it was that the Sacramento District Attorney's office had changed their position on his parole between the previous two parole hearings. (Partial Transcript, March 11, 2004 Board of Prison Terms Subsequent Parole Consideration Hearing, pp. 67-68) Again, Hoze did not discuss or disavow the *contents* of the letter.

233. Whatever his reasons, Hoze has now recanted his testimony in writing at least five separate times, casting such grave doubt on his crucial penalty phase testimony that petitioner must be considered factually innocent of a major prior uncharged crime, which, coupled with the trial court's finding that the other uncharged murder had not been proven beyond a reasonable doubt, requires reversal of the jury's death penalty finding. Had the court made it's finding regarding the Hamil murder prior to the jury's consideration of it, and had Hoze's recantations been presented to the jury, it is certainly probable that the jury, which was unable to impose death on the much-more-culpable Woodard, would have been unwilling to impose it on petitioner.

234. Hoze's testimony has been shown to be, at its worst, a lie and, at its best, seriously undercut by his subsequent recantations. The jury and trial court's reliance on that testimony constitutes a denial of petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process and a fair trial.

CLAIM VI: IT IS A DENIAL OF DUE PROCESS TO CONDITION IMPOSITION OF THE DEATH PENALTY IN PART ON AN UNCHARGED PRIOR OFFENSE FOR WHICH THERE IS NO POSSIBILITY OF PRESENTING A DEFENSE

235. Petitioner hereby incorporates his argument on appeal, at his opening brief pages 330 *et seq.*, and in particular pages 340-357, as if fully set forth herein.

236. The prosecution in this case charged petitioner, as an aggravating uncharged prior offense pursuant to Penal Code section 190.3, with the murder of Robert Hamil, a liquor store owner, some ten years prior to the trial. Petitioner had been interviewed by the police regarding this murder, but never charged.

237. The gravamen of petitioner's appellate argument was that his right to due process and a fair penalty hearing was violated by charging as an aggravating circumstance a ten-year-old crime which was not subject to meaningful investigation or the mounting of a viable defense.

238. That argument is renewed here because of the additional evidence available on habeas corpus, to wit: the declaration of Melody Ermachild, one of petitioner's trial investigators. (Ex. HC-33)

239. In her declaration, Ermachild describes the scanty information available from police sources and the impossibility of carrying the investigation any further due to the passage of time:

> Due to the passage of time and the lack of any leads other than the very minimal information contained in the report, I found it utterly impossible to conduct an investigation of the October 22, 1980 crime. Thus, it was not possible to find any witnesses, including, but not limited to witnesses who could reveal the identities of suspects or witnesses. Indeed, Masters, who was living in a variety of location in Long Beach in October, 1980, could not even remember his whereabouts on October 22, 1980. (HC-33, at p. 157, ¶ 4)

240. Even though the trial court opined, in its post-trial decision not to reduce the penalty of death, that the Hamil murder had not been proved, there is no way to know what the effect was of this uncharged prior offense on the individual jurors voting for death.

241. Every defendant is entitled under Due Process to his defense. By admitting into evidence a ten-year-old crime which was never charged, which petitioner never imagined he would have to defend against, and for which the trail was stale enough to render impossible the mounting of defense, petitioner's right to Due Process and a fair trial were violated.

CLAIM VII: THE STATE CANNOT, CONSISTENT WITH DUE PROCESS AND THE EIGHTH AMENDMENT, PROSECUTE AND SENTENCE TO DEATH PETITIONER FOR A MURDER WHICH DIRECTLY AROSE OUT OF UNCONSTITUTIONAL CONDITIONS OF IMPRISONMENT

242. Petitioner incorporates by reference all previous claims, as well as the record and exhibits from the underlying trial.

243. Petitioner was not charged and convicted as a principal in the murder of Sergeant Burchfield. Instead, he was charged as an aider and abettor, i.e., as someone who supported or encouraged the murder of Sergeant Burchfield.

244. In his testimony for the prosecution at trial, Rufus Willis explained that the reason for the "hit" on Sergeant Burchfield was that he was supplying weaponry to the BGF's rival gang, the Aryan Brotherhood. (RT 12738-39, 13223) Thus, petitioner was essentially charged and convicted of supporting or encouraging the murder of a correctional officer thought to be supplying weaponry to the Aryan Brotherhood for use against black inmates, including himself.

245. As Willis also testified, by 1985 the State had created a situation at San Quentin in which the gangs controlled the prison. Gang members extorted money and favors from prisoners for protection, had access to the files of other prisoners, and directed

the placement of prisoners throughout the prison. (RT 12701, 12776, 12778, 12780, 13007, 13010-12, 13015, 13043-44, 13131, 13179-80, 13217)

246. The conditions at the prison had been judicially declared cruel and unusual punishment. (*Toussaint v. McCarthy* (N.D.Cal. 1984) 597 F.Supp. 1388, affirmed in part and reversed in part (9 Cir. 1986) 801 F.2d 1080, and 1093, fn. 12 ["*See Wilson v. Deukmejian*, No. 103454 (Sup. Ct. Marin County, August 5, 1983) (Tentative Decision and Proposed Statement of Decision; Savitt, J.) . . . Judge Savitt's proposed decision paints as bleak a picture of the conditions in San Quentin's general population as does Judge Weigel's description of the segregation units."])

247. Psychiatrist Robert G. Slater, who was the San Quentin staff psychiatrist for the two years ending about 9 months before the Burchfield killing, testified extensively at trial to the inhuman conditions at the prison: At the time, San Quentin had the most hardcore of the criminals and those who had been problems at other prisons. Many had emotional disturbances. (RT 21059) Confinement in lock-up in South Block controlled some of the more serious consequences of acting out simply because they were locked in so tightly, but, in terms of the tendency to act out, the lock-

up conditions promoted the tendency to be violent. (RT 21059-60) That was because there were a large number of violent people together in one place under conditions that were extremely stressful to the point of being oppressive by any normal person's standards. Inmates were afraid, and as they heard about assaults and homicides that were extremely common, they would become terrorized. (RT 21060) In fact, in an article, talking about South Block, he wrote that there was "a sense of *impending* and *immediate* annihilation." (RT 21060-61; emphasis added) *And that sense of terror and impending, immediate annihilation was all-pervasive.*" (RT 21061; emphasis added)

248. That terror came from the horrific conditions:

> Ethnic gangs were vying for control of the prison in hostilities that at times became almost like an open warfare. And in addition to that, even the non-gang members were very predatory people [who] would engage in attacks for a variety of reasons. If you give somebody the wrong look or smile, gesture of disrespect, or if you're from the wrong race, or someone has identified you as an informant or child molester, you're from the wrong part of town, in some cases from the wrong part of the state, . . . just having a look that rubs some-body the wrong way, or if there had been some words or a grudge that occurred years earlier, these would all be grounds for an attack. And in the last year

> that I was there [1984], there were twelve murders of inmates by inmates . . . . And there were many, many more potential homicidal assaults that did not result in a completed homicide because medical care was mobilized so quickly. (RT 21062)

So, "People lived in a constant state of fear, fear that they would be assaulted or killed." Murder or murder attempts were part of the fabric of everyday life there. (RT 21063)

249. Another indicator of the level of violence in the lockup units in South Block at that time, according to Dr. Slater, was that nearly all of the prisoners had control of a weapon, either on their bodies or somewhere they knew they could get it. (RT 21064) There were, of course, stabbings, but also hot, corrosive liquids thrown through cell bars, or incendiary devices made from lighters or matches. (RT 21065) Fires were set in cells, or on the cell block. (RT 21066) All of this contributed to the atmosphere of terror. (RT 21067)

250. Racial tension was very high, and if a black inmate was seen mingling with whites or Mexicans, there would be consequences ranging from a warning to an assault. (RT 21067-68) The prison gangs were organized along racial lines, and the authorities segregated yards by race and within races by faction. (RT 21069)

251. As a result of the State's default, moreover, the prison was under the control of the gangs. Prison gangs ruled the sections and tiers of the prison. Gang leaders had access to inmate files and controlled the housing of inmates. (RT 13181-82, 13217-18) Guards sought protection from the prisoners; some even worked for gangs, (RT 12824; 13012, 13043-44, 13213, 13218, 13691), and an inmate's messages to the warden were sometimes screened by the gangs. (RT 12776-80) Even without gang screening, an inmate's direct pleas to the warden or his deputies might be simply ignored. (See reporter's transcripts of 8-9-88 and 8-10-88 hearings.) For his own protection a prisoner needed to belong to one of the prison gangs.

252. Gang membership, nonetheless, was at a price. Membership meant that one needed to support the gang and follow its orders. Thus, according to San Quentin authorities, the BGF required a blood oath of its members which promised their death if they refused a BGF order. (CT 1913, 5057)

253. The presence of gunrail officers further contributed to the atmosphere of terror, because the presence of guns in and of themselves was an extremely chilling factor – you were literally "under the gun." There were some cases where prisoners were

blinded or otherwise injured or even killed by guns. (RT 21069) Gunshots – usually warning shots – would go off fairly often, and there was a perception among the inmates that some of the shootings of prisoners were unjustifiable. Thus, fear of being shot contributed to the atmosphere of terror. (RT 21070)

254. Also contributing to the horrible conditions was the unbearable noise, created by stone walls that bounced the noise, people shouting, doors slamming open and shut, radios blaring, a constant din which was very, very loud to the point of not being able to carry on conversation. It rarely abated. It was always present when Slater was present, as early as 6 a.m., or as late as 10 p.m. The natural effect was to make inmates nervous, irritable, and tense, deprived of sleep, making some almost climb the walls with stress. (RT 21071)

255. The level of fear and anxiety was very high. The inmates called it being paranoid, but unlike the psychiatric use of the term – delusions of danger – the inmates were not delusional. They were living with their fear and the fear that they described was very intense. It was suspiciousness carried to the utmost without actually being delusional. (RT 21075) What they feared was not some imaginary threat but a real threat, and because they were so

frightened, there was a misinterpretation of cues. They would misperceive some unusual behavior or some facial expression or gesture as a threat, and in some cases would take preemptive action, a first strike as a means of self-defense. (RT 21076)

256. Dr. Slater, given the hypothetical of the Aryan Brotherhood having weapons that they could use against the BGF, and that the BGF had intelligence that Burchfield was spending a lot of time with the Aryan Brotherhood in the period leading up to his death, stated that it was *"reasonable"* for the BGF members to believe that the officer was conspiring with the AB and they must attack him first as a means of self-defense. (RT 21081-82)

257. Thus, petitioner's claim is simply this:

1. As a matter of Due Process of Law, the State itself must assume primary responsibility for the effects of cruel and inhumane prison conditions in violation of the Eighth Amendment of the United States Constitution.
2. The cruel and inhumane conditions at San Quentin in 1985 created a state of terror and exacerbated racial tensions.

3. San Quentin State Prison, at the time, was also virtually under the control of its prison gangs.

4. For his own self-protection petitioner was a member of the BGF and therefore needed to "stand" with the BGF and support the BGF when the BGF perceived it was under attack.

5. BGF members were informed that Sergeant Burchfield was supplying weaponry to the BGF's rival gang, the Aryan Brotherhood.

6. Under the atmosphere of delusion and terror created by the cruel and inhumane prison conditions at San Quentin in 1985, it was reasonable for a BGF member to believe that Sergeant Burchfield was conspiring with the Aryan Brotherhood.

7. Under the atmosphere of delusion and terror created by the cruel and inhumane prison conditions, it was reasonable for a BGF member to believe that an attack upon someone supplying weapons to the Aryan Brotherhood was an act of self-defense.

8. The cruel and inhumane prison conditions at San Quentin made killings, such as the one which gave rise to this proceeding, reasonably foreseeable.[16]

9. Given all of these circumstances, for which the State must assume primary responsibility, it is a violation of both Due Process of Law and the Eighth Amendment of the United States Constitution to charge and convict petitioner of first degree murder, and sentence him to death for encouraging or supporting what reasonably appeared to be an act of self-defense.

CLAIM VIII: THE PROSECUTION AND/OR THE CALIFORNIA DEPARTMENT OF CORRECTIONS IS WITHHOLDING EXCULPATORY EVIDENCE

258. The duty on the State to disclose material exculpatory evidence continues after conviction. (*Imbler v. Pachtman* (1976)

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[16] See, e.g., *James v. Wallace* (M.D. Ala. 1974) 382 F.Supp. 1177, 1180-1181 (prison conditions so horrible as to inevitably and necessarily make prisoners more sociopathic constitute cruel and unusual punishment). In *United States v. Bailey* (1980) 444 U.S. 394, 409, the court explained duress in the context of a defense to a charge of prison escape: "Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress . . . ." (Citation omitted) As described by Dr. Slater, the conditions at San Quentin were tantamount to a continuing threat to be killed.

424 U.S. 409, 472 n. 25; *Thomas v. Goldsmith* (9 Cir. 1992) 979 F.2d 746; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179)

259. Petitioner's counsel has been provided by other defense counsel with a redacted copy of the debriefing of inmate Jesse Brun, a member of the Aryan Brotherhood, in which Brun states that inmate and Aryan Brotherhood member John Pendleton had a part in the killing of Burchfield and that the BGF was not responsible for the murder. (Ex. HC-34) This statement is followed by a CDC parenthetical that "This information is inaccurate; and is unsupported by any other documentation." (*Id.*) Nevertheless, this information is exculpatory and should have been, but never was provided by either the CDC or the prosecutors.

260. Moreover, Andre Johnson states in his declaration that he debriefed in 1990 and again in 1992 and met and discussed this case with Lieutenant Spangler and Dave Gasser. (Ex. HC-3, p. 19, ¶ 10) (Spangler is with the CDC; Gasser an investigator with the Marin County District Attorney's office.) It is reasonable to assume that at that time, Johnson told them what he states in his current declaration – that Masters was not involved – yet no such

information was passed on to current counsel, as required by the afore-cited cases.

261. Inmate Charles Drume states in his declaration that prison authorities told him that if he wanted their protection, Drume needed to change his story that he was involved in the manufacture of the knife in the Burchfield murder. (Declaration of Charles Drume, Ex. HC-4, p. 21, ¶ 7) Indeed, prison authorities would not let Drume disaffiliate from the BGF and debrief unless he changed his story about his involvement in the Burchfield killing. (*Id.*) Prison authorities also told Drume that if he did not change his story, he would never get out of the Security Housing Unit and that he would stay there forever, and would be housed with the BGF. (*Id.*) When Drume finally agreed to change his story, and authorities took his tape recorded statement for the first time, they turned the recorder on and off because he didn't say exactly what they wanted. (*Id.*) None of this information was passed on to current counsel, as required by the afore-cited cases.

262. Petitioner is informed and believes that there are any number of other debriefings, interviews, or reports in the possession of the CDC in which the Burchfield killing is discussed and which provide other exculpatory information.

263. An Order to Show Cause should issue on this question in order to allow petitioner to review, through discovery and subpoena processes, all of the exculpatory material in the possession of the State, including unredacted versions of the Brun, Johnson, and Drume debriefings.

PRAYER FOR RELIEF

WHEREFORE, the petitioner respectfully prays that this Court:

1. Consolidate this petition for consideration with petitioner's appeal now pending in this Court, *People v. Jarvis J. Masters*, case number S016883;

2. Take judicial notice of the record on appeal and briefing in said appeal, as well as the records on appeal, briefing, and decision in the Court of Appeal regarding co-defendants Lawrence Woodard, in *People v. Woodard*, Marin County Superior Court case number 10467 and *People v. Johnson*, Superior Court case number 10985, and their consolidated appeal, First Appellate District Case No. 1051239/A052254, partially published at 19 Cal.App.4th 778 (1993);

3. Order respondent to show cause why petitioner is not entitled to the relief sought;

4. Grant petitioner sufficient funds to secure investigation and expert assistance as necessary to prove the facts alleged in this petition;

5. Order the Office of the District Attorney, Marin County, the California Department of Corrections, including but limited to San Quentin State Prison, and the Attorney General of the State of

California, to retain all records and files in any way related or referring to underlying action, and to turn over to counsel for petitioner all exculpatory evidence in their possession;

6. Allow petitioner to supplement and/or amend this petition to include claims which become apparent upon further investigation and research and to develop fully the facts and law of all the claims herein.

7. Grant petitioner the authority to obtain subpoenas for witnesses and documents;

8. Grant petitioner the right conduct discovery;

9. Order an evidentiary hearing at which petitioner will offer further proof in support of the allegations herein;

10. After full consideration of the issues raised in this petition, vacate the judgment and sentence imposed upon petitioner in Marin Superior Court case number 10467; and

11. Grant such other and further relief as is appropriate and in the interest of justice.

Dated: December 28, 2004

Respectfully submitted,

JOSEPH BAXTER
RICHARD I. TARGOW
Attorneys for Petitioner

VERIFICATION

I, JARVIS MASTERS, declare:

I am the petitioner in the above-entitled petition. I have read the foregoing PETITION FOR WRIT OF HABEAS CORPUS and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Verification was executed on December 25, 2004 at San Quentin, California.

JARVIS MASTERS

No: S130495

DEATH PENALTY

Related Automatic Appeal: No. S016883
(Superior Court of Marin County, Case No. 10467)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

PROOF OF SERVICE OF
PETITION FOR WRIT OF HABEAS CORPUS
and
EXHIBITS TO PETITION

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No: DEATH PENALTY

Related Automatic Appeal: No. S016883
(Superior Court of Marin County, Case No. 10467)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

PROOF OF SERVICE OF BY MAIL: 1013a, 2015.5 CCP
PETITION FOR WRIT OF HABEAS CORPUS
and
EXHIBITS TO PETITION

I am a citizen of the United States, resident of Sonoma County, over the age of 18 years, and not a party to the within entitled action. My business address if 645 Fourth Street, Suite 205, Santa Rosa, California 95404.

On January 5, 2005, I served a true copy of the document entitled:

PETITION FOR WRIT OF HABEAS CORPUS
and
EXHIBITS TO SAID PETITION

on opposing counsel/interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with first class postage

thereon fully prepaid in the United States Post Office mail box at Santa Rosa, California, addressed as follows:

Bill Lockyer
Attorney General of California
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102

Jarvis J. Masters
c/o San Quentin Prison
P.O. Box C-35169
San Quentin, CA 94974

Scott Kauffman, Esq.
California Appellate Project
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I declare under penalty of perjury that the foregoing is true and correct and that this document was executed at Santa Rosa, California on January 5, 2005.

Ken Ward