[redacted]

No. CRIM. S016883

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JARVIS J. MASTERS,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Vol. I

Automatic Appeal from the Superior Court of Marin County
Case No. 10467
Honorable Beverly B. Savitt, Judge

JOSEPH BAXTER, SBN 52205
645 Fourth Street, Suite 205
Santa Rosa, CA 95404
707-544-1149

RICHARD I. TARGOW, SBN 87045
JEANETTE L. LEBELL, SBN 141920
Law Office of Richard J. Targow
P.O. Box 1143
Sebastopol, CA 95473
707-829-5190

Attorneys for Defendant and Appellant
JARVIS J. MASTERS

DEATH PENALTY

TABLE OF CONTENTS: MAJOR HEADINGS

VOLUME ONE

TABLE OF CONTENTS
Continued

VOLUME TWO

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS: DETAIL

VOLUME ONE

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF CONTENTS
Continued

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS AND JURY INSTRUCTIONS

CONSTITUTIONS

California Constitution:

United States Constitution:

MISCELLANEOUS

CASE No. S 016883

IN THE
SUPREME COURT OF CALIFORNIA

PEOPLE v. JARVIS J. MASTERS

APPELLANT'S OPENING BRIEF

Vol. I

STATEMENT OF THE CASE

Appellant Jarvis J. Masters was convicted of first degree murder (Penal Code section 187, subd. (a)) and conspiracy to commit murder and assault on correctional staff (Penal Code section 182). (CT 5121-23)[1] The guilt phase jury also found true the Penal Code section 190.2 special circumstances allegation that the murder was intentional and "that the defendant knew or reasonably should have known that the person killed was a police officer engaged in the performance of his duties." (CT 5127-29) On May 18, 1990, the jury returned a penalty of death. (CT 6553)

THE INFORMATION

The December 3, 1987, Information charged three members of the alleged conspiracy: Appellant Masters and co-defendants Lawrence Woodard and Andre Johnson. (CT 6) Johnson's case, however, was severed from Woodard and Masters, and an Amended Information separately charged Woodard and Masters. (CT 3083) A third and final

---

[1] 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.

version of the Information, filed on August 17, 1989, charged appellant and Woodard in Count One with conspiracy to commit murder, in violation of section 187 of the Penal Code, and aggravated assault by a prisoner on correctional staff, in violation of section 4501 of the Penal Code. Count Two charged appellant Masters and co-defendant Woodard with murder with special circumstances in violation of section 187 of the Penal Code and alleged that defendants on June 8, 1985, murdered Correctional Sergeant Howell Burchfield. (CT 4519)

By the terms of the Information, Masters, Woodard, and other Carson Section inmates at San Quentin entered into their conspiracy from May 1 through June 25, 1985, as members of the Black Guerrilla Family (BGF) prison gang. (CT 4519-23) The Amended Information alleged that the conspiracy had two objectives: the killing of Sergeant Burchfield and, thereafter, the arranging of an assault by another prison gang, the Crips, on an unnamed correctional officer at San Quentin. (CT 4522)

Neither in the Information nor at trial was Masters charged as the actual murderer. The State consistently claimed that Andre Johnson was the inmate who stabbed Sergeant Burchfield with a sharp instrument. (CT 4522) Overt Act 3 of the Information, however, charged that Masters held the position of "Chief of Security" with the BGF. (CT 4520) Overt Act 10 of the Information charged that he sharpened the stabbing instrument and Overt Act 11 charged that he passed it. (CT 4521) Overt Acts 7, 9, and 12 charge that Masters and Woodard planned the hit. (*Id.*)

THE DEFENSE CASE IS NEVER HEARD

The thrust of Masters' defense case was, from the beginning, that the State had the wrong man. (*See, e.g.*, 1-9-89 RT 10-11; 8-8-88 RT 73; CT 1856-58, 1860, 1862, 4950) Rufus Willis, the alleged co-conspirator turned informant – the State's star witness – could not describe Jarvis Masters prior to seeing him at the preliminary hearing. The description he gave of Masters, instead, closely fit BGF Lieutenant Harold Richardson (see chart at page 52, *infra*), an uncharged co-conspirator who fully admitted to authorities his central role in planning the hit and sharpening and passing the knife. (CT 1908-09) Richardson's description of the incident both names the key players and leaves Masters out of the picture. (*Id.*) In addition, after Masters was charged Richardson admitted to a fellow inmate that he had successfully "cleaned up [his] tracks" and that someone else had been charged for what he had done. (RT 15773)

A third inmate, Charles Drume, also admitted to authorities that he was Chief of Security, the BGF role which the State ascribed to Masters. (CT 1912, 1914, 4520, 5045; RT 12731) Drume, likewise, left Masters out of the planning group and claimed that he, Drume, personally sharpened the knife. (CT 1912, 1914) Significantly, Drume repeated his admissions to a defense investigator and confirmed Masters' non-involvement. (CT 5046)

The defense, however, was not allowed to put on its case, either at the preliminary hearing or at trial. Even after Rufus Willis, the State's star witness, provided an outlandish mis-description of Masters, the preliminary hearing magistrate denied a defense request for a lineup. (PHRT 8408) After the State belatedly provided the defense with information concerning Richardson's admission, the magistrate would not even allow defense counsel to recall Willis to point out Richardson in order to prove that Willis had wrongly identified Masters. (PHRT 14840-43)

At trial, after Richardson and Drume pled the Fifth Amendment, the trial court would not allow the defense to introduce extensive testimony concerning their repeated declarations against interest. (12-13-88 RT 7, 40; 1-9-89 RT 12; CT 2430, 2436, 2647; RT 14718-19) Thus, neither the magistrate nor the jury heard the actual defense case.

DEFENSE REQUESTS FOR DISCLOSURE OF PEOPLE'S INFORMATION DENIED

Throughout the Municipal Court and Superior Court proceedings, a huge body of information concerning the June 8, 1985, stabbing was withheld by the Court, the District Attorney, the Attorney General and the California Department of Corrections. Dozens of *in camera* hearings were held in the absence of defense counsel. Many hundreds of pages of discovery were redacted, including large portions of the CDC's reports concerning admissions by Harold Richardson and Charles Drume. (*See*

e.g., CT 225-26, 1908-10) A defense request for the names of all informants and the substance of their information was denied by the Superior Court on August 11, 1988. (CT 1045-47) Both the Municipal Court and the Superior Court, likewise, denied defense requests for the disclosure of a San Quentin inmate, allegedly second in command for the BGF at San Quentin, who came forward three days after the killing with information concerning the conspiracy. (CT 212, 222, 475-77)

EIGHTEEN-DAY BREAK IN JURY DELIBERATIONS

While the jury was deliberating at the end of the guilt phase of the trial, the court released them for an eighteen-day Christmas/New Year's holiday break in deliberations. (RT 16792) The Court told the jury to put the case out of their minds. (RT 16793)

DEFENSE REQUEST TO RE-OPEN EVIDENCE DENIED

Upon the jurors' return, while they deliberated, the defense sought to re-open the evidentiary portion of the guilt phase based upon newly discovered evidence regarding Bobby Evans, a prosecution witness/informant who testified concerning alleged admissions by Masters, Woodard, and Johnson. (RT 16886) While Evans had claimed on the stand that he had not been promised any favors, he was released from jail soon after the close of evidence. (See RT 17070) The newly discovered evidence established that Evans lied, that he expected to be "taken care

of," and that he was "taken care of." While the Court pondered this defense motion, the jury asked for a read-back of Bobby Evans' testimony. (RT 16903) On January 8, 1990, the Court ruled that even if there was an inadvertent failure to disclose information, the error was harmless. (RT 17092) Meanwhile, the jury, fresh from the Bobby Evans read-back, reached a verdict of guilt and found the special circumstance true. (RT 17093)

PENALTY PHASE

As for the penalty phase, the Court elected to continue with the same jury, bifurcating the penalty phases of co-defendants Woodard and Masters and proceeding with the Woodard penalty phase first. On March 26, 1990, the defense filed a motion for a new jury, or in the alternative, to re-open the jury *voir dire*. (RT 5889) The motion was based upon prejudicial evidence disclosed and arguments made during the Woodard penalty phase, the effect of the Woodard penalty phase process itself, and prejudicial media coverage. (*Id.*) The Court denied both requests. (RT 18854, 18856)

On May 18, 1990, the jury returned a penalty of death. (CT 6553)

STATEMENT OF FACTS

A. OVERVIEW.

On June 8, 1985, San Quentin correctional officer, Howell Burchfield, was stabbed and killed while walking the second tier of Carson Section, one of several housing units in the prison. The State alleged that several members of the Black Guerilla Family ("BGF"), a prison gang, conspired to kill Sergeant Burchfield. Only three BGF members – Lawrence Woodard, Jarvis Masters and Andre Johnson – were charged.

There were three major prongs to the State's case against the three defendants. First, the State presented evidence surrounding the stabbing. Second, the State presented a host of documents pertaining to the BGF itself, explaining its purpose, its history, and its political outlook. Third, the State presented testimony from two prison inmates, Rufus Willis and Bobby Evans. Willis claimed to have been involved in the plan to kill Sergeant Burchfield, and Evans claimed that Woodard, Masters, and Johnson admitted their complicity to him. In conjunction with this evidence, the State introduced a number of documents purportedly written by the defendants in the weeks and months after the crime which Willis interpreted as corroborating his testimony.

In addition to Masters' claim that he was not involved at all, the joint defense maintained that Sergeant Burchfield had been killed by a member of the Crips, another prison gang, in retaliation for the death of

inmate Montgomery, a Crips leader. Both Masters and his co-defendants attacked the prosecution case, first, by relying on evidence showing that the stabbing occurred in front of a cell occupied by a Crips member and that the alleged murder weapon came from a Crip cell. Second, the defense presented evidence raising doubts about the credibility of the inmate/informants, including evidence that the star witness, Willis, was actually a renegade BGF/Crip who had sworn to bring down the BGF leadership. Third, the defense established the wholesale destruction of evidence by the State, as well as the incompetence of the State's evidence collection and preservation. Fourth, the defense established that Willis, who claimed intimate daily association with Masters, could not even provide his physical description. Finally, the defense cast doubt on the kites (notes between inmates) selectively turned over by Willis.

B. THE PROSECUTION'S CASE

1. The Circumstances of the Crime

The stabbing of Sergeant Burchfield took place on June 8, 1985. At that time, San Quentin was divided into several "blocks," each containing four different housing units: A, B, C, and D. (RT 10997)[2] C-section consisted of five tiers or rows of cells. In addition, there were two gunrails in front of, but separated from the cells, on which armed officers would

---

[2] These letters stand for Alpine, Badger, Carson and Donner sections. (RT 10997)

patrol. (RT 10099-11005) One gunrail was above the third tier, the other was above the fourth tier. (RT 11005, 11007) At the time, although each cell had its own light, the only other light in the section came from lights located above the fifth tier. (RT 11007)

Carson Section was a security housing unit. C-section inmates were locked into their cells and were not allowed to walk alone on the tiers or eat in the dining hall. The inmates' only physical contact with each other was a three or four times a week exercise yard, and every inmate was strip searched before going to the yard. (RT 11049-53)

On the evening shift of June 8, 1985, Sergeant Burchfield was assigned to C-section, along with Officers Hodgkin, McMahon, and Lipton. (RT 11144, 11234, 11316) The tiers were more noisy than usual that night. (RT 11147) The noise level concerned Sergeant Burchfield and he wanted to do something about it. (RT 11238) Between 11:00 p.m. and 11:30 p.m., Sergeant Burchfield left the security office, which housed the administrative offices of C-section, to walk along the tiers. (RT 11147-57) Pursuant to the usual procedure, Sergeant Burchfield walked along the tiers while another officer, in this case Officer Lipton, tracked his movements from the gunrail. (RT 11321-31) Sergeant Burchfield entered C-section on the first tier. (RT 11244-45, 11249, 11320-22)

Officer Lipton testified that he was approximately one or two steps behind Sergeant Burchfield as he walked along the tiers. (RT 11322, 11331) After completing the first tier, the Sergeant came up the stairs to the second tier. (RT 11250, 11329) Sergeant Burchfield was walking slowly by the cells on tier two close to the cell bars. (RT 11331-33) As Sergeant Burchfield neared cell four, he was hit with something and crashed to the ground. (RT 11338-39)[3]

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 Neumark 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)

To make their case, however, the State needed Lipton to testify that Burchfield was in front of cell two when he was hit. Cell two housed co-defendant Andre Johnson, the alleged spearman. (RT 11731) Cell

---

[3] Sergeant Burchfield was killed on the second tier. At the time, Masters was located on the fourth tier. (RT 11210)

four, by contrast, housed a Crip named Rich Ephraim. (RT 11514-15, 14887-90; 15673-74) Miraculously, *at trial* Lipton recanted his prior testimony and said that Sergeant Burchfield was in front of cell two when he was hit. (RT 11349) To rehabilitate Lipton, the People called his girlfriend who testified that when Lipton returned home, he told her the killing occurred between cell two and three. (RT 11913) Nonetheless, she admitted that Lipton was under a lot of peer pressure for not shooting in response to the attack. (RT 11915)

After Sergeant Burchfield fell, Officer Lipton called for assistance. (RT 11350) Sergeant Burchfield was taken to Neumiller Hospital, on the grounds of San Quentin. (RT 10998) He died without regaining consciousness from a stab wound to the heart. (RT 11138-41) The wound could have been inflicted by the blade marked as Exhibit 118-B, or any of a variety of other instruments, since stab wounds do not correspond well to the shape and size of the instrument making them. (RT 11433-36)

Between June 9 and June 12, many inmate-made weapons or blades were found during searches of Carson Section inmate cells and in "uncontrolled" or common areas. (RT 11598-11600) Although evidence found in uncontrolled areas was typically destroyed (RT 15641), one piece of metal was allegedly retained. Officer McMahon testified that while "keeping an eye on things" in C-section at the time that staff was responding to the Burchfield emergency, he found a *six*-inch piece of metal, with

one end sharpened, on the floor of Carson Section outside the security office. (RT 11261-62) This weapon was one of many found by officers in the days after the murder of Sergeant Burchfield. (RT 11598, 11600)

McMahon laid the six-inch object on a bookcase among the books, folders, manila envelopes, and office clutter. (RT 11262-63) Staff members, as well as himself, were going in and out of the office and people were looking at the object. (11263-64) At some point later that morning, he went back to the bookcase and placed the object in an interdepartmental envelope. (RT 11262) The envelope was labeled "U-Save-Um" and had "different lines on it for routing that you can scratch off and a new designation put on." (RT 11267) McMahon carefully sealed the envelope, signed his name over the seal, taped over his signature, and placed the envelope in his pocket. (RT 11264-81) Later, he gave the signed, sealed, and taped "U-Save-Um" envelope to Officer Arzate. (RT 11264)

Officer Arzate testified that he may have carried the piece of metal for several hours. (RT 11608) *His* object, however, was carried in a "plain old white envelope." (RT 11612) In addition, he might have had other metal on him at the time, the early morning hours of June 9, 1985. (RT 11608)

The defense subpoenaed the weapons and blades found by McMahon and other officers during post-crime searches. (RT 15286-93;

Exhibit 1225) Evidence which could not be tied to a particular person or cell, however, had been destroyed. (RT 15286, 15641-42; *see also*, RT 11614, 11765-66, 13023, 13035, 15641)

According to McMahon's interdepartmental communication dated June 9, 1985, the weapon he carried was *eight and one-half (8½) inches long*, not six inches, and did not appear to have any blood on it. (RT 11307; Exhibit 1203) McMahon's interdepartmental communication also fails to mention his claim that he put the metal object in an envelope. (RT 11293)

McMahon identified Exhibit 118-B, *a light grey piece of metal, eight and three-eighth (8 ⅜) inches in length*, with one end sharpened, as "looking like" the object he found. (RT 11266) Officer Arzate also remembers Exhibit 118-B as the one McMahon gave him, although over the years he had seen many like it. (RT 11611)

Officer McMahon did not mark the spot where he found the light grey piece of sharpened metal. (RT 11276) Officer Arzate, however, marked a spot below cells one and two, where Officer McMahon allegedly had told him he found the weapon. (RT 11522, 11570-71) Thus, the weapon was conveniently "found" beneath the cell occupied by co-defendant Andre Johnson. (RT 11731)

Later tests revealed that the light grey metal did not have any fibers matching Sergeant Burchfield's shirt; nor could any useful finger-prints be detected. (RT 11873-74, 11936) The State conceded that San

Quentin rules for evidence collection and preservation, including rules calling for permanent marking of evidence, were completely ignored. (RT 11293, 11612; Exhibit 1201) The carefully-sealed "U-Save-Um" envelope signed by Officer McMahon was also unexplainedly missing. (RT 11282) As for the alleged "plain old white envelope," that too disappeared. (RT 11612) Officer Arzate did not recognize the initials found on the light grey weapon. (RT 11684) Officer McMahon said he never put initials on it. (RT 11266)

After taking possession of the grey weapon, Officer Arzate found what appeared to be a shaft of some kind on a metal screen above the security area in Carson Section. (RT 11528) It was made of rolled-up newspaper covered with a white cloth. (RT 11529-30) Officer Arzate, however, did not know whether other poles were found, since evidence found in uncontrolled areas was typically destroyed. (RT 11614, 15641) As for the rolled-up newspaper found on the metal screen, no blood samples could be found. (RT 11581)

At 1:15 a.m., on June 9, 1985, while Officer Arzate was removing inmate Ephraim from cell four (RT 11575), Andre Johnson allegedly told Officer Arzate that if anything happened to Ephraim "you will be the next one speared." (RT 11576)

2. Documents Pertaining to the BGF

In the aftermath of the stabbing, correctional officers conducted a number of searches of inmates' cells and seized a great number of

documents relating to the BGF. Over objection, these documents were introduced into evidence.

In general, these documents confronted the jury with the violent, extremist, anti-white political rhetoric of the BGF. Specifically, the documents advocated the "liberation" of black prisoners and the overthrow of the United States. (Exhibits 383-A3(c), 390-C(1)) In addition, certain documents praised the efforts to free George Jackson in the infamous Marin County Civic Center shoot-out of 1970 and the later attempt by Jackson to escape from San Quentin. (Exhibit 318-B6(a))

3. Testimony of the Informants

In June of 1985, inmate Rufus Willis was housed in C-section on the 4th tier, cell 21. (RT 11728) Willis claimed to be a member of the BGF. (RT 12652-54) At the time, he was serving a term of 25 years to life for a 1980 first degree murder, robbery, and kidnapping. (RT 12648) This conviction, however, does not give the full flavor of Willis. While in prison, Rufus "Zulu" Willis stabbed or ordered the stabbings of numerous individuals, some of whose names he could not even remember; he also kept a "stockpile" of weapons including zipguns, crossbows, spears, darts, bombs, and shanks. (RT 12958-78) He had BGF members in other parts of the prison making weapons for him. (RT 12701) Willis also boasted that he bought marijuana from guards; that he extorted money and home-cooked chicken dinners from guards in return for his protection

of these guards from other inmates; and that guards sold him hacksaw blades, gave him information on other gangs, and passed notes and weapons for him. (RT 12701, 12824, 12990-13000, 13006, 13213) One woman officer would give him information from inmates' central files and allow him to use the phones whenever he needed. There was also an unspoken agreement that his cell would not be searched. As he put it, he "basically had it made in Carson Section." (RT 13007-12)

At trial, Willis admitted that when he initially contacted authorities, his goal was to secure immediate release from custody. (RT 12651)[4] In his first meeting with inspector Neumark, he was assured that he would be released from custody by 1987. (RT 13062-63) Throughout his initial conversations with inspector Neumark, he was assured that his release from custody would be no problem. (RT 13063-64, 13169, 13171, 13174-75) Prior to his first meeting with the District Attorney, Neumark told Willis not to say anything about the deal they had reached. (RT 13065, 13169) Neumark also advised him that if the District Attorney said there

---

[4] Willis contacted authorities on the evening of June 19, 1985. As Lt. Derrick Ollison walked by Willis' cell, Willis gave him some papers, later introduced as Exhibits 151-A, B and C, and asked him to give these to the persons running the investigation into Sergeant Burchfield's death. (RT 11724, 11728-30) Willis had never stopped Lt. Ollison before and had never before indicated he had any information about the Burchfield stabbing. (RT 11739-40) Willis claimed that he had tried to get this information to the warden before, but it had, instead, been delivered to Woodard. (RT 11749)

would be no deals, he was not to worry about it. (RT 13065) He would be released after trial. (RT 13171)

In fact, Neumark was unable to come through on his promise. (RT 13066-67, 13227) Instead, in exchange for his testimony, Willis received immunity from prosecution for what he knew was a capital offense, and immunity for his in-prison crimes committed both before and after the Burchfield stabbing, and protection while in prison. (RT 12651-52, 12982-83, 13052-53) He was also aware that at the conclusion of the case, the prosecutor would advise the parole board that Willis had cooperated in the investigation and prosecution, and that by cooperating with the District Attorney, he was eligible for a one-year reduction in his sentence. (RT 13134-36)

Willis testified that he had been a BGF member since 1982. (RT 12653-54) BGF members communicated with each other through written notes or "kites," sent from cell to cell on "fishlines." (RT 12661, 12699) BGF membership included exercise classes, black history classes, training in weapons production (knives, zip guns, crossbows, spears, grenades and darts), and Swahili. (RT 12657-71) BGF members communicated with each other in Swahili and used Swahili names to allow them a measure of secrecy. (RT 12672) Willis' Swahili name was "Zulu." (RT 12673)

The BGF organizational structure consisted of one "supreme commander," one "general," seven "enforcers," and an unspecified

number of commanders, lieutenants, sergeants, and foot soldiers. (RT 12676-77) In addition, within each unit, there was an intelligence officer (to gather information) and a chief of security in charge of ensuring all comrades in the living unit were supplied with material in the case of war. (RT 12706-07) Willis started as a foot soldier, working his way up to commander in D-section at San Quentin. (RT 12677-88) Willis claimed he quickly took control, established communication, recruited and educated, and had renegades removed by ordering them stabbed, at which point the administration would have them re-assigned for their own protection. (RT 12690-99, 12972)

Willis' gang leader power, however, was eclipsed by inmate Redmond, the BGF Commander of C-section. (RT 12712) Several weeks before the stabbing, Redmond sent Willis a kite advising him of a plan to injure a San Quentin staff member. (RT 12709-10) At Redmond's behest, Mary Olley, a San Quentin program administrator who was described as Redmond's "old lady," had eight or nine D-section inmates, including Willis, moved to C-section to consolidate his extraordinary power. (RT 13217-18)

Willis fought the move to C-section. He told Counselor Howell he opposed it because "moves were going down on correctional officers." (RT 13043) Howell, however, said he did not want to know about it unless black officers were involved. (RT 13044) Willis quickly set up a

contingency plan calling for stabbings and assaults on BGF leadership. (RT 13017-18) He brought a group of seven to eight inmates with him to C-Section, including Charles Drume. (RT 13181)

Willis, who had already been a BGF commander, became the intelligence officer in C-section. (RT 12688, 12731) Woodard was a lieutenant. (RT 12731) Inmate Rhinehart was also an officer. (RT 12730) Masters, according to Willis, was in charge of security. (RT 12731) His "Head of Security" position was a foot soldier position. (RT 12676) According to Willis, these four – Willis, Woodard, Rhinehart and Masters – formed the BGF's "Central Committee" in C-section. (RT 12730) Redmond was their Commander. (RT 12712) Masters, by contrast, was at the bottom of the ladder. (RT 12676, 12730-31, 12847, 12874, 13008)

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)

At a subsequent meeting, 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 suggested as the person who should do the assault. (RT 12741)

Sometime after this meeting, and before the next meeting, Redmond was 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)

At trial, Willis testified that on the evening of June 8, Masters gave a signal indicating that Sergeant Burchfield was moving to the second tier. (RT 12769) Contrary to the testimony of C-section correctional

officers, Willis testified that C-section was quiet before the attack. (RT 12770) At the preliminary hearing, moreover, Willis testified that the Central Committee had not discussed using a signal and twice testified that he did not remember any such signals.[5] (RT 12947-48)

Although he had planned the attack, after the killing of Burchfield, Willis decided to talk about it to authorities, because he did not believe it was going to happen (RT 12770-71), nor did he believe that Burchfield would be killed. (RT 12771) The day after Burchfield's death, Willis wrote a letter to the warden explaining that he would divulge what he knew in exchange for being released one or two years after the trial. (RT 12775) He disguised his handwriting and placed the letter on his cell bars to be picked up by a correctional officer along with the rest of the mail. (RT 12776, 12820)

In 1985, however, San Quentin was under the firm control of prison gangs. 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) Indeed, gangs controlled letters to the warden. Thus, the same day Willis sent his letter to the warden, he received it back with a message from

---

5 See n. 44, *infra*, at 117.

Woodard. (RT 12778) Woodard asked Willis to advise him who had written the letter. (RT 12779)

Bobby Evans

The prosecution also presented the testimony of BGF member Bobby Evans. Evans was in San Quentin in 1985. (RT 13673) At the time of trial, Evans had been convicted of five felonies (four burglaries and an attempted robbery). (RT 13699) In addition, he admitted to stabbing many people, robbing banks, and selling drugs. (RT 13695-13705, 13848)

Prior to contacting authorities in this case, Evans had provided other information to authorities. (RT 13796-98, 13870) In May of 1989, after his release on parole from San Quentin, Evans was charged with armed robbery. (RT 13805, 13808) He pled guilty to attempted robbery in exchange for a 16-month sentence in state prison. (RT 13865) He was concerned about going back to state prison because his life had been threatened by the BGF leadership. (RT 13864-65) After his guilty plea, he contacted authorities and claimed to have knowledge of the Burchfield killing. (*Id.*) Parole agent James Hahn directed Evans not to speak with anyone but the District Attorney. (RT 13274; CT 4814)[6]

---

[6] Hahn spoke to Evans on June 12, 1989 (CT 4814). Deputy District Attorney Berberian, on June 14, requested only that Evans not speak to the defense without someone from his office present. (CT 4789)

Significantly, at the time of trial, Evans was still in county jail and had not yet been sentenced on his May attempted robbery conviction. (RT 13809-10, 13884, 15570) Nevertheless, Evans testified that he was not receiving anything for his testimony and that he expected nothing in exchange for his testimony. (RT 13672-73) He also was not concerned that he might do a year on the parole violation on top of the 16-month sentence. (RT 13863)

At trial, Evans testified that in July of 1985 he was moved into the Adjustment Center in San Quentin. (RT 13715) Woodard was already there; (RT 13718) appellant arrived later. (RT 13725) At the time, Evans was an "enforcer" in the BGF. (RT 13684) In August, he attended a number of BGF meetings at which the June 8, 1985, killing of Burchfield was discussed. (RT 13721) According to Evans, Woodard admitted giving the order, and Masters admitted having voted in favor of the plan. (RT 13725-26) The District Attorney, however, did not introduce any yard lists showing Evans on the same yard as Woodard and Masters.

Evans also allegedly received notes from Andre Johnson in which Johnson claimed that he had killed Sergeant Burchfield. (RT 13764-65) No such note, however, was produced in evidence as Evans admitted to having destroyed it. (RT 13762)

4. The Incriminating Kites

Willis' testimony was corroborated by the kites (written communications between prisoners) he turned over to the investigators. One of the

kites, in Woodard's handwriting, which Willis testified had been written before Burchfield's murder, stated in part that,

> Our Supreme Commander and General was transported to A.C. today and jumped on by the dogs. . . . This total disrespect of our Supreme Commander will be responded to by each and every one of us. The entire South Section is now totally under my control!! . . . [N]ext yard all will be required to get off on K-9's. . . . My status is not to go beyond you two.
>
> (Exhibit 151-B)

Willis testified that the "Supreme Commander" referred to BGF leader Kenny Carter who had been placed in the Adjustment Center ("A.C."); "dogs" and "K-9's" referred to correctional officers. (RT 12831-35, 14382)

In one of two other notes, which Willis states were written by Woodard after the murder, Woodard wrote, in part:

> I've suggested to you that we not further create any antagonism with the K-9's at this time even though they are moving us to A.C. . . . But let me go further into how the K-9's lost a eight year veteran of oppression. We lost no one. . . . The K-9's are in a state of panic because they, 1) don't know, really, how the move came down, 2) who did the move, 3) they found no weapons or bloody clothes, 4) no snitches come forth with any proof. . . . Also the K-9's have no motive with which to work with. . . . The war is to be addressed on a level of progress and development. This means it goes from one step to a higher step as previously discussed. . . . We must not weaken nor become emotional. We are an organized, moti-

> vated military organization. . . . I take special notice of the constant excellent conduct of A-1 [Willis] during this present crisis. We can all learn to become more motivated by him.
>
> (Exhibit 151-A; RT 12838-48, 14382)

In a second note after the murder, Woodard wrote: "[We] leave one of the enemy dead. None of us are even scratched, and its now on the Crips." (Exhibit 151-C; RT 12836-37, 14382)

Willis testified that Masters would regularly write him two to three kites a day before the assault on Sergeant Burchfield. (RT 13092) According to Willis, some of these kites dealt with the planned murder of Burchfield. (RT 13093) Willis, however, destroyed these numerous kites, along with 200 to 300 notes (RT 13091), presumably because none of them implicated Masters. (RT 13092) He also destroyed his own reports on the yard meetings. (RT 13092-93)

Charles Neumark, the District Attorney Investigator, told Willis he needed a detailed admission from Masters. (RT 13088) Willis, therefore, wrote Masters a letter. (*Id.*) According to Willis (RT 13089), Exhibit 150-C represented Masters' response :

> "OH, WE TO CHANGE CODES FOR EVERYONE. F.II ALERT, SEMI ALERT, ETC.
>
> MWENZI L-9 THE KISU'S IS FROM MY KNOWLEDGE IS 7-1/2 INCHE. HOWEVER, I'M NOT SURE IF WE HAVE ANY BECAUSE "TAU" BROTHER-IN-LAW WAS BEING SEARCHED BY THE GOON

SQUAD YESTERDAY. I THREW MINES OFF THE TIER WHICH WAS 4 FLATS EASY. I HAD C-NOTES LOOKING AND FOUND IT, BUT DRAY TRIP TO THE A/C MADE IT IMPOSSIBLE TO GET. THE KISU USED FOR THE (MOVE) WAS INSTRUCTED TO BE DESTROYED BY WAWA I'M NOT SURE IF HE DID THIS. IF IT'S NOT THEN IT MUST. I'VE BEEN FOLLOWING THESE DOGS PATTERN STEP BY STEP. IF WE HAVE ANY STOCK MATERIAL LEFT ALL THE KISU'S WILL BE 7-1/2 INCHES TO A FLAT 8 INCHES. I'M NOT SURE AS TO WHAT REPORT YOU ARE REQUESTING. IF IT'S THE BEGINNING STAGES OF THE STREGERY TO THE WHICH THE SATURDAY LIVE JUMP OFF. GIVE A YES, AND I DREW IT FOR YOU. CHECK THE RAZOR EDGE DOUBLE EDGE I PUT ON THAT "BLACK" COULD CHOP A T-BONE STAKE UP. WHEN THE YOUNGER SAW IT, HE SAID GOD DAMN. RIGHTEIOUS [sic] ON THE FLOOR SAFE! THEY SHOULD BE COMING TO GET US SOON, AND M-II REALLY PUTT-ING HIMSELF ALL OVER THE TIER. I DESTROY SO MANY PA-PERS. I THINK I DESTROYED MY FLOOR MATE. ANYWAY, I DON'T HAVE MY PROPERTY YET. NOTHING! I'M GETTING THESE C-NOTES NOW PUSHING THEM INTO A CORNER FOR THEM TO TAKE OFF. LET ME NO WHAT REPORT YOU ARE TALKING ABOU-T, I WILL GET BACK. LET ME WHEN YOU ARE GOING TO SLEEP IF I CAN'T GET IT TO YOU TONIGHT FOR SURE TOMARROW, BECAUSE I GOT TO BARROW A PEN AND SOME PAPER. . . I'M GOING TO FORWARD ALL C-NOTE KITES SOON AS POSSIBLE FOR IMMEDIATE REVIEW, TONIGHT OR TOMARROW. L/2U

Willis testified that "Dray" and "the Younger" referred to Andre Johnson, "kisu" referred to the knife or weapon used to kill Burchfield, and

"C-notes" referred to the Crips. (RT 12708, 12855-59) Willis also testified that the "Saturday live jump off," referred to in the note was a reference to the hit on Burchfield. (RT 12859-60, 14839)

Willis testified that he was not satisfied by Masters' response to his request for a report. Willis sent Masters another letter, asking for more details. (RT 13088) Exhibit 159-C, in Masters' handwriting and bearing his fingerprints, represents Masters' response. (RT 13088, 14245, 14389) This kite (along with transliterated interpretation provided by the State)[7] provided in pertinent part:

> "Usalama (safety) report. Extended salutations and rage to you and all righteous relatives. Relatives, the usalama (safety) assignment carried out on 6/8/85 was the result of this pig (officer) known activities with these enemy elements. This pig (officer) works or least was working from 11 pm to 7 am. The pig (officer) was being watch and was monitor over months. Information was placing this pig (officer) as a key link to the AB (Aryan Brotherhood) weaponry. He was continually communicating with the leadership body of the AB's (Snowman) and indicated to have been seen supplying them with .22 bullets.

---

7 The parenthetical interpretations were provided in the State's exhibit.

This pig (officer) soon became a priority target agreed to by all commission members and sector commander (Woodard) in addition to this pig (officer) another pig (officer) was given the same status because of his activities. The C-notes (Crips) wanted to smash at the EME's (Mexican Mafia) but when we heard of this, that they were getting off soon, we propose another type of strategy surrounding our primary targets, who were these two (2) pigs (officers). . . . "Somo" (Johnson) was recommended by A-1 (Willis) and approve by U-1 (Masters)[8] and later approve by M-II (Woodard) and L-9 (Rhinehart). Though a back up personnel was also station with "Somo" (Johnson) possibilities of not fulfilling his orders. Both personnel was being prepare by U-1 (Masters)[9] and A-1 (Willis) and L-9 (Rhinehart) and was brief by said commission members. The end result proved . . . effectiveness by scoring a "MS" (master strike) on this pig (officer). He was not seen and no one knows as to who deal this move outside commission

---

8 Appellant does not accede to the State's interpretation that Masters was "U-1." Because Masters was not allowed to put on his version of the case, as we note below at pp. 80-121, this claimed misinterpretation of the second kite became moot.

9 See n. 6, *supra*, at 22.

members' sector commander and some usalama (safety) personnel. Relative "Somo" (Johnson) is highly commended for representing the party with this "MS" (master strike). Prior to lifting up the weaponry it was through reorganization usalama assignments in the building party weaponry. A lost of one 8 inch "HS" (hacksaw blade) and a 4 inch "HS" (hack-saw blade) was behind cell searches when assignments by all usalama personnel was working on cutting, making, and sharpening weaponry. In addition, after the hit that score the "MS" (master strike) we lost a 8 flats to stock material. Also as this date the C-notes (Crips) hasn't came through with their commitment, through they will - . . . Much Love U1[10]

Finally, the State introduced Exhibit 153-B, a document containing questions handwritten by Willis, along with answers handwritten by Johnson. Among other things, the note stated that "Askari" sharpened the knife while "Askari II" sent the knife "to put on the pole." (Exhibit 153B) Incredibly, Willis, testified that *both* "Askari" and "Askari II" referred to appellant Masters.[11] (RT 12926, 12930)

---

[10] See n. 6, *supra*, at 22.

[11] The author of the note, or someone who altered it, clearly intended to distinguish "Askari II" as a separate and identifiable person. Thus, the reference to "Askari II" was first written as

(continued...)

C. THE DEFENSE CASE

1. Evidence Suggesting the Crips Were Responsible for the Killing

Officer McKinney was one of the officers who responded to C-section immediately after the killing. He heard someone say "let's get another one for Montgomery." (RT 11390) This was a reference to the fact that approximately one year prior to Sergeant Burchfield's death, San Quentin inmate Montgomery was killed. (RT 11390-91, 12757) Although defense counsel tried to elicit evidence that Montgomery was a Crips leader, thereby giving the Crips a motive to kill Sergeant Burchfield, the trial court sustained the prosecution's relevancy objection to this testimony. (RT 11392; *but see*, RT 11390)

As noted above, significant evidence suggested that the killing occurred in front of cell four, occupied by Crip gang member Ephraim. Prior to trial, Officer Lipton repeatedly stated that Sergeant Burchfield was in front of cell four when he was hit. (*Supra* at 10) (RT 11214, 11301, 11338, 11341, 11343, 11347, 11362, 11377-78) Correctional Officer

---

[11](...continued)
"Askari III," but "III" was crossed out and "II" was written alongside of it. The handwriting on the "II" also appears somewhat different than the handwriting on the "III", suggesting that Willis may himself have altered the note. Given the fact that all this care and attention went into the designation of "Askari II" (possibly by Willis), it would be difficult to believe that "Askari" and "Askari II" were intended to refer to the same person.

Munoz found what appeared to be blood on the bars of cell four. (RT 11488)

Equally significant, however, was the State's own testimony concerning four state-issued shoes and a piece of metal found in one of them. Federal Bureau of Investigation analyst, William Tobin, examined a number of metal pieces found after the killing and compared them to the light grey weapon found outside the security office, the alleged murder weapon. (RT 11261-62, 11949-55) One of these metal pieces had been found on top of the security office screen (the same place where the spear shaft was found) *concealed in a single state issued shoe.* (RT 11528, 12010) According to Mr. Tobin, the metal found in this lone shoe was cut from the same source as the light grey weapon. (RT 11956)

Who was the owner of the lone shoe? All the evidence pointed to Richard Ephraim, the Crips gang member who occupied cell four. After Sergeant Burchfield's killing, authorities searched Ephraim's cell and seized three state-issued shoes. (RT 14979) The security office screen, where both the shaft and the single shoe were found, was directly beneath cells one through three, and thus within the reach of his throw. (RT 11528, 12010)

2. Evidence Casting Doubt on Willis' Testimony that BGF Members Were Responsible for the Killing

Herbert Gates was a San Quentin inmate between 1983 and 1985. (RT 14754) During that time period, the BGF and the Crips were enemies. (RT 14755) In 1983, Gates met Rufus Willis on the Crips exercise yard. (RT 14756) This was unusual, because Willis was thought to be a BGF member. (RT 14756)

Willis explained to him that one of his close friends had been attacked by the BGF in Folsom State Prison, that he had come to his friend's assistance and been attacked as well, that his friend had been killed, and that he was on the Crips yard for protection from the BGF. (RT 14757-58) Willis said that he was going to get revenge on the BGF for the killing of his friend. (RT 14758)

Willis' cousin, Thurston McAfee, was also in San Quentin in 1984 and 1985 and confirmed Gates' testimony. While at San Quentin in 1984, Willis spoke of forming his own "hit squad" and getting out of the BGF. (RT 14898-99) Willis, indeed, admitted stabbing four people in D-section before his transfer to C-section. (RT 12690) He also admitted having a group of about seven to eight inmates he was developing. (RT 13015) He was prepared to attack the BGF leadership. (RT 13017) Similarly, San Quentin inmate Tommy Harris confirmed that Willis spoke of forming

his own group to assault staff in the prison system. (RT 15041-43) Both McAfee and Harris agreed that Willis was not trustworthy. (RT 14903, 15045)

In 1987, Julie Cader was an inmate and trustee at the Marin County Jail. (RT 15279-80) Willis, who was being housed there (RT 15280), told Cader that he had made a deal under which he would serve eight years in prison. (RT 15280) He said he "would do whatever he had to make sure he wouldn't spend the rest of his life in prison." (RT 15281)

Prior to his testimony in this case, Willis was transferred to a prison in Carson City, Nevada. (RT 15512) Willis told fellow inmate Darrell Wright that although he was serving a life sentence, he had come up with a plan to get out of prison. (RT 15519-21) Both Wright and fellow inmate Johnny Brown confirmed that Willis was a member of the Crips. (RT 15517-18, 15551) In fact, Willis told Brown that he was a Crip when he was in California. (RT 15551)

3. The State's Destruction of Evidence

The defense case was also founded on the State's destruction of evidence, as well as the incompetence of the State's evidence collection and preservation. Thus, out of the presence of the jury, the Court 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)

Aspects of the State's negligence have already been noted. Investigating officers lost chain of custody of the alleged spearhead. (*Supra* at 12-13; *infra* at 35-36) 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)

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 in 2C8.[12] (RT 11537) Carruthers' bed brace, however, was not the only bed brace missing in Carson section. (RT 11123, 11125)[13] Photographs required by prison rules of the missing bed braces could not be found. (RT 11123; Exhibit 1201) 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 2C4. (RT 16077)

According to the State's expert, moreover, a welder had been used in connection with the alleged murder weapon and bed brace. (RT

---

12 "2C8" is shorthand for cell 8 on the 2nd tier of Carson - or C-section.

13 The People's claim that the metal came from Carruther's bed brace was based in part upon the testimony of FBI Metallurgist Tobin who compared the spear in evidence with metal from Carruther's bed. (RT 11955) Tobin, however, testified that it was common for vendors to send large shipments of metal items such as bed frames or bed braces and that such shipments might all be from the same "heat." Thus, all of the bunk braces in a particular section of the prison might be of the identical metal composition. (RT 11971-72)

11966) Carson section, however, was a security housing unit; C-section inmates were locked in their cells at all times except for their three (3) or four (4) times per week in the exercise yard, and every inmate was strip searched before going to the yard. (RT 11049-53) No evidence was offered as to how a welder could be used, fueled, and powered without being noticed or how the welder could be brought in or out of a high-security unit without being noticed.

According to the State's witnesses, many stabbing instruments were secreted throughout Carson section. (RT 11517, 11592, 11598-600, 11613, 12009, 12010, 12012, 12015, 12682, 12701, 13031-33, 13038-39, 13188, 13412) Evidence which could not be tied to a person or cell, such as evidence found in uncontrolled areas, however, was destroyed. (RT 15640-42, 15286; Exhibit 1225) The State also failed to record the identity of many of the witnesses who came forward with information concerning the murder. (CT 1410; RT 15247-48, 15251, 15254-65; PHRT 10116, 10120, 10124, 10129)

Officer Arzate was one of the great imponderables in the State's investigation. He 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 also destroyed the "U-Save-Um" envelope McMahon used to carefully seal and mark the alleged spearhead. (RT 11264, 11267,

11281-82) The "plain old white envelope," which he allegedly used to preserve the weapon evidence, also disappeared. (RT 11612) It was also Arzate who seized three state-issued shoes from the Crips' occupied cell four. (RT 11592) These disappeared, along with the lone shoe found atop the Carson security screen. (RT 11528, 11591, 12010, 14975-80, 14991, 15637) This rendered impossible the fitting of Ephraim with the 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, was found.

Officer Arzate was not the only San Quentin officer who destroyed evidence. Officer Kimmel collected and reviewed approximately ten notes claiming responsibility for the death of Sergeant Burchfield. All of these notes were destroyed. (RT 15247-48, 15251, 15254-65)

The State's informants also participated in this 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, 13089-96, 13424) *The notes he gave to staff were those created after his meeting with staff; those created prior to the meeting were destroyed.* (RT 13139) Willis knew he had to come up with a note from Masters to get a deal. (RT 13140) 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)

4. Willis' Total Mis-description of Masters

Willis' testimony about Masters' involvement was premised upon his intimate relationship with Masters. He claimed that Masters and he, along with inmates Rhinehart and Woodard, were members of the Carson section BGF Central Committee. (RT 12730-31) At their regular yard meetings he and Masters allegedly huddled as close as *one to two feet* from each other. (RT 13099) Masters allegedly wrote him two to four times a day. (RT 12850, 13092)

The defense showed, however, that Willis had absolutely *no idea* what Masters looked like. Thus, at the preliminary hearing, Willis described Masters as five feet seven inches tall (5' 7"), chubby with "a stomach," weighing 175 -180 pounds, bald and without facial hair, in his thirties, looking old, wearing glasses on the yard, and without any tattoos on his face. (RT 13099-13105)

Masters, however, was none of the above. He was six feet one inch tall (6' 1"), slim, wore a moustache and goatee, had hair on the top of his head and was young (23 at the time Willis allegedly knew him). (RT 11056, 21551) Masters also bore a distinctive tatoo on the left side of his face, the number "255". (Exhibit 1214 B) As for the glasses, Willis essentially conceded that Masters never wore glasses on the yard and that he may have confused him with Woodard. (RT 13101-03) (RT 13097-98; Exhibit 1214 B; RT 13107-08; *see also* PHRT 8404-06) At the

same time, he admitted that not all BGF members in C-section participated in killing Sergeant Burchfield. (RT 13109)

5. Willis Did Not Know Masters' Name

Willis also did not even know Masters' name. Willis knew the person he huddled with only as "Askari." (RT 12715-16)[14] The word "Askari," however, a Swahili word for "warrior," describes the person as a kinship member of a class of individuals, much like the words "Brother," "Sister," "Comrade," or "Soldier." Thus, in 1985 the title "Askari" was warmly borne by other BGF "Warriors" in C-section as well as a large portion of the San Quentin black prison population. (RT 13916, 14802, 14906, 14921) Willis didn't even know Masters by his nicknames: "Askari Left Hand" and "Thomas". (RT 12715-12716, 14910; CT 1916)

6. Evidence Casting Doubt on the Transcribed Kites Selectively Turned over by Willis

(a) Willis was a transcriber

Masters' defense also cast doubt upon the State's interpretation of the incriminating kites. 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) Thus, defense witness Thurston McAfee testified that Willis had others writing kites for him. (RT 14905) Indeed, Willis

---

[14] Willis claims he also knew the person by his code name "U-1." (RT 12716)

described himself as a BGF "transcriber" to San Quentin officer Ollison. (RT 11749) He admitted that the "Usalama Report" (the second kite penned by Masters) was written in response to the CDC's request that he provide them documents with more details. (RT 13088-89) The trial court itself noted that one of the kites was an obvious transcription. (RT 13297)

(b) Woodard's kite leaves Masters out

The Woodard notes made no reference to Masters. Indeed, Exhibit 151-B cast doubt upon Willis' claim that Masters was a member of Carson BGF Central Committee. Willis testified that the Central Committee was composed of four individuals: Woodard, Willis, and Rhinehart, who were officers, and Masters, who was a foot soldier. (RT 12730-31) No explanation was offered as to why a foot soldier would sit on the Central Committee with three officers. Exhibit 151-B, moreover, suggests that the inner circle only included three individuals. Thus, Woodard writes to his fellow officers: "My status is not to go beyond *you two*." (Emphasis added.)

(c) Exhibit 150-C was misinterpreted

Exhibit 150-C, the first Masters note, does not lend itself to Willis' interpretation. Willis testified that it was sent to and received by him. (RT 12853-54, 12856, 13083) By its terms, however, it was written to L-9, i.e., Rhinehart. (RT 12719; see pp. 25-26, *supra*) The letters "L-9," moreover, are unexplainedly in a different handwriting and appear to have

been inserted into the letter.[15] At the preliminary hearing, Willis admitted that he himself inserted the "L-9" on the document. (RT 13127) Willis 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," which is also different in size and color from the light grey metal weapon allegedly used to kill Burchfield. The stock material is also described as "flats," an odd description for a spearhead. (RT 11266; 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 weapon, since the prison had already seized and were 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.

(d) Masters didn't author Exhibit 159-C

It is also evident that Masters did not actually *author* Exhibit 159-C, the so-called "Usalama Report." Willis testified that Masters wrote this document at Willis' request. (RT 13088, 14245, 14389) *Significantly, words misspelled by Masters in Exhibit 150-C, the first kite handwritten by*

---

[15] See also n. 11, p. 29, *supra*.

Masters, are now spelled correctly only 30-60 minutes later. (RT 13088) Thus, the first note describes a kisu as 7½ "inche" long. The second note spells "inch" correctly. 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. . . ." In the "Usalama Report," the sender correctly spells "know." The first note proclaims "Right*ie*ous on the floor safe," while the "Usalama Report" spells "righteous" correctly.

(e) The Johnson kite was misinterpreted

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.[16]

---

[16] See n. 11, p. 29, *supra.*

ARGUMENT

PART ONE: MASTERS WAS DENIED A FAIR OPPORTUNITY TO IMPEACH HIS ACCUSERS AND PRESENT HIS PRINCIPAL DEFENSE

I. INTRODUCTION

A guard was killed during prison conditions judicially declared cruel and unusual punishment. *See 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.[17] (RT 21290-91, 21393; Penalty Phase Exhibit 228) 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.)

---

[17] In *Wilson v. Deukmejian*, the Marin County Superior Court also found that the general population conditions at San Quentin also violated the Eighth Amendment ban on cruel and unusual punishment. (RT 21394, 21396-98; Penalty Phase Exhibit 229) Masters was housed in the general population at San Quentin prior to 1983.

The trial below was a product of this awful crucible. The principal defense witnesses refused to testify, both for fear of prosecution by the State and out of concern for gang retaliation. The State managed to obtain its principal witnesses by means unavailable to the defense: by granting its witnesses state and federal immunities, by State protection, and by reduced sentences for testifying.

While charging Masters with aiding and abetting the murder, the State withheld evidence that they had the wrong man, and the evidence corroborating this evidence. Not privy to this exculpatory information, the defense, nonetheless, asked for a lineup as soon as they learned that the State's principal witness could not identify Masters. Without disclosing crucial evidence of misidentification, the State opposed the request as untimely and the magistrate agreed. But even when, at the end of the preliminary hearing, the state-withheld information was finally disclosed, the defense was not allowed to re-question the State's identifying witness.

Masters fared no better at trial. A continuous series of rulings denied Masters all opportunity to put on his defense – that the person identified by Rufus Willis, the prosecution's main witness, was not him.

MASTERS WAS NOT ALLOWED TO PROVE THE MISIDENTIFICATION

The basic facts are undisputed. The State claimed that the murder of Sergeant Burchfield was planned by four members of a powerful California prison gang, the Black Guerilla Family. The State further claimed that one of these four, a "Chief of Security" responsible for supplying shank materials in his section, played a role in sharpening the spear. The State said this person was Masters.

The State knew better. In an interview with prison officials and prosecutors that was withheld from the defense, inmate Harold Richardson fully admitted his role — as a principal co-conspirator, as one of the four planners, and as the overseer of spear-sharpening — and identified three other co-planners, leaving out any reference to Masters. But the State sequestered Richardson and withheld his admission from the defense until the very end of the preliminary hearing, some two and one-half years after the murder of Burchfield. The State and its witnesses also concealed and destroyed evidence which might have led the defense to this exculpatory evidence.

While all of this information was concealed or destroyed, the defense, at the outset of the preliminary hearing testimony of Rufus Willis and before the defendants were brought in, nonetheless asked Rufus Willis to describe Jarvis Masters, whom he admitted he didn't know by name. The co-conspirator described by Willis bore no relationship to

Jarvis Masters, but instead described Harold Richardson whose identity as a principal co-conspirator was not yet known by the defense.

Although kept in the dark, the defense was diligent. Upon learning from Willis' answers that the prosecution's case was based upon mis-description, defense counsel immediately asked for a lineup. The prosecution, without revealing the information or the other evidence it withheld, opposed the request and the magistrate ruled in their favor. Willis was then allowed to see Masters at the defense table.

When the State finally revealed Richardson's admission, Masters sought to re-call Willis for further cross-examination. This request was also denied. Indeed, the defense was not even allowed to show Richard-son to Willis to conclusively resolve the question of Willis' mistaken identification.

Richardson's admissions were likewise excluded. Upon Richard-son's exercise of his Fifth Amendment privilege, both the magistrate and the trial court denied all attempts to introduce evidence of his admissions, despite the fact that admissions were made both in writing and orally to three different individuals.

The trial court also denied all attempts to introduce multiple admis-sions by Charles Drume, another Fifth-Amendment-invoking, admitted-co-conspirator who (1) placed himself among the planners, leaving out Masters, (2) admitted fashioning the spear attributed to Masters by the

State, and (3) admitted his role as "Chief of Security," the role attributed by the State to Masters.

By denying Richardson and Drume immunity, the District Attorney and the Court shut the final door on the defense case. State witnesses fared far better. In addition to receiving both State and federal immunity and protection from the BGF, State witness Rufus Willis earned a recommendation for a one-year reduction in his sentence. State witness Bobby Evans also received protection and was released after the close of evidence.

While the jury deliberated, the defense discovered that Bobby Evans had lied to the jury. He told them that nothing was promised for his testimony. Newly discovered evidence, however, revealed both that he expected to be "taken care of" and that he was "taken care of" through a reduction of his sentence. While the jury heard a read-back of his false testimony, the trial court denied a defense request to re-open the evidence, thus preventing the jury from learning the truth.

Thus, the State, at every turn, took full and sometimes unfair advantage of its powers in convicting Jarvis Masters. It identified Masters by granting others immunity, by sequestering a witness, by granting protection and benefits, by withholding evidence, and by silencing those who would exculpate Masters. The magistrate and the trial court, in turn, denied Masters all opportunity to prove this identification wrong. Misiden-

tification was his one principal defense. By every standard of due process, the trial below was unfair, and the judgment of death cannot stand.

THE ISSUES

In the sections that follow, before dealing with the broader issue of the denial of the constitutional right to present a defense, appellant will first discuss the individual components which, individually and cumulatively, resulted in the denial of Masters' constitutional rights to due process and a fair trial:

(1) The magistrate's denial of Masters' motion for a lineup following Willis' mis-description of Masters and the trial court's refusal to grant a Penal Code section 995 motion on these grounds;

(2) The trial court's refusal to admit Richardson's and Drume's numerous out-of-court statements against interest which were supported by compelling indicia of reliability and which were the principal evidence available to Masters that he was not a part of the conspiracy; and

(3) The trial court's resulting failure to sever Master's trial from Woodard's.

Appellant will then discuss the broader issue: the fundamental constitutional unfairness of denying Masters, in this death penalty case,

each and *every* opportunity to present his one principal, factually-supported defense that he was not the person identified by Willis, the prosecution's main witness.

Finally, appellant will discuss the fundamental constitutional unfairness of the State's failure to disclose that Bobby Evans both anticipated and received significant benefits for his testimony, and the fundamental constitutional unfairness of the trial court's refusal to allow the jury to learn about this evidence and Bobby Evans' deceit.

II. THE DENIAL OF A LINEUP AND CRUCIAL CROSS-EXAMINATION OF WILLIS WAS PREJUDICIAL CONSTITUTIONAL ERROR

A. THE PRINCIPAL FACTS

1. Willis' Inability to Identify Masters

Before Rufus Willis testified at the preliminary hearing, defendants moved that Willis be out of court during his initial testimony in order to test his identification of the defendants. (PHRT 8329-8330)

The court agreed and when the examination of Willis commenced, the defendants were not present. (PHRT 8362) Willis claimed that he had known each of the defendants for the few months between his arrival at C-section (the site of the killing) in 1985 and his San Quentin departure after the Burchfield killing. (PHRT 8365-66) Willis claimed he saw Masters for about two months after Willis came to C-section in January, 1985: on the fourth tier, as Masters walked by his cell on the way to the shower (PHRT 8378-79), and several times on the exercise yard, which was twice-a-week for a couple of months. (PHRT 8380)[18]

Willis initially said that March, 1985, was the last time he saw Masters until the Burchfield killing. (PHRT 8380) He then corrected himself: He saw him all the way up until June 7. (PHRT 8381) Willis

---

[18] He sometimes huddled one to two feet away from him at BGF yard meetings. (RT 13099)

admitted, however, that Masters never actually identified himself to Willis as Masters; rather, Masters identified himself only as "Askari." (PHRT 8388-89)

"Askari," a Swahili word for "warrior," however, doesn't necessarily mean a particular person. Like the words "Brother," "Comrade," "Soldier," or "Justice," it describes a kinship member of a class of individuals. Thus, the title "Askari" was used by other BGF members in C-section as well as a large portion of the San Quentin black prison population in 1985. (RT 13916, 14802, 14906, 14921) In addition, Masters was specifically known as "Askari Left Hand" and "Thomas." (RT 14910, 15339, 15347; CT 1916) *Thus, Willis did not know Masters by either his name or his nick-names.*

Willis also gave several contradictory — and as to Masters grossly inaccurate — descriptions of the "Warrior" he had in mind: He 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) Masters, however, 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,[19] 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; Exhibit 1214 B)

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,[20] in light of Willis' gross misidentification of Masters. (PHRT 8404)

2. The Defense Were Kept in the Dark about Harold Richardson

Appellant's lineup request was made on July 14, 1987, immediately after Willis demonstrated his inability to name or identify Masters. (PHRT 8404) At the time, the defense didn't know about one of the State's many well kept secrets: on August 21, 1986, BGF Commander Harold Richardson had admitted his role in the murder.[21] (CT 1908)

---

19 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)

20 "[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.*

21 As early as April 9, 1986, Masters' defense counsel had requested that the State produce all documents relating to Harold Richardson's involvement in the murder of Sergeant Burchfield. (2 ACT 623, 640, 2626-29) Richardson's whereabouts were also kept secret by the Department of Corrections. (CT 695)

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 22 for chart notes**

Leaving out Masters entirely, Richardson named eight co-conspirators. (CT 1908-09) Richardson said the hit was planned by Willis, Johnson, Woodard, and himself. (CT 1908) Richardson also said that he himself supervised the sharpening of the spear. (*Id.*)

Significantly, Richardson closely matched Willis' descriptions of the fourth co-conspirator, the one he could only name as "Askari." See Chart on page 52 and the accompanying notes in the footnote below.[22]

---

[22] **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 71" (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 my have confused Masters with Woodard. (RT 13102)

3. The Magistrate's Denial of Masters' Motion for a Lineup

While still in the dark about Harold Richardson, Masters' counsel acknowledged that, as distinguished from the situation in *Evans*, considerable time had passed since the incident. Masters' counsel pointed out that this delay was not defense counsel's doing. Masters was first arraigned on December 20, 1985, more than six months after the incident. (2ACT 2) The preliminary hearing, ordinarily heard within ten days of the municipal court arraignment (Penal Code section 859b), was continued one and a half years, for good cause repeatedly approved by the Court itself. (*See, e.g.*, 2ACT 21, 202, 613, 679, 821, 1024, 1793; PHRT 6946)[23] *The preliminary hearing was also the first time the defense was given access to Willis, who refused to speak with the defense,*[24] *and the hearing was thus the first time defense counsel could have learned that Willis' testimony was founded upon misidentification.* (2 ACT 1449, 1500; 2 CT 551; PHRT 8404-05; 2ACT 1389-1390) The magistrate, nonetheless, ruled that under *Evans v. Superior Court, supra*, "[b]ased on this showing I've heard, and the testimony as to the number of times that he's met him on the yard and so forth, I'd deny the motion." (PHRT 8408)

---

[23] The preliminary hearing commenced on June 22, 1987. (PHRT 6946)

[24] After repeated defense requests to speak to him, Willis filed a declaration that he would not speak to the defense. (2ACT 1389-1390) See also, n. 27, p. 57, *infra*.

4. The Trial Court's Failure to Grant Masters' Motion to Dismiss Based on the Denial of the Lineup

Masters raised the magistrate's denial of a lineup and the opportunity for questioning Willis as a ground for setting aside and dismissing the information. (CT 501, 1414) Masters asserted that the lineup motion was timely because Willis had been secreted, and the motion was made *immediately* after Willis' mis-description of Masters at the preliminary hearing. (CT 551-52; 1001-02) Any delay in bringing the motion was due to the State's own actions.[25] Had the State turned over Harold Richardson's admission in a timely fashion, the lineup request could have been made a year and a half earlier. The defense motion was, nonetheless, denied. (CT 1414)

B. DENYING A LINEUP AND QUESTIONING OF WILLIS WAS ERROR

Both lower courts relied on Willis' testimony that he had seen "Askari" many times to find that there was insufficient likelihood of mis-

---

[25] In the hearing on Masters' motion to dismiss, his co-counsel, Michael Satris, asserted, without contradiction, that:

> We didn't have that information at the time that we cross-examined Mr. Willis, because the State, through the person of the Department of Corrections, kept it from us. They claimed a privilege that was litigated secretly, we had no knowledge of it until right at the end of the preliminary hearing, and it's disclosed to us, so the State has kept this information from us. (8-8-88 RT 73.)

identification. Their reasoning reflects a crucial failure of logic. *Since Willis clearly didn't know Masters by name or appearance, the number of times he met an unnamed co-conspirator physically different than Masters was irrelevant to his identification of Masters.*

1. The Magistrate's Ruling Contravened the Principles Underlying *Evans*

The magistrate's failure to order the lineup was an abuse of discretion which, as *Evans* makes clear, constitutes a denial of due process:

> 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.

In this case, identification was certainly material — the reasonable likelihood of mistaken identification arose directly from Willis' mis-description of Masters — and a lineup, fairly conducted, would have resolved the issue. Indeed, had the lineup been conducted, and had Willis, as expected, identified Harold Richardson, charges against Masters would probably have been dismissed.

2. The Lineup Was Requested as Soon as the Misidentification Was Revealed

As for timeliness, *Evans* requires that the lineup be requested "as soon after arrest or arraignment as practicable . . . *unless good cause is clearly demonstrated*" for the delay. 11 Cal.3d at 626 (emphasis added). In this case, some one and a half years had passed since the defendants' arraignment,[26] but one and a half years had also passed between the arraignment and the preliminary examination, and the Department of Corrections had removed Willis from San Quentin and kept him at an undisclosed location. Richardson's whereabouts had also been kept secret along with his exculpatory evidence.[27] (CT 695)

---

[26] Arraignment in Municipal Court took place on December 20, 1985 (2ACT 2); Masters' request for a lineup was made on July 14, 1987. (PHRT 8345, 8404-05)

[27] Masters' assertions that Willis and Richardson were kept from the defense were uncontradicted. Thus, Willis' address was deleted from the District Attorney's witness list. (2 ACT 1500) In place of an address, the list said "CONTACT DAVE GASSER." (*Id.*) (Mr. Gasser was a District Attorney investigator.) Johnson's defense counsel noted that Willis was unavailable. (2 ACT 1449) During the preliminary hearing, while the prosecution complained in general that Masters' motion for a lineup was late, no answer was made to defense counsel's statement that:

> . . . Mr. Willis has been kept separate, completely separate, and his whereabouts has been maintained absolutely confidentially with respect to access by the defense.
>
> As a matter of fact, we were notified early on . . . that we, the defense . . . were not to contact Mr. Willis because he did not wish to talk with any of us.
>
> So the full extent of the difference in the description given by Mr. Willis and the way Mr. Masters looked during that

(continued...)

(...continued)

> period of time really was not developed and was not revealed until here in the court this morning. (PHRT 8404-05)

After repeated requests to speak to Willis, directed to him through the District Attorney, Rufus Willis filed a declaration confirming his refusal to meet with or speak with the defense. (2 ACT 1389-90)

The prosecution's response did not in any way factually contradict defense counsel's assertions. (PHRT 8406-07; CT 1002) And, it must be noted when Willis was returned to the courtroom, the prosecutor led him to identify, in order, Johnson, then Woodard and then Masters, so that if Willis knew the first two, he would by process of elimination have been led to identify Masters as the third defendant sitting at the defense table. (PHRT 8409-10).

In Masters' section 995 motion, he again made the factual assertion regarding "Willis' complete inaccessibility to the defense prior to his production at the preliminary hearing." And, "[defendant had no cause for the lineup until Willis so wrongly described him." (2 ACT 551.) Again, these factual assertions were entirely uncontradicted in the People's response, other than to claim that there was no evidence to substantiate counsel's claim of Willis' inaccessibility. (CT 765) Willis, however, filed a declaration both refusing interviews and "face to face" meetings. (2ACT 1389-90) The government's argument also conveniently ignored the fact that the need for a lineup did not arise until Willis' misidentification. Again, however, the People presented no *factual* assertions contradicting defense counsel's. (CT 765) Willis, moreover, admitted that District Attorney Investigator Neumark told him not to speak to anyone else. He was also under the District Attorney's hire. He received $25.00 a month and $50.00 for every visit by the District Attorney. (RT 12812) In 1987, he was secreted in the women's section of the Marin County Jail. (CT 15279-80) After the preliminary hearing, his whereabouts were kept secret. (CT 1218; RT 15610-11) The whereabouts of other informants were also kept secret. (2 ACT 1435-36, 1440; 6-27-88 RT 13; CT 695) Having committed himself to the prosecution, Willis knew loyalty would be required. Thus, Willis knew that disloyalty to the prosecution could result in his death at the hands of the CDC. (RT 13066)

Absent good cause, the preliminary hearing must take place within ten days of the arraignment, or the complaint must be dismissed. Penal Code section 859b; *People v. Pickens* (1981) 124 Cal.App.3d 800. For good cause, however, the magistrate allowed this ten days to become one and a half years. (*See, e.g.*, 2ACT 21, 202, 613, 679, 821, 1024, 1793, PHRT 6946) The magistrate well knew that what might take ten days in a normal case could easily take one and a half years in this case. Thus, the good cause for the one-and-a-half-year delay in bringing a preliminary examination in this case by itself supports a finding of *Evans* good cause.

Moreover, 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 disaffiliating from the BGF — was not timely disclosed to the defense. (See 51, *supra*, and 81-85, *infra.*) 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. (See the uncontradicted statement of defense counsel Michael Satris in the hearing on Masters' 995 motion, 8/8/88 RT 73.)

3. State Misconduct Thwarted the Defense Investigation

The State's one-year delay in providing the Richardson confession was inexcusable. The State should have known immediately that Richardson's admissions had to be disclosed to the defense. As early as April 1986, the defense made a request for all discovery bearing on Richardson's involvement in the conspiracy. (2 ACT 623, 626-29, 640) The State's delay in turning over the discovery, moreover, does not stand in isolation. At every turn, the State – by its incompetence, perpetual desire for security, and lack of interest in defense exculpatory evidence – thwarted the ability of the defense to investigate their case in any normal fashion. 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

At the very outset, investigating officers lost chain of custody of the alleged spearhead. (*Supra* at 11-15) 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)

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; Exhibit 1201) 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)

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; Exhibit 1225)

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 also 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. (RT 11592) Those also disappeared, along with the important shoe found atop the Carson security screen. (RT 11528, 11591, 12010, 14975-80, 14991, 15637) This rendered impossi-

ble 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 was found.

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

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

The States' 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)

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 Sgt. 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 Sgt. 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)

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

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

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

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 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) Lt. Spangler's false testimony

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 Lt. 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 Lt. Spangler's office at San Quentin to conduct an audit. (*Id.* at 231-232) Lt. Spangler, thereafter, testified under oath to the magistrate that everything had been turned over. (*Id.* at 296)

Lt. Spangler testified falsely. Some six months after Lt. 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's December 11, 1985, letter averred that Lawless knew the details of the murder from an informant. (Exhibits C and H to August 8-10, 1988 hearing)

(4) Lawless leaves Masters out

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) 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)

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)

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) 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' testi-

mony 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

While 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), 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; Exhibit H to 8-10-88 hearing) 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)

The other shoe fell on February 24, 1988. Investigative officer Lt. 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) Lt. 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 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. (8-10-88 RT 324; CT 567)

(6) Still unexplained

Still missing to this day is Lawless' December 12, 1985, letter to Warden Vasquez about Ingram's admissions. (Exhibits H and I at 8-10-88 hearing; 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. (Exhibit H at 8-10-88 hearing) *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)

Confronted with the "Lawless file," Lt. Spangler, the San Quentin officer who testified under oath that he had turned over all files related to the murder of Sgt. 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 had also known that Lawless had provided information about the Burchfield case. (*Id.* at 298) After making these admissions, Lt. Spangler feigned a lack of recollection of Lawless' letters but admitted that he had prepared the file and that the file had his hand-writing on the outside. (8-10-88 RT 299-301)

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 Sgt. Burchfield. (8-10-88 RT 315-16) Lawless also reported that the CDC Special Services Unit[28] promised Willis a parole within two years of a conviction in this case. (8-10-88 RT 328)

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 328-329)

---

[28] See p. 167 and n. 51, *infra.*

4. The State Must Assume Responsibility for Delay

In light of the above evidence, it cannot be denied that 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. 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 State therefore, cannot point its finger at the defense and fault them for any delay in waking to the truth. State incompetence and misfeasance thwarted the defense investigation at each and every turn, especially in connection with matters relating to the second tier where Richardson was celled and the murder took place. Indeed, the State opposed the motion for a lineup while the State *secretly* knew of Richardson's admission, and presumably knew that Richardson fit Willis' description of "Askari." Accordingly, in the utmost real sense, the lineup motion was made "as soon . . . as practicable" and with very good cause — State

action cause — for anything that might be deemed delay. As the United States Supreme Court has said:

> The State may not insist that trial be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.
>
> *Wardius* v. *Oregon* (1973) 412 U.S. 470, 474-475 (quoted in *Evans*, 11 Cal.3d at 623).

This case more than violates *Wardius v. Oregon.* In this case the State kept both its hand, and the defense hand, hidden from the defense. Before the defense was even dealt its hand, *as soon* as it became aware of the gross variance in Willis' description from the real Jarvis Masters, the defense requested a lineup. In the language of *Evans*, the defense request was as early as was practicable.

Furthermore, this was not, as *Evans* cautions against, a case in which the request for a lineup involved "[d]ilatory or obstructive tactics made under the guise of seeking discovery but which tend to defeat the ends of justice . . . " *Id.* Rather, Masters' was attempting to *ensure* justice by showing that the prosecution's principal witness against him could not identify him, at the only time available to test that identification before that witness would be able to identify Masters merely by his presence as one of the defendants along with the two other defendants that Willis actually could identify.

5. The Magistrate Did Not Weigh the Benefits or Burdens of a Lineup

Evans did leave the question to the discretion of the trial judge,

> after consideration not only of the benefits to be derived by the accused and the reasonableness of his request but also after considering the burden to be imposed on the prosecution, the police, the court and the witnesses.
>
> *Id.* at 625.

There is no indication, however, that the magistrate took any of these factors into account. Had he done so, he would have noted that in the context of a 5-plus-month, 53-day preliminary hearing, one and a half years after the arraignment, with a witness who was incarcerated, the burden on the court, prosecution, and witnesses was slight as compared to the massive consequences – a possible sentence of death – if the defendant were wrongly identified.

In this way, the failure to hold the lineup infected both the entire remainder of the preliminary examination and the trial.

C. DENYING THE OPPORTUNITY TO QUESTION WILLIS REGARDING RICHARDSON WAS FURTHER ERROR

The error was exacerbated by denying Masters the opportunity to recall Willis. After Harold Richardson appeared and his statements – in which he took responsibility for much of what had been pinned by Willis on Masters – were admitted, Masters sought to recall Willis to show him

Richardson and have him identify Richardson as the person he confused with Masters. (PHRT 14840-43) This request was also denied, under Evidence Code section 352 and because Richardson refused to testify. (PHRT 14841, 14843)

These reasons make no logical sense. The probative value of questioning Willis was high. The potential prejudice was nil. Richardson's refusal to testify was irrelevant. Thus, once again, the lower court arbitrarily prevented Masters from a unique and indispensable opportunity to show his innocence before trial. It was unique, because rarely will a defendant be able to identify a third party as the actual perpetrator and have him identified as such by the prosecution's main witness before trial, before, as noted above, the prosecution witness had become so fixed in his identification that he would be "reluctant to recede from such a position, even if in error, at later proceedings in court." *Evans*, *supra*, 11 Cal.3d at 621. It was indispensable for the same reasons. Only at this moment was there any chance that Willis, without time for preparation and coaching, might in fact see Richardson and by his answers to defense questioning exonerate Masters. Given the fact that Willis' description of this "Askari" fit Richardson and not Masters, and Richardson's admission of his role in the conspiracy, it appears reasonably likely that Willis had Richardson in mind.

The purpose of cross-examination, the Confrontation Clause cases teach, "is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig* (1990) 497 U.S. 836, 845. In this case, the opportunity to confront Willis with the person he had described in his initial mis-description of Masters, and to subject that description to rigorous cross-examination, was lost forever.

D. THE TRIAL COURT'S DENIAL OF THE MOTION TO DISMISS WAS CONSTITUTIONAL ERROR

Denying a lineup and the opportunity to question Willis about Richardson was constitutional error. The State's opposition to the lineup request while it secretly knew of Richardson's admission was fundamentally unfair. *Wardius v. Oregon, supra*, 412 U.S. at 474-75. A defendant, moreover, has a constitutionally-protected right to present a defense at his preliminary examination, and,

> [W]here it appears that, during the course of the preliminary examination, the defendant has been denied a substantial right, the commitment is unlawful within the meaning of section 995, and it must be set aside upon timely motion.

Jennings v. *Superior Court* (1967) 66 Cal.2d 867, 874. Thus, the denial of the defense motion to dismiss was constitutional error. (CT 1414)

In *Jennings*, the error was the magistrate's denial of a defense motion for a four-day continuance in order to obtain the testimony of a

missing witness. If the denial in *Jennings* of a 4-day continuance in a drug prosecution was unconstitutional, then, *a fortiori*, the denial of a crucial lineup and absolutely critical cross-examination in a capital murder trial was unconstitutional.

In *Jennings*, it was sufficient for reversal that the proffered testimony was material to Jennings' defense of entrapment. *Id.* at 876. In this case, Masters' proffered defense — that the prosecution's key witness could not identify him as one of inmates involved in the conspiracy and that Willis had instead described Richardson as the co-conspirator in question — was not simply material, it was the heart of Masters defense. Had the evidence proved exculpatory as expected, the case against Masters would have been dismissed.

The *Jennings* opinion also explains:

> The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where the lack of probable cause is clearly disclosed.

Jennings, 66 Cal.2d at 880, quoting *People* v. *Elliot* (1960) 54 Cal.2d 498, 504, and *Jaffe* v. *Stone* (1941) 18 Cal.2d 146, 150. Moreover, "[t]o effectuate this constitutional and statutory purpose," states *Jennings*, "the defendant *must* be permitted" to "introduce evidence tending to overcome

the prosecution's case or establish an affirmative defense." *Id.* (emphasis added.)

If a defendant "must" be permitted to elicit testimony or introduce evidence tending to overcome the prosecution's case, then in this case Masters "must" have been given the opportunity to show, through a lineup and cross-examination, that the prosecution had the wrong man. While it arose in a slightly different setting, the words of the Supreme Court in *Crane* v. *Kentucky* (1986) 476 U.S. 683, 690 aptly describe the constitutional deprivation:

> In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."

E. DENIAL OF THE LINEUP AND CRUCIAL CROSS-EXAMINATION AT THE PRELIMINARY HEARING FATALLY INFECTED THE PROCEEDINGS BELOW

In *People* v. *Pompa-Ortiz* (1980) 27 Cal.3d 519, this Court held that an illegal commitment is grounds for reversal following trial only if it in some way prejudiced the defendant at his subsequent trial. Irregularities in preliminary proceedings reviewed after trial are reviewed under "the appropriate standard of prejudicial error and shall require reversal only if the defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result" of the preliminary hearing error. *Id.* at 529.

This court, in its post-*Pompa-Ortiz* cases, does not distinguish between the familiar state and federal standards; rather, it speaks only of whether the defendant has been deprived a fair trial or otherwise has suffered prejudice or the error has affected the ultimate outcome of the trial. *See, e.g.*, *People* v. *Jenkins* (2000) 22 Cal.4th 900, 958; *People* v. *Milwee* (1998) 18 Cal.4th 96, 121.

Given the fact that the denial here prejudices substantial constitutional rights (*Jennings v. Superior Court, supra*, 66 Cal.2d at 874), contravening both the right to due process of law (*Wardius v. Oregon,* supra, 412 U.S. at 474-75; *People v. Evans, supra*, 11 Cal.3d at 625), and basic rights under the Confrontation Clause (*Maryland v. Craig, supra*, 497 U.S. at 845), the "appropriate standard" must be the federal harmless-beyond-a-reasonable-doubt standard. *See also People* v. *Boulware* (1993) 20 Cal.App.4th 1753, 1757 (*Chapman* v. *California* (1967) 386 U.S. 18, 24 is "appropriate" standard to be applied to failure to provide counsel at preliminary hearing); *People* v. *Cox* (1987) 193 Cal.App.3d 1434, 1440 (applying *Chapman* standard to absence of counsel at arraignment).

One cannot seriously argue that the denial of an indispensable lineup and crucial cross-examination, which could have shown at the outset that the prosecution had the wrong man, was "harmless beyond a reasonable doubt." *Chapman v. California, supra,* 386 U.S. at 24.

Indeed, by any standard, the denial of once-in-a-lifetime crucial lineup and cross-examination opportunities, was clearly prejudicial. Willis' obviously erroneous description of Masters alerted the court that Willis was either mistaken in his identification of Masters, or lying. To say, as the magistrate said, that a misidentifying witness need not be shown a lineup simply because he claims to have seen the defendant many times — a defendant whom he cannot accurately describe or name — boot-straps the result into the question. Once he had misdescribed Masters, Willis' claims to have seen him in no way vitiated the likelihood of mis-identification, and Willis' claims should have given way to the reality of his inability to accurately describe Masters.

In this way, the magistrate prevented Masters from taking advantage of his principal available opportunities to vindicate his "basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' " *Crane* v. *Kentucky*, *supra*, 476 U.S. 683, 690-691, quoting *United States* v. *Cronic* (1984) 466 U.S. 648, 656. The error was prejudicial under any standard because it infected the entire trial: once Willis had been able to see Masters at the defense table, he could then confidently identify him throughout the trial, as he subsequently did.

This is not a case, like *People* v. *Jenkins* (2000) 22 Cal.4th 900, 951, 958, in which there was time following the preliminary hearing to

cure errors of discovery or of the refusal of the magistrate to grant a continuance. Rather, the errors were irredeemable, prejudicial, and constitutionally reversible.

III. THE EXCLUSION OF COMPELLING EVIDENCE OF MISIDENTIFICATION AND INNOCENCE WAS ERROR

After denying Masters a lineup and a recall of Willis to prove defendant's misidentification — his actual innocence — the case proceeded to the Superior Court. In that court as well, Masters was not allowed to introduce compelling evidence of misidentification.

Masters filed a pre-trial motion to sever his case from Woodard's on the grounds that he intended to present co-conspirator admissions by inmates Harold Richardson and Charles Drume which implicated Woodard but exculpated Masters. (CT 1842) The court, cognizant that Masters' case would have to be severed if the statements were admissible, took up the admissibility of the proffered statements first. Finding the statements of Harold Richardson and Charles Drume inadmissible, the trial court denied the motion to sever. (CT 2408; 12-13-88 RT 40) Masters moved for reconsideration (CT 2430), but the court again denied the motion to sever. (1-9-88 RT 4, 14)

In this section, appellant will demonstrate that the pre-trial and trial exclusion of the inmates' admissions violated Evidence Code sections 1230 and 1042(a).

In the next section, appellant will show that as the evidence was in fact admissible, the failure to sever was also error. Appellant will then

demonstrate that the decisions denying Masters a lineup, denying him a critical cross-examination of Willis, and excluding the critical inmate admissions went to the heart of his defense and, thus, denied him his constitutional right to present a defense.

A. THE FACTUAL AND PROCEDURAL BACKGROUND

In his motion to sever (CT 1842), Masters argued that the statements against interest of inmates Richardson, Drume, and Ingram implicated themselves, Woodard, Johnson, and Willis, but did not mention Masters, evidencing Masters' non-involvement in the planning and execution of the Burchfield murder. (CT 1860)[29]

1. The Richardson Statements Against Interest

According to the *in camera* testimony of Jeanne Ballatore, then Legal Affairs Coordinator at San Quentin, inmate Harold Richardson, sometime in August, 1986, told her that he wanted to drop out of the BGF.

---

[29] Exhibits attached to the motion included: (1) a debriefing interview with Richardson, in which he implicates Willis, Johnson, Woodard, and himself, with no mention of Masters (CT 1909); (2) three reports of an interview with inmate Drume, in which he implicated himself as the conspirator who had manufactured the weapon used to kill Burchfield, and Woodard as one of the other co-conspirator's, but did not mention Masters by either his given or any of his prison names (CT 1912, 1914, 1916); and (3) the notes of an interview with inmate Lawless, who reported that he was housed in the AC next to inmate Ingram, who told Lawless that it was he, Ingram, who cut the stock from which the weapon which killed Burchfield was made. Ingram said he sent it to Johnson. (CT 1919) Again, there was no mention of Masters.

Ballatore explained the "debriefing" process, [30] and Richardson began to provide information to her about the BGF. During one of their conversations, Richardson indicated that he had information about the Burchfield case. Ballatore contacted Lieutenant Spangler (who was investigating the Burchfield murder for San Quentin), and together they interviewed Richardson on August 21, 1986. (CT 1908)

Ballatore and Spangler explained the purpose of the interview, to talk about the BGF and assess Richardson's sincerity about dropping out. They discussed what he knew about BGF activities in his section, and then asked what he knew about the Burchfield case. (CT 1908-09) Richardson elicited promises from the prison officials "to keep him in as safe a housing as possible" (PHRT 14264), not to use the information in the murder prosecution, and to "do everything possible to keep the information confidential." (PHRT 14888-89) He was advised that the statement could not be used against him, because they were not giving him his *Miranda* warnings. (Letter from Richardson dated 8/8/87 to Jeanne Ballatore, CT 2531-2532.) Ballatore stated that she took very good notes; that she wrote the memorandum in question the next day from those notes; and that she and Spangler reviewed it together to ensure its completeness and accuracy. (CT 2522-23, 2527) The

---

30 See Cal. Code of Regs., Title 15, § 3378.1; see also *Madrid* v. *Gomez* (N.D. Cal. 1995) 889 F. Supp. 1146, 1241.

Ballatore memorandum details Richardson's statements about the Burchfield incident. The hit was planned by Willis, Johnson, Woodard, and Richardson:

> RICHARDSON stated that he knows all the details about the Birchfield [sic throughout] murder but he would not testify. According to RICHARDSON, Birchfield was killed because he was bringing hacksaw blades and bullets into the AB's [Aryan Brotherhood]. It was RICHARDSON's job to monitor Birchfield's activities. REDMOND B55567 ordered the hit on Birchfield. . . . The hit took about two weeks to plan. The hit was planned by WILLIS C71184, JOHNSON C71184, WOODARD C21690, and himself on the Carson Section yard. (CT 1908)

The initial plan called for two weapons:

> The initial plan was for RICHARDSON to spear Birchfield and for JOHNSON C71184 to use a zip gun. JOHNSON C71184 was afraid of the zip gun and asked to use the spear. RICHARDSON was then to use the zip gun. RICHARDSON did not use the zip gun because the BGF lost their gun powder during a search. (CT 1909)

A shank was cut and sent to Richardson for sharpening:

> CARRUTHERS C20634 cut the bed frame and sent it down to RICHARDSON to sharpen. RICHARDSON sent the metal to INGRAM B95647 to cut. One piece was sent to Cisco GOMEZ C20891, on the third tier of Carson Section. The other piece was sent to JOHNSON C71184 on the second tier of Carson Section. IF JOHNSON C71184 was unable to make the hit on the second tier, GOMEZ C20891 was to do the hit on the third tier. (*Id.*)

Vaughn lured Burchfield to Johnson's cell and Johnson speared him:

> VAUGHN C30853 sent JOHNSON C71184 a note through Sergeant Birchfield to lure Birchfield to JOHNSON'S cell. They knew they could keep Birchfield on the tier because in the past, he had stayed on the tier talking to the AB's.

> JOHNSON C71184 speared Birchfield according to RICHARDSON. RICHARDSON does not know what he did with the weapon as he was in 2C44 and could not see. (*Id.*)

The magistrate denied the State's claim of privilege and ordered Richardson's statement released to defendants in redacted form. (CT 4953; *see, e.g.*, CT 2532-34,19808-10) The magistrate warned Richardson that his statements could be used against him. (CT 4953) So warned, Richardson sent a handwritten letter to Ballatore confirming his involvement in the planning of Burchfield's murder but correcting a few of the details of his statement:

> I was supposed to zip Officer Morris, not Burchfield. . . . Had I wanted to have zipped him I would have as he passed my cell before he even made it down to Johnson's. . . . Johnson was to spear Burchfield but I was to zip Officer Morris. . . . My attorney is trying to tell me, by me telling you I was to have used a zip gun it shows I was plotting on Burchfield. Burchfield never was my target. Only originally with the spear which was discussed on the yard, but before I could say no or yes Johnson claimed he didn't want to zip Morris because it might backfire. So our victims were rotated. He had Burchfield. I had Morris. You didn't quote my statement verbatum [sic]. You left Morris [sic] name out of the report.
> (CT 2531-32.)

After the magistrate ordered Richardson's statements released (in redacted form) to defendants, Richardson by secret writ petition sought and obtained Superior Court review of the magistrate's decision. Richardson's request was denied. (PHRT 14669, 14678, 14686-92) For reasons

fully discussed below, the trial court did not allow evidence of Richardson's initial admissions or his later adoption of his admissions. Richardson, nonetheless, continued to make admissions inculpating himself and exculpating Masters. Thus, the defense offered to prove that Richardson admitted to inmate Broderick Adams, in August, 1988, that the "K-9's [the prison guards] have me on a hot one trying to accuse me of that thing on a K-9 in '85 [the murder of Sgt. Burchfield]. I cleaned up my tracks and they got some other motherfuckers for it." (RT 15773)

2. The Drume Statement Against Interest

Charles Drume (pronounced "drum") was a member of the BGF in C-section at the time of Sgt. Burchfield's murder. Drume was identified by Willis as "C.D.," one of Willis' soldiers in D-section, who carried out at least one hit for Willis in that section and was part of Willis' contingent that moved with him from D-section to C-section, prepared to align with him in the event of a BGF split. (RT 12963-64, 12966, 13181-82) Drume was under Willis' command. (RT 13182-83)

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) 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[31] (CT 1912, 1914, 5045) and correctly recited the BGF oath for the investigators. (CT 1912, 1914) 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 contrary to Willis, Drume omitted Masters as one of the planners. Equally significant, Drume claimed that it was he (and 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.[32] (*Id.*)

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

---

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

32 Although one of the Drume interviewers claimed that there was no one at San Quentin named Wallace at the time of the interview (December 1988), Wallace was confirmed on an inmate movement log from June 1985 as having been housed in Cell 41, Third Tier. (CT 4946)

Swahili name ("Askari Left Hand"[33]) when asked who among the BGF members he knew. (CT 1916; RT 14910)

Drume claimed he was motivated to come forward by his disenchantment with the BGF. (CT 1912) Even more than Richardson, who could have *initially* thought he was protected by promises of immunity, 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.

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 expanded upon his disclosures. He confirmed that he was in charge of security in C-section ("Ulama Chief") 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."

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

---

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

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) This "Thomas," without a doubt, was Masters. 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 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 Lt. 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.

3. The Trial Court's Rulings

(a) The pre-trial motion to dismiss

As noted in Argument II, the defense filed a common-law and statutory motion to dismiss the complaint based upon (1) the denial of a lineup, and (2) the preliminary hearing denial of an opportunity to question Willis about Richardson. (*Supra* at 55) The defense also sought dismissal based upon prosecutorial misconduct in granting Willis use immunity, but not Richardson. (CT 528-46) (This issue is discussed in Argument VII at pp. 196-214, *infra*.)

In opposing the defense motion, Deputy District Attorney Berberian argued that the defense could use Richardson's statements to Jeanne Ballatore since they were relevant and against his penal interest. (8-8-88 RT 58) The trial court heartily agreed: "You have in hand a statement made by Richardson against penal interest, which is therefore not a hearsay statement and is evidence." (*Id.* at 54) The court also described Richardson's testimony as "extremely significant" to the misidentification issue. (*Id.* at 57) Regarding the defense claims of prosecutorial misconduct and the magistrate's refusal to allow Willis to be recalled in light of the newly-discovered Richardson evidence, the court stated, "those two in particular really bother me and taken together they concern me . . . ." (*Id.* at 106) The court, nonetheless, denied the defense motion to dismiss. (CT 1404)

(b) *The pre-trial denial of severance*

At the hearing on the motion to sever, the court, after granting the prosecution's motion to sever Johnson (12/12/88 RT 51-52), expressed doubt about the admissibility of the Richardson and Drume statements. (12/12/88 RT 53-55) It was the following day, however, that the court's principal concern — a concern not raised by the People — came to light. The statements, the court said, were unreliable, because they were made, in Richardson's case, a year after the incident and in Drume's case still later. (12-13-88 RT 7; see also 2-15-89 RT 25) Having found the statements unreliable and thus inadmissible, the court denied the motion for severance. (12-13-88 RT 40; CT 2457) The court also denied a motion for reconsideration adding that Richardson's statements to Ballatore were not against his penal interest. In the court's view, what he said to Ballatore and Spangler could not be used against him because he was told in the debriefing that he was not being Mirandized. (CT 2430, 2436, 2647; 1-9-89 RT 12)

(c) *The refusal to grant an adverse inference*

In support of its argument regarding the reliability of Richardson's admissions, the defense also sought an adverse inference under Evidence Code section 1042, subdivision (a) (hereafter, section 1042(a)). By an order filed May 13, 1988, the trial court had upheld the state's claim of privilege with regard to large portions of Richardson's statement to

Ballatore, as well as portions of his letter of August 8, 1987 correcting certain portions of that statement. Those portions of the statements were redacted, leaving only the matter specifically related to the Burchfield murder. (CT 602) In their pleadings seeking severance and admission of the Richardson statements, defendants argued that the court's upholding of the Department's privilege and consequent withholding from them of the redacted portions of the Richardson statement required an adverse inference finding under section 1042(a) that the unredacted portions were reliable.

The defense sought an adverse inference that the redacted portions of the statement provided credibility to the Richardson admissions by providing information which could in some manner be corroborated. (CT 2447-48) In response to the prosecution's statement that the court might, *in camera*, "balance in the redacted information in evaluating the trustworthiness of Richardson's statement . . . ," Masters argued that the lack of the redacted material deprived him of the use of it to prepare his showing of reliability. (CT 2619-20) Indeed, Masters argued, the additional redaction of portions of Richardson's post-interview letter to Ballatore and the withholding in their entirety of the prison staff's notes

regarding other debriefing sessions also prevented Masters from using those items to bolster Richardson's reliability. (CT 2620)[34]

The trial court viewed the unredacted Richardson materials in chambers with only the attorney for the California Department of Corrections present. (CT 2452, 2454-55) The court did not even provide a disclosure of the general subject matter of the redacted materials, instead reducing the defense to a generalized argument that it might provide evidence of Richardson's credibility. (1-9-89 RT 9-11) The trial court denied the defense request for an adverse inference that the unredacted portions of Richardson's statements were reliable. (2-15-89 RT 24-25; *see also* RT 19089-92)

(d) *The ruling during trial*

During trial, just prior to the beginning of the defense case, the defense again sought to introduce the Richardson and Drume statements. (CT 4868, 4880, 4949, 5044, 5087) By that time, the prosecution had elicited Willis testimony consistent with the Richardson declaration, with the singular exception that Richardson attributed to himself the role the prosecution attributed to Masters. After an Evidence Code section 402 hearing at which Richardson again asserted his Fifth Amendment privilege to avoid answering questions relevant to the case (RT 14797), the

---

[34] Masters repeated this argument during trial in his opposition to the prosecution's motion to exclude the Richardson statement. (CT 4961)

court again took up the admissibility of his statements to Ballatore. This time, the court focused on what it considered the irrelevance of the Richardson statement, given that it did not mention Masters at all:

> It's a non-statement. It is a non-statement, period, and I don't see how it comes in under 1230 unless he denied that Masters was there, asked and denied. Then of course it would be different.
> (RT 14718)

Regarding the argument that Richardson's subsequent correction of a portion of his earlier statement, without correcting the part not implicating Masters, the court characterized it as

> non-statement upon non-statement. It's like hearsay on hearsay. He didn't mention Masters and therefore he confirms that Masters isn't in there because he writes to Ballatore and doesn't correct that portion of the fact that he didn't mention Masters in the first place. [¶] [¶] It's a wonderful argument but it doesn't fly. I'm going to deny, under 352, as well as the fact that it doesn't fit under 1230 because it's a non-statement. It's not a statement.
> (RT 14718-19)

The defense request for the admission of the Charles Drume statements was also supported by Drume's detailed statements to defense investigator Barry Simon. (*Supra* at 88) During those February 23, 1988 admissions, Drume made it clear that to the best of his knowledge, Masters, had no involvement in the murder of Sgt. Burchfield. (CT 5046-47) Drume also disclosed that he first came forward immediately after

the murder of Sgt. Burchfield, to prevent the murder of another guard. (CT 5047) The defense offered to call witnesses concerning Drume's statements. (RT 15347) The court, however, refused to change its ruling. (*Id.*)

B. THE EXCLUSION OF THE ADMISSIONS WAS ERROR

To summarize:

1. In evaluating the defense motion to dismiss based upon the Richardson issues, the trial court described Richardson's admissions as "extremely significant" to the misidentification issue and stated that Richardson's statements to Jeanne Ballatore would be admitted since they were against penal interest.
2. In denying the motion for severance, the court found that the Richardson and Drume statements were unreliable, because they were made, in Richardson's case, a year after the incident and in Drume's case still later.
3. Then, the court found that Richardson statements were not against his penal interest.
4. At trial, after reviewing the matter anew, the court did not rely upon a finding of unreliability but principally upheld the exclusion of the Richardson admissions upon the ground that the statements were irrelevant.

5. The court buttressed its trial ruling that the Richardson statements were irrelevant by also excluding the statements under Evidence Code section 352;

6. The court simply "let stand" its pre-trial exclusion of Drume's various admissions.

Below we show that none of these rulings are supportable.

1. The Richardson and Drume Admissions Were Against Penal Interest

We begin with the Evidence Code. Section 1230 provides, in relevant part:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of . . . criminal liability, . . . or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

With regard to Drume, the against-penal-interest exception applies on its face. Drume was not given immunity and he admitted to participation in a capital crime. Indeed, it was undisputed below that Drume's statements were against his penal interest.[35]

---

[35] As already noted, the District Attorney's opposition to the defense motion to dismiss was founded upon the against-penal-interest-admissibility of certain of Richardson's statements to Jeanne (continued...)

In denying the motion for severance, however, the court ruled that Richardson's statements were not against his penal interest, because he was told in the debriefing that he was not being Mirandized. (1-9-89 RT 12) The court did not adopt this analysis at trial (RT 14718-19), presumably because the analysis did not apply in light of Richardson's later admissions.[36] It was after he had been informed by the magistrate that his statements could be used against him that Richardson wrote to counselor Ballatore and corrected details of his statement. This was clearly a statement against penal interest, since the magistrate had just

---

[35](...continued)
Ballatore. (8-8-88 RT 58) Their position switch on this issue – in their opposition to the motion for severance and their opposition to the use of Richardson's statements at trial – raises serious due process and judicial estoppel concerns. *See, e.g., Standeter v. United States* (1980) 447 U.S. 10, 25-26; *Thompson v. Calderon* (9 Cir. 1996) 109 F.3d 1358, 1371; *People v. Watts* (1999) 76 Cal.App.4th 1250. By contrast, the District Attorney has never denied that Charles Drume's voluntary admissions to Deputy District Attorney Berberian, District Attorney Investigator Gasser, San Quentin Captain Everly, or San Quentin Lieutenant Watkins were against Drume's penal interest. (*See, e.g.*. CT 4885-87) The trial court also found that Drume's statements were against interest. (RT 15339-40)

[36] The court's reliance upon the lack of Miranda warnings was itself questionable. Lack of Miranda warnings no longer prevent the use of statements to the police by those in custody. Voluntary statements, such as those of Richardson, can be used for impeachment. *Harris v. New York* (1971) 401 U.S. 222, 224, 226; *People v. Peevy* (1998) 17 Cal.4th 1184, 1188. This increased Richardson's "risk of . . . criminal liability" (Evidence Code § 1230) in the event he was charged. By his own statement Willis, Woodard, and Johnson could identify him as a principal co-conspirator, and inmate Ingram could identify him for his role in manufacturing the knife. (CT 1908-09)

warned him that his statements could be used against him. In this state of mind, he adopted his previous statements regarding the planning of the murder, statements which excluded Masters from the planning group.

Richardson, moreover, continued to make statements against penal interest. Thus, the defense offered to prove that Richardson admitted to inmate Broderick Adams, in August, 1988, that the "K-9's [the prison guards] have me on a hot one trying to accuse me of that thing on a K-9 in '85. I cleaned up my tracks and they got some other mother-fuckers for it." (RT 15773)

Richardson's reference to "that thing on a K-9 in '85' " obviously refers to the killing of Sergeant Burchfield in 1985. He had already admitted his involvement in the murder. His statement that he "cleaned up his tracks" obviously constitutes a direct admission that he played a role in the murder, and left tracks, but somehow managed to remove them. Richardson's statement to Broderick Adams is a textbook statement against penal interest.

Thus, both the Richardson and Drume statements were against penal interest under Evidence Code section 1230.

2. Richardson's Statements Were Also Admissible as Against His Interest in Avoiding Hatred and Social Disgrace

In addition to being against his penal interest, Richardson's admissions to Ballatore and Spangler were admissible under Evidence

Code section 1230 since his informing on the BGF and his violation of a death oath "created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true." Evidence Code section 1230.

The trial entirely ignored the hatred, ridicule and social disgrace exception to the hearsay rule argued by the defense. (*See, e.g.*, CT 2613-2614; 1-9-88 RT 13) Under California law, however, this exception stands on equal footing with the against penal interest exception. This is because declarations against social interest deserve as much recognition for their inherent reliability as any other well-accepted hearsay exception. Imwinkelried, *Declarations Against Social Interest: The (Still) Embarrassingly Neglected Hearsay Exception* (1996) 69 So.Cal.L.Rev. 1427, 1442-1444 [hereafter *Declarations Against Social Interest*]. The inference of truthfulness in a typical statement deserving the interest against hatred and social disgrace in his community is " 'much more powerful' than the inference of the sincerity of many types of routinely admitted hearsay." *Id.* at 1455-1456 (comparing, e.g., excited utterances which, while they may guarantee sincerity, carry a high degree of risk of inaccuracy of observation), quoting Morgan, "Declarations Against Interest" (1952) 5 Vand.L.Rev. 451, 475.

Richardson was a member of the BGF, a gang that required a blood oath of its members:

> If ever I should break my stride
> And faulter at my comrade's side,
> *This oath will kill me!*
>
> If ever my word should prove untrue
> Should I submit to greed or lust
> Should I misuse the people's trust,
> Should I be slow to take a stand,
> Should I show fear of any man,
> *This oath will kill me!*
>
> If ever my word prove untrue
> Should I betray these chosen few,
> *This oath will kill me!*
> (CT 4993; emphases added.)

By debriefing, Richardson, was clearly violating that blood oath and risking his life:

> Debriefing requires the inmate to admit that he was a gang member, identify other gang affiliates, and reveal everything he knows about the gang's activities and organizational structure. Because prison gang members join 'for life,' the CDC considers debriefings necessary to prove that renunciations of gang membership are genuine. . . . [A] number of prison staff [at Pelican Bay] agree that inmates who debrief . . . are considered 'snitches,' and thus face serious risks of being attacked or even killed by other inmates.
>
> *Madrid* v. *Gomez* (1995 N.D. Cal.) 889 F.Supp. 1146, 1241.

Conditions at San Quentin at the time made these severe risks all the more extreme. Guards and prison officials could not be trusted.

According to State testimony, guards and prison officials often worked for or with the BGF. (RT 12824) Gangs extorted money from prisoners, had access to inmates' private files,[37] and could place inmates where they wanted them in the prison. (RT 12701, 12776, 12778, 12780, 13010-12, 13015, 13043-44, 13179-80) Even guards were in fear of the BGF. Messages to the San Quentin warden concerning BGF activities were first delivered to the BGF, or not delivered at all. (RT 12776-80; see 8-9-88 and 8-10-88 hearings and exhibits admitted therein.)

The CDC, the magistrate, and the trial court were fully aware of the extreme risks taken by those who came forward against the BGF. Lawrence Thomas, a former Criminal Activities Coordinator at San Quentin, declared: "When one turns against the Black Guerilla Family . . . the penalty for this betrayal is death." (CT 1218) The Attorney General described Richardson as being "at grave risk for having 'snitched.'" (6-27-88 RT 26) SSU agent James Hahn declared: "The BGF is known to kill those members who become witnesses for the state." (CT 4707) Richardson's attorney described him as being in "serious danger." (*Id.* at 32) The trial judge stated: "There is a danger to every inmate in Mr. Richardson's position. There is no doubt." (*Id.* at 33)

---

[37] Access to an inmate's private file meant access to the names and addresses of family members, and thus the ability to threaten or harm them.

The fact that Richardson's statement was made during a debriefing made it even more reliable than a simple statement against penal interest, because if Richardson were to both debrief and then be found to be lying, he would face the worst of all worlds as a snitch without the protection of protective custody. (*See, e.g.*, 6-27-88 RT 26, 33) Thus Richardson's statements were doubly admissible. They were admissible under section 1230 as against penal interest. They were also separately admissible under section 1230 since the utterances violated a blood oath against a gang who ruled the prison, and false statements made the utterances all the more dangerous.

For the same reasons, Drume's statements against penal interest were *also* admissible as statement against his interest in avoiding "hatred, ridicule, or social disgrace." Evidence Code section 1230. Indeed, the defense offered to prove that Drume was stabbed in the eye because of his disclosures to the State. (CT 1912-16) Drume's statements put his life at grave risk. (*See, e.g.*, 6-27-88 RT 26, 33)

3. Statements Against Penal, Hatred, or Social Disgrace Interests Require Preliminary Findings Only that a Reasonable Man Would Not Have Made Them Unless True

During pre-trial the court ruled the Richardson and Drume statements unreliable because they were made, in Richardson's case, a year after the incident, and in Drume's still later. (12/13/88 RT 7) Having

found the statements unreliable, the court ruled that they were inadmissible. As above noted, at trial, however, the court excluded the Richardson statements under other grounds.

In *People v. Duarte* (2000) 24 Cal.4th 604, 614, this court discussed the preliminary findings of trustworthiness to be made by the trial court as "'tak[ing] into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.' (*People v. Cudjo* (1993) 6 Cal.4th 585, 607, 863 P.2d 635)" Yet, no less a commentator than the venerable Justice Jefferson has asserted that the finding required by section 1230, alone among the exceptions to the hearsay rule, is, by the statutory language, not that the statement is *trustworthy*, but rather that, "a reasonable man in his position would not have made the statement unless he believed it to be true." Evid. Code § 1230; 1 Jefferson, Cal. Evidence Benchbook (3rd Ed., Jan. 2001 Update) §§ 6.4, 6.5; *accord*: *People* v. *Sanders* (1990) 221 Cal.App.3d 350, 398, n. 7; contra: *People v. Chapman* (1975) 50 Cal.App.3d 872; People v. Blankenship (1985) 167 Cal.App.3d 840, 847.[38] If a statement is contrary to an individual's

---

[38] Jefferson, criticizing the Second District decision in *Chapman*, points out that Evidence Code section 1230, unlike some other hearsay exceptions, contains no separate requirement of "trustworthiness." (1 Jefferson, Cal. Evidence Benchbook, *supra*, at 268-269.) "There is no requirement set forth in Evid. § 1230 for the declaration-against-interest exception to the hearsay rule that the trial judge must make a (continued...)

penal interest or his interest against hatred and social disgrace in his community, the trial court's determination should be limited to the determination of whether a reasonable man in the declarant's position would not have made the statement unless he believed it to be true. *Sanders*, *supra*, at 398, n. 7.[39]

In this case, the trial court latched onto an entirely extraneous circumstance – the amount of time that had passed before the statements were made – to declare inadmissible statements which by the statutory standards were entirely admissible. No reasonable person in Richardson's position would have told the prison authorities of his involvement in the Burchfield murder – thereby risking his very life should his snitching

---

[38](...continued)
finding that the statement is trustworthy as a prerequisite to admissibility." Rather, what would justify exclusion is a finding that, in the words of section 1230, "'a reasonable man in his position would not have made the statement unless he believed it to be true,'" and that this might be met, for example, with "evidence of of a motive to falsify because of threats [that] would certainly justify a trial judge in finding that a reasonable man would make the statement which the proponent sought to have introduced even though he believed the statement to be untrue."

[39] Under *Sanders*, the analys here is is simple: (1) Any reasonable prisoner, seeking to disaffiliate with a prison gang; (2) thus requiring the protection of the prison authorities; and (3) seeking to gain that protection through the debriefing process; (4) would not have made the statements that Richardson made; (5) implicating himself and other BGF gang members in the Burchfield murder; and (6) thereby risking the enmity of both his former BGF colleagues and the prison guards who would be guarding him; (7) without believing them to be true.

be found out, especially if the prison authorities believed him not to be telling the truth and refused to remove him from among his former gang-mates – unless he believed his statements to be true.[40] Similarly, Drume would not have made the statements to the State and to the defense – both admitting his involvement in this murder and simultaneously implicating fellow gang members – unless he, too, believed them to be true. That is where the analysis should have stopped. The statements were admissible.

4. Drume Came Forward Early

Even assuming, *arguendo*, that section 1230 authorizes a separate finding of reliability, and alacrity in coming forward favors the reliability of an informant, this factor weighs heavily in favor of the Drume admissions. It must be remembered that shortly after the murder, Drume contacted Lt. 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 attack had been scheduled to take place one week after the Burchfield attack. (RT 12757-58) Thus, Drume first came forward within days of the murder to save human life. That's a sign of reliability.

---

[40] Indeed, it is sadly ironic that the State, in the person of the Department of Corrections, validated its belief in Richardson's statements by granting him disaffiliation from the BGF and moving him from San Quentin, while the selfsame state, through the Marin County District Attorney, was challenging the truthfulness of the same statement in court.

5. The Passage of Time Didn't Change the Death Penalty and Death Risk Character of the Richardson and Drume Admissions

Even further assuming, *arguendo,* that section 1230 authorizes a separate finding of reliability, the statements were reliable for the reasons they doubly satisfy Evidence Code section 1230. The passage of time didn't make the statements any less against penal interest. There is no statute of limitations for first degree murder. The passage of time also had nothing to do with whether the statements violated the BGF blood oath and exposed Richardson and Drume to real and immediate dangers. That oath promised death to anyone who "betray[ed] these chosen few," or "faulter[ed] at [his] comrade's side." (CT 4933, 5051)

(a) *The special indicia of reliability surrounding Richardson's admissions*

Richardson was also under powerful incentives not to be caught lying, which would have ended his status as a debriefed ex-gang member and prevented his transfer to protective custody.[41] Everyone – the trial court, the magistrate, the Attorney General, and Richardson's attorney – agreed that Richardson was "at grave risk." (6-27-88 RT 26, 32-33) It was not until Richardson was willing to risk disaffiliation that he came

---

[41] "Upon completion of the debriefing process, the inmate shall be housed in a facility commensurate with the inmate's safety needs." (Cal. Code of Regs., title 15, § 3378.1(d).)

forward. *All* of the evidence going to the reliability of Richardson's statement supports its admission.

Richardson's averments were not only extremely detailed; they were made both orally and in writing to prison authorities, and later confirmed by his admissions to Broderick Adams. Indeed, the lengths to which Richardson went (e.g., the secret writ) to keep his statements hidden, and his abject refusal to cooperate with the defense (*see, e.g.,* PHRT 14686-14690,14818-22, 14824-27; 6-27-88 RT 20; 1-9-89 RT 7; CT 954, 2445), further confirm the trustworthiness of his statements and belie the court's assumption that he was still conspiring with the BGF. *See, e.g., United States* v. *Thomas* (9 Cir.1978) 571 F.2d 285, 290 (fact that declarant "incurred personal risk in making the statement" minimized possibility of fabrication). The Court's assumption, moreover, is refuted by the breadth of Richardson's admission, since he specifically implicates the BGF and many of its members, including himself.

Richardson's reliability was also corroborated by the State's principal witness, Rufus Willis. *Willis testified that Richardson had been a BGF commander, of rank equal to his own, while Masters was of lower rank than both of them.* (RT 12688) *Including Masters as a member of the ruling BGF committee in C-section, in Richardson's stead, defies common sense.* This is why Willis' description of Masters fit Richardson but not Masters. (PHRT 8346-62, 8383-89, 8403-08, 14819-20; see chart

supra at 52) Thus, Richardson's admissions are backed by powerful indicia of reliability, and fit hand in glove with the State's entire case. The trial court itself found that Willis corroborated Richardson. (8-8-88 RT 56-57).

(b) *The special indicia of reliability surrounding Drume's admissions*

Drume's statements were also supported by compelling indicia of reliability. Shortly after the murder of Burchfield, Drume came forward and spoke to Lt. Amos to prevent a second murder. (CT 5047) That's a sign of reliability. He later boldly exposed himself by openly writing to the County Clerk. (CT 5044, 5052) Without promises or assurances of any kind, he met with the district attorney's investigator and two San Quentin officials. (CT 1912, 1914, 5045) He clearly exposed himself to the death penalty by admitting his role in the murder. (*Id.*) Without promises or assurances of confidentiality, he repeated his admissions in further detail to defense investigator Barry Simon. (CT 5046) Thus, a total of six witnesses could be called to verify Drume's spontaneous admissions, all without promises or assurances: Lt. Amos, District Attorney Investigator David Gasser, San Quentin investigators Captain Everly and Lt. Watkins, defense investigator Barry Simon, and the Marin County Clerk. (CT 5046-47, 5051-57)

Drume, moreover, was identified by Willis as a BGF soldier under his command. (RT 13182-83) By Willis' testimony, Drume had previously carried out a hit for Willis. (RT 12963-64, 12966) Drume's claim that he fashioned a knife for the hit on officer Burchfield with metal from his own cell is corroborated by Willis' testimony that Drume accomplished a prior hit for Willis with metal from his own cell. (RT 12966)

Drume's admissions also clearly put him at risk. His statements to all sides pointed the finger at BGF members Woodard, Redmond, Willis, Johnson, and Wallace.[42] (CT 5046, 5053-57) As the Attorney General and the trial court explicitly declared with respect to Richardson, someone in Mr. Drume's position was "at grave risk." (6-27-88 RT 26, 33) Indeed, Drume was promptly stabbed in the eye for his public disclosures. (CT 1912-16, 5046)

---

42 Drume identified co-defendant Woodard as "Old Man Askari" and "Woodie", and Willis as "Zulu." (CT 1914, 1916, 5046-47) Andre Johnson is identified as "Drake." It is undisputed in the record that Johnson went by the nickname "Dray," or "Drae." (CT 3084; 2-28-89 RT 4) Drume also referred to "Drake" as the "one you know. The short one of the three." (CT 1915) It is undisputed that Andre Johnson is the shortest of the three defendants. Jarvis Masters, by contrast, is six feet one-inch tall. (PHRT 8405) By an interviewer's ear, Drume identified BGF Chieftain Redmond as "Ferrjery." (Feraji). (CT 5046, 5053-57)

Although one of the Drume interviewers claimed that there was no one at San Quentin named Wallace at the time of the interview (December 1988), Wallace was confirmed on a June 1985 inmate movement log as having been housed in Cell 41, Third Tier, only two cells down from Drume. Willis identified himself as "Zulu" and identified Redmond as "Feraji." (RT 12672-73, 12710, CT 4946)

(c) *A finding of reliability is compelled by Evidence Code section 1042*

In support of its argument regarding reliability (which, for the reasons earlier discussed, should have been unnecessary), the defense also sought an adverse inference under Evidence Code section 1042(a).

The trial court's May 13, 1988 order upheld the state's claim of privilege for large portions of Richardson's statement to Ballatore, as well as portions of his August 8, 1987 letter correcting certain portions of his statement. Those portions of the statements were redacted. (CT 602) In their pleadings seeking severance and admission of the Richardson statements, defendants argued that the court's upholding of the Department's privilege required an adverse inference finding under section 1042(a) that the redacted portions of the statement would provide credibility to the statements regarding the Burchfield murder by providing information which could in some manner be corroborated. (CT 2447-48) Masters argued that the lack of the redacted material deprived him of the use of it to prepare his showing of reliability. (CT 2619-20) Indeed, Masters argued, the additional redaction of portions of Richardson's post-interview letter to Ballatore and the withholding in their entirety of the prison staff's notes regarding other debriefing sessions also prevented

Masters from using those items to bolster Richardson's credibility. (CT 2620)[43]

Appellant was correct. An adverse finding was required. Section 1042(a) provides, in relevant part:

> [I]f a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer *shall* make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material. (Emphasis added)

Section 1042(a) codifies the due process principle that "the prosecution cannot commence criminal proceedings 'and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.' " *Pitchess* v. *Superior Court* (1974) 11 Cal.3d 531, 540, quoting *United States* v. *Reynolds* (1953) 345 U.S. 1, 12; and citing *Jencks* v. *United States* (1957) 353 U.S. 657, 672; *Roviaro* v *United States* (1957) 353 U.S. 53, 60-61 (reversible error to withhold name of informer when his identity and testimony are highly material). " '[S]ince the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of

---

[43] Masters repeated this argument during trial in his opposition to the prosecution's motion to exclude the Richardson statement. (CT 4961)

anything which might be material to his defense . . . .' " *Reynolds*, *supra*, 345 U.S. at 12, quoted in *Jencks*, *supra*, 353 U.S. at 670-671.

Nor does the fact that the evidence sought might be "indirect" rather than "direct" make any difference. In *Jencks*, the Supreme Court quoted with approval the words of Judge Learned Hand:

> Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively. .
>
> *United States* v. *Andolschek* (2 Cir. 1944) 142 F.2d 503, 506 (quoted in *Jencks*, *supra*, 353 U.S. at 671).

Section 1042 uses the mandatory "shall" in directing adverse findings, and the defendant need only meet a minimal showing of relevance or materiality to his defense. *People* v. *Montgomery* (1988) 205 Cal.App.3d 1011, 1020 (it is sufficient that defendant stated valid theoretical bases for his claim to the trial court). If the information is material and the claim upheld, the court is "required to make an adverse finding" pursuant to the statute. *Id.* at 1022.

Most California cases discussing section 1042 involve confidential informants. The most extensive discussion of section 1042(a) in a case not involving informants appears in *People* v. *Superior Court (Biggs)*

(1971) 19 Cal.App.3d 522, in which the defendant sought to show that he, himself, was an undercover informant for the police and was acting in that capacity when arrested along with others for drug activities. As occurred in this case, the trial court held *in camera* hearings with the prosecution to determine whether to require disclosure of notes of police contacts with defendant Biggs as well as contacts with other informants. Speaking generally of the balancing to be done, the court explained:

> It does not explicitly require the litigant to establish the information's materiality, relevance or even admissibility. On the other hand, it does not license fishing trips. By calling for disclosure in the interest of justice, it compels the claimant to throw into the balance some showing of the "plausible justification" demanded by antecedent case law (citations). In a criminal case the defendant must at least show how the information affects the preparation or presentation of his defense.
>
> *Id.* at 530.

In the instant case, Masters' "plausible justification" was that the redacted material might yield other information which could be verified or otherwise relate to Richardson's veracity. This was not a "fishing trip." The redacted material was given to the prison authorities at the same time and under the same circumstances as the material sought to be admitted, and, as a matter of probability, it was likely to be related to Richardson's BGF activities, activities which could presumably be verified by other evidence. This certainly meets the standard set forth by the Supreme

Court under which a trial court is not to pass upon the veracity of a defendant's claimed need, "but only to ascertain if a *reasonable possibility* existed that the requested information might exonerate him." *Biggs*, *supra*, 19 Cal.App.3d at 532-533, citing *Price* v. *Superior Court* (1970) 1 Cal.3d 836, 843 (emphasis added).

Moreover, the very procedure used by the trial court in the instant case was criticized in *Biggs*. As noted above, the trial court viewed the unredacted Richardson materials in chambers, with only the attorney for the California Department of Corrections present. According to *Biggs*, however, the *in camera* hearing provided for in section 915, subdivision (b),

> is far too constricted to permit an enlightened determination. Shared only by the court and government, it provides no means for assessing the defendant's claim. It is paradoxical to hold a hearing for balancing the conflicting interests of two sides when only one is represented. Deprived of the three-way communication habitual to an adversary setting, the judge cannot simultaneously perform the tasks of inspecting and identifying the material, measuring the government's claim to withhold it and assessing the defendant's need to get it. The ex parte process places too much confidence in judicial prescience and invites error, even unfairness.
>
> *Id.* at 530.

Regardless of whether the *in camera* proceeding was, as suggested in *Biggs*, flawed by its exclusion of defense counsel, the underlying point remains the same: This is the classic situation requiring an

adverse inference. Anything which Richardson said in the redacted material regarding the BGF, or their activities, or anything else which could have been independently verified, was material to his credibility and the credibility of the excluded admissions. If the adverse inference had properly been applied, the court would have been compelled to make the "adverse" inference of reliability of the Richardson statement and admitted it.

6. The Richardson and Drume Admissions Are Statements

Thus far we have shown that:

1. The Richardson and Drume statements were doubly admissible under Evidence Code section 1230.

2. Section 1230 does not require a redundant finding of reliability if its requirements are satisfied.

3. Even assuming, *arguendo*, that a redundant finding of reliability is authorized, the ultimate penal and extreme personal risks associated with the statements provide compelling indicia of reliability.

4. A special finding in favor of Richardson's reliability is required under Evidence Code section 1042.

While the court stood by its pre-trial exclusion of Drume's statements, without further explanation (RT 15347), the court apparently forsook its pre-trial findings regarding the Richardson admissions and

took a new approach. Thus, the court ultimately excluded Richardson's admissions as "non-statements":

> It's a non-statement. It is a non-statement, period, and I don't see how it comes in under 1230 unless he denied that Masters was there, asked and denied. Then of course it would be different. (RT 14718)

More than likely, the Court didn't intend that its ruling be taken literally. Section 1230 applies to "statements by a declarant." Richardson's admissions are clearly statement by a declarant, regardless of whether the statements mention Masters. Evidence Code section 1230.

7. The Richardson and Drume Statements Are Completely Relevant

Presumably, the trial court's remarks represented a finding that the Richardson statements were irrelevant because they didn't mention Masters. The Richardson statements, however, far exceeded the minimal requirements of relevance.

In "criminal cases, any evidence that tends to support or rebut the presumption of innocence is relevant." *People v. Reeder* (1978) 82 Cal.App.3d 543, 552, quoting *People v. Whitney* (1978) 76 Cal.App.3d 863, 869. By this standard, Richardson's admissions were overwhelmingly relevant since (a) they provided compelling evidence of misidentification; and (b) the admissions undermined three principal aspects of the State's case.

(a) Richardson's admissions corroborated Willis' misidentification

Richardson's admissions were dramatically relevant. Given Willis' inability to name or describe Masters, and the fact that his description fit Richardson, Richardson's admission strongly supported the belief that the State had the wrong man. (See chart at page 52.) Richardson, indeed, admitted to Broderick Adams that the State was trying someone else for his crimes. (RT 15773) Even the Attorney General, in a brief filed on behalf of the CDC, agreed: "Since Richardson did not mention Masters and named a number of other conspirators, Richardson's admissions could be deemed exculpatory as to Masters." (CT 230) The trial court also stated, "Willis' testimony was corroborative of Richardson's statement to Ballatore. (8-8-88 RT 56-57) The trial court also described Richardson's statements as "extremely significant" to the mis-identification issue. (8-8-88 RT 57)

(b) The Richardson and Drume admissions contradicted the State's case against Masters

The Richardson and Drume admissions had additional relevance. The State's case against Masters was based on the claim (1) that he fashioned the knife, (2) that he voted for and planned the hit, and (3) that

he was chief of security.[44] Richardson's statements undercut the first two of these elements. Drume's admissions undercut the third.

Willis testified that Masters insisted on sharpening the knife. (RT 12760-61, 12763) Richardson, by contrast, stated that Ingram sharpened the knife under Richardson's direction.

> CARRUTHERS C20634 cut the bed frame and sent it down to RICHARDSON to sharpen. RICHARDSON sent the metal to INGRAM B95647 to cut. (CT 1909)

Both views can't be true. If Ingram sharpened the knife under Richardson's direction, then Masters didn't sharpen the knife.

More than anything, the State's case against Masters was based on the claims that he both drew up the plans and voted for the hit. (CT 4520; RT 13726, 16045, 16047-52, 16054) Thus, Willis testified that one person, Masters, drew up diagrams and the hit list. (RT 12732-34, 12740, 12891, 13479) According to Ballatore, however, Richardson said, "[t]he hit was planned by WILLIS C71184, JOHNSON C71184, WOODARD C21690, and himself on the Carson Section yard." Both views can't be

---

[44] Willis also testified that, on the evening of June 8, 1985, Masters gave a signal indicating that Sgt. Burchfield was moving to the second tier. (RT 12769) This testimony, however, was impeached. Since Masters was housed on the fourth tier he wouldn't know about Sgt. Burchfield's movements from the first tier to the second tier. (RT 12751) Willis' testimony that C-section was quiet before the attack was contradicted by a C-section correctional officer. (RT 12770) At the preliminary hearing, moreover, Willis testified that the Central Committee had not discussed using a signal and twice testified that he did not remember any such signals. (RT 12947-48)

true. If Masters diagramed the attack, and prepared the hit list, one would expect him to be named as a planner, if not the principal planner.

Drume's admissions were equally relevant. The trial court acknowledged that "it would be different" if Richardson denied "Masters was there." (RT 14718) *Drume denied Masters was there.* (CT 5046-47) *Drume also said that he, Drume – and thus not Masters – was Chief of Security.* (CT 1912, 1914, 5045)

8. Evidence Code Section 352 Was Improperly Invoked

The trial court's last-minute invocation of Evidence Code section 352 was also error. On appeal from a trial court's use of section 352 on appeal, this court will look first to see if there is some affirmative showing that the court did in fact weigh prejudice against probative value. *People* v. *Clair* (1992) 2 Cal.4th 629, 660. In this case, the court's use of section 352 was simply an afterthought.

The trial court's section 352 ruling was a clear abuse of discretion. *People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1124. To overcome a section 352 objection, "evidence of a third party's culpability 'need only be capable of raising a reasonable doubt of [the] defendant's guilt.' " *People* v. *Cudjo* (1993) 6 Cal.4th 585, 609, quoting *People* v. *Hall* (1986) 41 Cal.3d 826, 833. "[T]hird party evidence need not show 'substantial proof of a probability' that the third party committed the act" to defeat a section

352 challenge. *People v. Hall, supra*, 41 Cal.3d at 833. Trial courts should avoid "a hasty conclusion . . . that evidence of [a third party's] guilt was 'incredible.' Such a determination is properly the province of the jury. *Id.* at 834. "[In] criminal cases, any evidence that tends to support or rebut the presumption of innocence is relevant." *People* v. *Reeder* (1978) 82 Cal.App.3d 543, 552, quoting *People* v. *Whitney* (1978) 76 Cal.App.3d 863, 869. "[It] is fundamental in our system of jurisprudence that all of a defendant's pertinent evidence should be considered by the trier of fact." *People v. Mizer* (1961) 195 Cal.App.2d 261, 269. According to *Reeder*, judicial discretion under section 352 should be exercised

> in light of the more fundamental principle that a defendant's due process right to a fair trial requires that evidence, the probative value of which is stronger than the slight-relevancy category and which tends to establish a defendant's innocence, cannot be excluded on the theory that such evidence is prejudicial to the prosecution.
>
> 82 Cal.App.3d at 552.

Thus, in criminal cases

> Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value to his or her defense.
>
> *People v. Cunningham* (2001) 25 Cal.4th 926, 998. *Accord, People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Reeder* (1978) 82 Cal.App.3d 543, 552.

The court in *People* v. *De Larco* (1983) 142 Cal.App.3d 294, 305, cited *Reeder* for the proposition that section 352 must bow to defendant's right to present a defense, but also cautioned that "Still, the proffered evidence must be 'competent, substantial and significant.' (*People* v. Northrup (1982) 132 Cal.App.3d 1027, 1041; [*Reeder*, *supra*, at 553].)" The *De Larco* discussion continued:

> Inclusion of relevant evidence is tantamount to a fair trial. . . . Indeed, discretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People* v. *Lavergne* (1971) 4 Cal.3d 735, 744; *People* v. *Murphy* (1963) 59 Cal.2d 818, 829.)
>
> 142 Cal.App.3d at 305-306.

The Richardson and Drume admissions far exceeded the legal requirements for overcoming an Evidence Code section 352 objection. The Richardson and Drume third party culpability evidence raised far more than "a reasonable doubt of [the] defendant's guilt." *People v. Cudjo, supra*, 6 Cal.4th at 609. Its probative value was far greater than "slight-relevancy." *People v. Reeder, supra*, 82 Cal.App.3d at 552. By both providing dramatic misidentification evidence and negating each of the elements of the State's case, the evidence tended to nullify the State's entire case. Thus, the trial court's last-minute invocation of section 352 was clearly error.

C. CONCLUSIONS

The Richardson and Drume statements were doubly admissible under Evidence Code section 1230. Richardson's statements to Jeanne Ballatore, Lt. Spangler, and Broderick Adams, were *both* statements against penal interest *and* statements against his interest in avoiding hatred, social disgrace, and BGF retaliation. The same is true of Drume's statements to Deputy District Attorney Berberian, District Attorney Investigator Gasser, Captain Everly, and Lt. Watkins, as well as his statements to defense investigator Barry Simon. These statements were admissible under section 1230 because a reasonable person would not have made the statements if they were not true. The ultimate penal and extreme personal risks associated with the statements, and the extensive corroboration provided for the statements, provide compelling indicia of reliability. A special finding in favor of Richardson's reliability was also required under Evidence Code section 1042.

The Richardson and Drume statements were not simply relevant. They were dramatically relevant. Coupled with Willis' misidentification testimony, the statements, if believed by a jury, nullified the State's entire case against Masters. The exclusion of the Richardson and Drume admissions was therefore plain error.

IV. THE COURT'S FAILURE TO SEVER MASTERS' TRIAL FROM WOODARD'S FURTHER PREVENTED MASTERS FROM PRESENTING HIS DEFENSE

Before evaluating the prejudicial effect of the rulings preventing Masters from putting on his principal defense, we must first consider the trial court's denial of Masters' motion for a severance of his trial from Woodard's. Denying Masters his right to put on the Richardson and Drume evidence — which exculpated Masters by implicating co-defendant Woodard — allowed the trial court to deny Masters' motion for severance of his trial from Woodard's. Indeed, the trial court's pre-trial denial of Masters' severance motion may have influenced the court's later trial ruling on the Richardson and Drume admissions.

A. FACTUAL AND PROCEDURAL BACKGROUND

Masters' initial motion to sever was filed November 29, 1988. (CT 1842) Masters argued that the statements against interest of inmates Richardson, Drume, and Ingram implicated themselves, Woodard, Johnson, and Willis, but did not mention Masters, thereby showing his noninvolvement in the planning and execution of the Burchfield murder. (CT 1860)[45]

---

[45] Exhibits attached to the motion included: (1) a debriefing interview with Richardson, in which he implicates Willis, Johnson, Woodard, and himself, with no mention of Masters (CT 1909); (2) three reports of an interview with inmate Drume, in which he implicated himself (continued...)

In a pre-trial hearing on December 12, 1988, the court granted the prosecution's motion to sever Johnson's trial from Masters' and Woodard's in order to be able to present documentary evidence against them that the trial court had earlier ruled violated Johnson's *Miranda* rights. (12/12/88 RT 46-52)

Turning then to Masters' motion to sever, the court initially recognized that it might have to grant severance to Masters:

> If it's even close that it can come in, then we're going to have severance . . . unless Mr. District Attorney can talk me out of it, but right now I'm putting Mr. Masters to the test of showing me that it can come in.
>
> (12/12/88 RT 71)

The following day, however, the court made the evidentiary rulings discussed *supra*, at 90, and, having found the evidence inadmissible, denied the defense motion to sever. (12/13/88 RT 7-14 (argument); 40 (ruling)) Following the filing of a motion for reconsideration (CT 2430), the court again denied the motion to sever the Masters and Woodard trials. (1/9/88 RT 4, 14)

---

[45](...continued)
as the conspirator who had manufactured the weapon used to kill Burchfield, and Woodard as one of the other co-conspirator's, but did not mention Masters by either his given or his prison name (CT 1912, 1914, 1916); and (3) the notes of an interview with inmate Lawless, who reported that he was housed in the AC next to inmate Ingram, who told Lawless that it was he, Ingram, who cut the stock from which the weapon to kill Burchfield was made and sent to Johnson (CT 1919). Again, there was no mention of Masters.

Because, as had already been shown, the court's evidentiary rulings excluding the Richardson and Drume statements were error, so, too, was the court's denial of the motion to sever.

B. JUDICIAL EFFICIENCY MAY NOT OVERCOME THE RIGHT TO PRESENT A DEFENSE

There is a statutory preference for joint trials. Penal Code section 1098; *People* v. *Lara* (1967) 67 Cal.2d 365, 394. While the decision to sever is "largely within the discretion of the trial court" (*People* v. *Turner* (1984) 37 Cal.3d 302, 312, citing *People* v. *Graham* (1969) 71 Cal.2d 303, 330), "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." *Williams* v. *Superior Court* (1984) 36 Cal.3d 441, 451-452. "[P]ractical considerations of convenience must be subordinated when they run counter to the need to insure fair trials and to protect fundamental constitutional rights." *People* v. *Aranda* (1965) 63 Cal.2d 518, 530, n. 9.

A reviewing court must assess the claim of error by reference to "facts as they appear at the time of the hearing on the motion to sever." *People* v. *Boyde* (1988) 46 Cal.3d 212, 232; *People* v. *Turner* (1984) 37 Cal.3d 302, 312, and cases there cited. The appellate court "may reverse a conviction where, because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." *Turner*, *supra*, 37 Cal.3d at 313 (citation omitted). In a capital

prosecution, moreover, "the court must analyze the severance issue with a *higher* degree of scrutiny and care than is normally applied in a noncapital case." *Williams v. Superior Court*, *supra*, 36 Cal.3d at 454. (Emphasis added)

While review takes place under an abuse of discretion standard, "[w]hen substantial prejudice is clearly shown, a trial court's denial of a defendant's motion for severance [of charges] constitutes an abuse of discretion under Penal Code section 954." *Williams*, 36 Cal.3d at 452. In addition, under the heightened scrutiny of a capital case, even when a trial court's refusal to sever defendants does not rise to an abuse of discretion, "such a ruling could still be the basis for reversal after trial if the reviewing court determines that, 'because of the consolidation, a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law . . . .' " *People* v. *Boyde*, *supra*, 46 Cal.3d 212, 233, quoting *Turner*, *supra*, 37 Cal.3d at 313.

C. THE GROUNDS FOR SEVERANCE

Of the grounds commonly cited in favor of severance, two are applicable here: the first is the *Bruton-Aranda* rule as it is applied to Richardson and Drume. Richardson and Drume were not co-defendants; rather, their extra-judicial statements were those of self-proclaimed co-conspirators. Nevertheless, the heart of the rule is satisfied here, for their statements exculpating Masters could not be adequately edited to excise

the portions incriminating Woodard. *Bruton* v. *United States* (1968) 391 U.S. 123, 129-130; *People* v. *Aranda* (1965) 63 Cal.2d 518, 530-531.[46] In *People* v. *Coble* (1976) 65 Cal.App.3d 187, 193 (*overruled on other grounds*, *People* v. *Fuentes* (1998) 61 Cal.App.4th 956, 969), the Court of Appeal applied the *Aranda* rule despite the fact that the statement sought to be introduced was that of an uncharged co-conspirator rather than a co-defendant, which the court considered "a distinction without a legal difference." This court, citing *Coble,* has noted that the point is arguable on principle. *People* v. *Hill* (1992) 3 Cal.4th 959, 994 (statement of uncharged accomplice arguably comes within *Bruton-Aranda* proscription, citing *Coble*). In any case, the *reason* behind the rule is present in this case: the Richardson and Drume statements are from self-proclaimed percipient witnesses, their declarations are largely corroborated by the prosecution's case, and they inculpate one co-defendant while exculpating the other. In these circumstances, failure to sever must inevitably lead to an unfair trial either for Woodard or, as here, for Masters.

The facts below also provide another commonly-cited reason for severance: conflicting defenses. *People* v. *Massie* (1967) 66 Cal.2d

---

46 This case is distinguishable from those involving "inferential" guilt, or the possible application of the "contextual implication" approach discussed in *People* v. *Fletcher* (1996) 13 Cal.4th 451, 468. In this case, Masters would have had to implicate Woodard (and Johnson) in order to provide the necessary corroboration of the Richardson and Drume statements.

899, 916-917, and nn.18, 21; *see also, Turner*, *supra*, 37 Cal.3d at 302, *People* v. *Jones* (1970) 10 Cal.App.3d 237; *People* v. *Wheeler* (1973) 32 Cal.App.3d 455. Masters sought to introduce several out-of-court statements implicating, and inadmissible against, Woodard, which because they did not name Masters as part of the leadership group who planned the murder, suggested his innocence of that role. Such evidence is precisely the sort of evidence which, when its exclusion denies a defendant his defense, requires severance. In a recent case involving severance under the federal rules, the United States Supreme Court explained that severance should be granted

> if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when . . . [f]or example . . . a defendant might suffer prejudice *if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, e.g.*, *Tifford* v. *Wainwright*, 588 F.2d 954 (CA 5 1979) (per curiam).
>
> *Zafiro* v. *United States* (1993) 506 U.S. 534, 539 (emphasis added).

Viewed alone, inconsistent defenses have not been sufficient to require reversal for failure to sever. *People* v. *Hardy* (1992) 2 Cal.4th 86, 168, citing *People* v. *Boyde*, *supra*, 46 Cal.3d at 232. The cases in particular deny the need to sever when co-participants in the crime are trying to shift the blame to their co-defendants. In this case, however, the

excluded statements tended to exonerate Masters entirely from involvement in the BGF leadership's planning of the murder, and there was no indication that Woodard (or Richardson or Drume) intended to shift any blame to Masters. That alone distinguishes the instant case from those in which joint participants were trying to shift the blame to each other. For example, *Boyde*, *Turner*, and *United States* v. *Brady* (9 Cir. 1978) 579 F.2d 1121, 1128 (*cert. den.* 439 U.S. 1074), all rejected claims of abuse in the courts' failure to sever, but all are distinguishable from the instant case. In *Boyde*, the court noted that there was no dispute that both defendant's were involved, and the jury could assess their respective credibility on the issue of who was the actual killer. 46 Cal.3d at 233. Similarly, in *Brady*, it was "undisputed that each appellant participated in the incident." 579 F.2d at 1128. In *Turner*, "no denial of a fair trial result[ed] from the mere fact that two defendants who are jointly tried have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution." 37 Cal.3d at 313.

This was not such a case. In this case, Masters sought to introduce out-of-court declarations by uncharged inmates which directly implicated Woodard and by inference exculpated Masters. Indeed, their very relevance depended on their implication of Woodard, Willis, Johnson and others and failure to even mention Masters as part of the Burchfield murder conspiracy. (See CT 2385) Moreover, the statements' credibility

if presented to the jury rested in part on their consistency, in respects other than Masters' participation, with the prosecution's version of events. Redaction to protect Woodard's rights, therefore, was not an option. See *People* v. *Massie*, *supra*, 66 Cal.2d 899, 918 (severance should have been granted unless incriminating portions of confession could have been effectively deleted without prejudice to co-defendant).

The antagonism was not only between defenses, but also between conflicting constitutional rights — Woodard's right to confront an accuser versus Masters' right to present a defense. In such a case, the appropriate remedy was to protect both defendants' rights by severing their trials. The trial court's failure to do this resulted in constitutional error because it provided a final nail in the coffin of Masters' right to present his defense.

V. DENYING MASTERS EVERY OPPORTUNITY TO PRESENT HIS PRINCIPAL DEFENSE RESULTED IN PREJUDICIAL ERROR

Whether viewed individually or together, the foregoing errors are not simply violations of California law. They amount to a massive denial of Masters' right to a fair trial and his right to present a defense. U.S. Const., Amends. V, VI, XIV; Cal. Const., art. I, §§ 7, 15.

Masters' defense was that he was not the person described by Willis as one of the planners of the Burchfield murder. At every instance, however, he was stymied in his attempt to prove that Willis was either lying or mistaken. He was also prevented, at the first moment that he had evidence that Willis could not accurately describe him, from testing Willis' identification with a lineup. He was likewise prevented from cross-examining Willis about Richardson at the preliminary hearing. He was prevented from introducing the admissions of Richardson and Drume, and the testimony of Broderick Adams, despite ample evidence of reliability. And he was forced to trial with Woodard, which by mid-trial made the admission of that evidence ever so much less likely, as it would have forced a mistrial.

A. THE RIGHT TO PRESENT A CRITICAL DEFENSE

Masters had a constitutional right to present a defense.

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Cham-*

> *bers v. Mississippi*, *supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S., at 485; *cf. Strickland v. Washington*, 466 U.S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial largely through the several provisions of the Sixth Amendment.")
>
> *Crane* v. *Kentucky* (1986) 476 U.S. 683, 690.

Numerous decisions of the United States Supreme Court affirm this right. In *Chambers v. Mississippi* (1973) 410 U.S. 284, the constitutional error arose from Mississippi's refusal to admit exculpatory hearsay evidence. In *Green* v. *Georgia* (1979) 442 U.S. 95, the court reversed for similar reasons a Georgia penalty determination in which a hearsay statement of a co-conspirator, implicating himself and exculpating the defendant in the actual murder, was excluded as hearsay. The high court found a due process violation in Georgia's application of its hearsay law when the excluded testimony was highly relevant to a critical issue in the penalty phase, and substantial reasons existed to assume its reliability. *Id.* at 97. *Chambers* and *Green* "hold that states must allow defendants to put reliable third-party confessions before the jury, despite the hearsay rule, when necessary to assist in separating the guilty from the innocent." *Carson v. Peters* (7 Cir. 1994) 42 F.3d 384, 385.

In *Crane* v. *Kentucky, supra*, 476 U.S. 683, the 15-year-old defendant was prevented from presenting evidence of the extreme circumstances under which he made his confession. The Supreme Court held that this evidentiary ruling resulted in a denial of Crane's right to present a defense. *Id.* at 687. Just as, in *Crane*, "the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial" (*id.* at 690), in this case the blanket exclusion of every scintilla of evidence of Masters' non-involvement in the Burchfield conspiracy deprived him of a fair trial.

In *Washington* v. *Texas* (1967) 388 U.S. 14, an accomplice to murder was prevented by a state evidentiary rule from presenting the testimony of his already-convicted co-conspirator that it was the co-conspirator that fired the fatal shot and that he, Washington, had tried to prevent it. This, too, was found to be a violation of the defendant's Sixth Amendment right to compulsory process. *Id* at 23. What is notable about *Washington* is that, like the trial court's expressed concern in this case, the Texas statutes reflected a concern that co-conspirators could help each other by falsely exonerating their cohorts in separate trials. *Id.* at 21. In light of the fact that "the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court" (*id.* at 22), the rule excluding entire classes of prisoners could not survive constitutional scrutiny. In the instant case, Richardson and

Drume were excluded for much the same reasons — their connection with Masters through the BGF and the possibility that they manufactured their statements because of that connection. The exclusion of their statements, just as in *Washington*, cannot survive constitutional scrutiny.

Chambers and *Green* support appellant's position that the trial court's refusal to admit the Richardson and Drume statements was a violation of due process. For reasons already discussed in detail, the Richardson and Drume admissions were both highly relevant and supported by substantial indica of reliability. Whether or not the jurors would have believed the Richardson or Drume evidence is not in issue here. In *Davis* v. *Alaska* (1974) 415 U.S. 308, 317, the Supreme Court, commenting on the exclusion of defense cross-examination concerning a prosecution witness' adjudication as a juvenile delinquent, stated:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so they could make an informed judgment . . . .

1. The *Cudjo* Distinction

This Court has not yet fully embraced *Chambers* and its progeny. Thus, in *People v. Cudjo* (1993) 6 Cal.4th 585, this Court identified two types of violations:

(1) Those which result from *"general rules* of evidence or procedure which preclude material testimony or pertinent cross-examination for arbitrary reasons, such as unwarranted and overbroad assumptions of untrustworthiness." *Id.* at 611 (emphasis in original).

(2) Those which result from a "mere erroneous exercise of discretion" under rules which do not themselves implicate the federal Constitution. *Id.*

Cudjo, *supra*, held that for the most part, the mere erroneous exercise of discretion under such "normal" rules does not implicate the federal Constitution. *Id.*

2. *Cudjo*'s Contradictions

Cudjo, by its own curious yet tacit admission, is contrary to United States Supreme Court authority. Thus, Cudjo notes that its generalizations are contrary[47] to *Delaware v. Van Arsdall* (1986) 475 U.S. 673, which held that the Confrontation Clause was violated when a trial judge disallowed cross-examination for bias based upon his individual but incorrect assessment of probative value versus prejudice. *Cudjo, supra*, 6 Cal.4th at 611-612.

---

[47] *Cudjo* cites *Delaware v. Van Arsdall* with a "but cf." According to the Bluebook, "but cf." indicates that the authority "supports a proposition analogous to the contrary of the main proposition." The Bluebook, A Uniform System of Citation at 23 (17th ed.).

This Court could have as easily cited other Supreme Court decisions which disprove the *Cudjo* distinction. In, *Webb v. Texas* (1972) 409 U.S. 95, 97-98, for example, the defendant's Sixth Amendment rights were violated where the sole defense witness was "driven" from the stand by the trial judge telling the witness that if he lied the judge would personally see him tried for perjury whereas none of the prosecution witnesses received similar admonishments. In *Olden v. Kentucky* (1988) 488 U.S. 227, 232-233, the defendant's Sixth Amendment right to present a defense was violated by a trial judge's independent decision to attempt to avoid "prejudicing" the jury by refusing to allow a defendant to elicit on cross-examination the fact that an alleged rape victim was cohabiting with a black man.

As Justice Kennard pointed out in her *Cudjo* dissent, moreover, the *Cudjo* majority's distinction between violations resulting from rules of evidence and those resulting from judicial error amounts to an odd distortion of the nature and purpose of the constitutional guarantee. What the state and federal Constitutions secure for the accused is the right to present a defense, not merely the right to be free of unduly restrictive state laws of evidence and procedure. *Cudjo*, *supra,* at 641. When important rights are at stake, judicial error is no more constitutionally tolerable than legislative error.

3. *Fudge's* Implicit Rejection of *Cudjo*

People v. Fudge (1994) 7 Cal.4th 1075, decided shortly after *Cudjo*, also casts doubt upon the continued vitality of the *Cudjo* distinction. In *Fudge*, this Court again addressed the issue of standard of prejudice regarding exclusion of relevant evidence over defendant's objection, and it reached the same conclusion, but without any mention of *Cudjo*. *Fudge* offers a bipolar analysis:

> Although completely excluding evidence of an accused's defense theoretically could rise to this [constitutional error] level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.)
>
> *Id.* at 1103.

In the instant case, of course, the accumulated exclusions went to the very heart of Masters' misidentification defense.

4. *People v. Cunningham*

People v. Cunningham (2001) 25 Cal.4th 926, this Court's most recent word on the subject, reaffirms the *Fudge* bipolar analysis, while setting forth a controlling principle. The prosecution's evidence established that defendant went to a bar in Pasadena where the victims Treto and Cebreros were socializing. Several times during the evening, Treto displayed a large amount of cash. *Id.* at 957. At the end of the evening, Treto and Cebreros proceeded to the parking lot behind the bar and were

about to enter Treto's vehicle when defendant approached the two, drew a gun, demanded Treto's cash, and fatally shot Treto. *Id.* Over defense objection, the trial court excluded evidence that the two men had participated in a high stakes gambling tournament two nights earlier. The defense argued that this public exposure of Treto's high stakes gambling could have motivated others to steal Treto's money. *Id.* at 996. The trial court also prevented defense counsel from cross-examining Treto's wife concerning letters that had been found in his wallet, written by another woman to Treto, apparently concerning their relationship. *Id.* at 997. The latter ruling was based upon the trial court's determination that defense counsel had not provided information to support a plausible theory that the murder was somehow connected to Treto's personal life. *Id.* at 997-998.

This Court held that the rulings did not constitute an abuse of discretion. Preliminarily, this Court noted that

> Evidence Code section 352 must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value to his or her defense.
>
> *Id.* at 999.

Subject to this controlling constitutional principle, the Court reaffirmed *People v. Fudge, supra*, without citing *People v. Cudjo, supra*:

> Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional rights. (*People v. Fudge, supra,* 7 Cal.4th 1075, 1103.) Accordingly, such a ruling, if erroneous, is 'an error of law merely,' which is governed by the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 342. (*People v. Fudge, supra*, 7 Cal.4th at 1103.)
>
> *Id.*

This Court held that the rulings were not error as a matter of state law. The rulings, moreover, were also not of constitutional dimension because,

> It does not appear that, had the trial court permitted the inquiries that defense counsel sought to make, the resulting testimony would have produced evidence of significant probative value to the defense. . . . Although defense counsel was not permitted to develop such topics as Treto's earlier participation in pool tournaments and his apparent relationship with another woman, defendant's offers of proof simply did not indicate that relevant evidence of significant probative value would be forthcoming.
>
> *Id.*

As with *Fudge*, the evidence Masters sought to introduce stands in stark contrast – it would quite simply eliminate him as a defendant.

5. Recent United States Supreme Court Decisions

Arguably, *Fudge* and *Cunningham* have silently overruled *Cudjo*, and *Cunningham's* "significant probative value" test represents this Court's lodestar for whether an exclusion of relevant evidence violates a defendant's constitutional right to a fair trial. Recent decisions by the United States Supreme Court are consistent with such a standard.

(a) Egelhoff v. Montana

While the United States Supreme Court has not been able to agree on how far to extend the principles underlying *Chambers* and its progeny, the post-*Cudjo* opinions of nearly all of its members are incompatible with *Cudjo*. In *Egelhoff v. Montana* (1996) 518 U.S. 37, the Supreme Court held that due process was not violated by a Montana statute which prohibited an accused's voluntary intoxication from being taken into consideration in determining the existence of a mental state which was an element of the criminal offense. While no opinion gathered the support of five of the justices, and *Egelhoff* does not represent a change in the law, the common ground expressed by at least eight of the justices contradicts this Court's holding in *Cudjo*. Specifically, two aspects of the plurality opinion are contrary to *Cudjo*, and the dissenting opinion of four of the justices is contrary to *Cudjo*.

The four justices who signed the plurality opinion identified an exception to the *Crane v. Kentucky* general rule that due process "would

effectively be denied 'if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence.'" *Egelhoff v. Montana, supra,* 518 U.S. at 53 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690) By their view, "*Crane* does nothing to undermine the principle that the introduction of relevant evidence can be limited by the State for a 'valid' reason, as it has been by Montana." *Egelhoff v. Montana, supra,* 518 U.S. at 53. By this standard, of course, an "erroneous exercise of discretion" (*Cudjo, supra*, 6 Cal.4th 611) – an invalid reason – does not constitute an exception to *Crane v. Kentucky.*

By the plurality view, moreover, "*Chambers* was an exercise in highly case-specific error correction." *Egelhoff v. Montana, supra*, 518 U.S. at 53.

> The holding in Chambers . . . is certainly not that a defendant is denied "a fair opportunity to defend against the State's accusations" whenever "critical evidence" favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.
>
> *Id.*

Thus, the plurality viewpoint (1) is inconsistent with the *Cudjo* thesis that a "mere erroneous exercise of discretion" cannot implicate the federal Constitution (*Cudjo, supra,* 6 Cal.4th at 611); and (2) undermines

the *Cudjo* thesis that an invalid judicial action constitutes an exception to the general principles of *Crane* and *Chambers*.

The four dissenting justices called for a more far-reaching holding. By their view, *Chambers v. Mississippi, supra,* 410, U.S. 284, and *Crane v. Kentucky, supra,* 476 U.S. 683, "illuminate a simple principle: Due process demands that a criminal defendant be afforded a fair opportunity to defend against the State's accusations." *Egelhoff v. Montana, supra,* 518 U.S. at 63.

(b) Lilly v. Virginia

The plurality opinion in *Lilly v. Virginia* (1999) 527 U.S. 116 is even more far-reaching, and more to the point for the instant case. According to the plurality opinion, *Chambers v. Mississippi*, *supra,* affords a defendant a Due Process Clause right to introduce reliable third-party declarations against interest:

> In 1973, this Court endorsed the more enlightened view in *Chambers*, holding that the Due Process Clause affords criminal defendants the right to introduce into evidence third parties' declarations against penal interest–their confessions–when the circumstances surrounding the statements "provide considerable assurance of their reliability." 410 U.S. at 300.
>
> *Id.* at 130.

Accord, Justice v. Hoke (2 Cir. 1996) 90 F.3d 43 (defendant's constitutional right to present his defense was violated by trial court's abuse of discretion

in excluding as collateral evidence witnesses' testimony regarding robbery victim's motives to fabricate allegations against defendant).

There is no distinction suggested in *Lilly* between general rules and "mere" evidentiary trial court rulings.

(c) Simmons and *Shafer*

Two recent Supreme Court decisions also reaffirmed the *Crane v. Kentucky* right to introduce relevant evidence during the penalty phase of capital decision-making. In *Simmons v. South Carolina* (1994) 512 U.S. 154, citing *Crane v. Kentucky*, *supra*, the high court reaffirmed a defendant's due process right to introduce relevant evidence of his good behavior in prison during the penalty phase of a capital trial. *Id.* at 163-165. *Simmons* extended the *Crane v. Kentucky* principle to a defendant's right "to inform the jury that he never would be released on parole." 512 U.S. at 165. *Accord*, *Shafer v. South Carolina* (2001) 532 U.S. 36.

6. Ninth Circuit Standards Supporting the Right to Present a Defense

(a) Franklin v. Henry

Decisions by the Ninth Circuit Court of Appeals also embrace the constitutional right to present a critical defense and suggest appropriate standards for measuring that right. In *Franklin v. Henry* (9 Cir. 1997) 122 F.3d 1270, the defendant was tried for the sexual abuse of a child. Franklin attempted to introduce as evidence his own testimony that the

child, Shayna, in his presence told her two brothers that on the night prior to the alleged sexual abuse by defendant, Shayna's mother had come into her room and "licked her private." *Id.* at 1272. The trial court excluded this evidence, as well as evidence of Franklin's statement to the police when first informed of the charges that the mother would be in jail if Franklin "believed everything the kids said." *Id.*

The Ninth Circuit commenced its analysis by noting that "[t]he state court of appeal had determined that it was error to exclude the proffered evidence. That conclusive determination means that the state has no rational justification for what . . . the Superior Court did in excluding Franklin's testimony." *Id.* at 1273. The Ninth Circuit's analysis, obviously, is at odds with the *Cudjo* thesis.

Without difficulty, the Ninth Circuit held that the state error had a constitutional dimension:

> If believed by the jury, Franklin's testimony would have shown Shayna capable of fantasies about her mother analogous to the charges she made against Franklin. Exclusion of the evidence deprived Franklin "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful testing.'" *Crane v. Kentucky*, 476 U.S. 683, 690-91.
>
> 122 F.3d at 1273.

(b) DePetris v. Kuykendall

DePetris v. Kuykendall (9 Cir. 2001) 239 F.3d 1057 reaffirms *Franklin v. Henry*. DePetris shot and killed her husband while he was asleep in bed. At trial, she claimed "imperfect self-defense" – that is, she claimed an actual, honest belief that she was in imminent danger, even if such belief was objectively unreasonable. *Id.* at 1058.

To prove her claim, DePetris offered into evidence the decedent's handwritten journal and sought to testify about how, having read the journal, contributed to her belief that decedent's threats were to be taken seriously. *Id.* at 1059. The trial court, however, excluded the evidence as irrelevant. While the California Court of Appeal held that the journal and related testimony were admissible, it held that their exclusion was harmless error because the jury heard other evidence relating to the decedent's propensity for domestic violence. *Id.* at 1059.

The Ninth Circuit held that the error was of constitutional dimension, and rejected the United States District Court's characterization of the trial court's ruling as the exclusion was "only one piece of physical evidence." *Id.* at 1063. Since the ruling went to the "heart of the defense", it was not mere evidentiary error:

> [T]he trial court's exclusion of Dana DePetris's journal and petitioner's testimony about having read it was not mere evidentiary error. It was of constitutional dimension. The ruling went to the heart of the defense. Petitioner's sole defense was that she killed her husband in an honest belief that she needed to do so to save

> her life. The success of the defense depended almost entirely on the jury's believing petitioner's testimony about her state of mind at the time of the shooting.
>
> *Id.* at 1062.

According to the Ninth Circuit, habeas relief was required to enforce the right to present a valid defense:

> Because this evidence was critical to her ability to defend against the charge, we hold that the exclusion of this evidence violated petitioner's clearly established constitutional right to due process of law – the right to present a valid defense as established by the Supreme Court in Chambers and Washington.
>
> *Id.* at 1063

(c) Perry and Crenshaw

Perry v. Rushen (9 Cir. 1983) 713 F.2d 1447 is also instructive. This Court's decisions in *Fudge,* and *Cunningham* offer a bipolar constitutional analysis, i.e., a "complete exclusion" of defense evidence on a critical issue may be unconstitutional, but the exclusion of evidence on a "minor or subsidiary point" is an error of law "merely." *People v. Cunningham*, *supra,* 25 Cal.4th at 999. However, *Perry* suggests a method of evaluating cases between the two poles. Like the instant case, *Perry* involved an exclusion of evidence which affected the defendant's ability to put on a misidentification defense. A young woman walking through Golden Gate Park at about 4:30 p.m. stopped to ask directions of a black man jogging with a dog. In due course, the man

attacked the woman, but fled when bystanders appeared. One bystander took pursuit and identified Perry standing on the sidewalk with his dog. Shortly thereafter, the victim identified Perry based both on his "general appearance and on a scar on his forehead." Other bystanders also identified Perry. 713 F.2d at 1448.

At trial, the defendant sought to introduce evidence that another man, Wolfe, might have committed the assault and been confused with Perry. The evidence consisted of testimony of two witnesses who had been robbed and raped by Wolfe in the same area of the park. One attack had occurred three years earlier and the second only an hour earlier. Both Perry and Wolfe were black, of similar height and weight, had similar hair, and wore clothing of somewhat similar color. *Id.*

Analyzing the due process precedent, Perry derives a balancing test for evaluating the constitutional dimension of evidentiary error.

> In each of these cases, the evidence was highly exculpatory: third party confessions, if believed would necessarily exonerate the defendant of the primary offense. In each case, also, the evidence was crucial to the defense; no other avenues were available to prove defendant's story . . . Where the state interest is strong, only the exclusion of critical, reliable and highly probative evidence will violate due process. When the state interest is weaker, less significant evidence is protected.
>
> 713 F.2d at 1452.

Perry also sets out the various factors to consider to determine whether the exclusion of evidence has reached constitutional proportions:

> [T]he court should consider . . . its probative value on the central issue, its reliability, whether it is capable of evaluation by the trier of fact, whether it is the sole evidence on the issue or merely cumulative, and whether it constitutes a major part of the attempted defense. The weight of the state's interest likewise depends upon many factors. The Court must determine the purpose of the rule, its importance, how well the rule implements this purpose, and how well the purpose applies in the case at hand. The court must give due weight to the substantial state interest in preserving orderly trials, in judicial efficiency, in excluding unreliable or prejudicial evidence.
>
> *Id.* at 1452-53.

Perry then applies its balancing test to the facts of the case. In the opinion of the Ninth Circuit, California had a valid state interest at stake: placing reasonable limits on the trial of collateral issues and avoiding undue prejudice to the People from unsupported jury speculation as to the guilt of other suspects.

The Ninth Circuit ultimately concluded that these State interests outweighed the defendant's interest, but only because the connection of the proffered evidence to defendant's case was tenuous. While Wolfe bore similarities to Perry, the identification of Perry was strong.

> The victim positively identified Perry only minutes after the attack. Wolfe had no dog. Wolfe lacked the prominent forehead scar that Perry has, and . . . did not resemble Perry in facial features. Wolfe was clean shaven, while

> Perry wore a mustache and chin whiskers. Finally, although both wore blue pants, Wolfe's jeans were not likely to be mistaken for the warm-up pants worn by Perry. The evidence thus possessed only slight probative value on the reliability of the identification.
>
> *Id.* at 1454.

Perry indicates that the constitutional balance would be significantly different if a witness had identified Wolfe. Even a recanted identification might make a constitutional difference. *Id.* at 1454-55. Perry also distinguished *United States v. Crenshaw* (9 Cir. 1983) 698 F.2d 1060:

> In *Crenshaw* we held that it was error for a trial court to refuse a subpoena for a defense witness who would have testified that he planned the robbery of which defendant was convicted of aiding and abetting. Because the case was submitted to the jury in a posture that permitted the jury to convict the defendant for having planned the robbery, the defendant was entitled to introduce evidence that someone else had done the planning . . . Perry . . . had no such evidence to offer.
>
> *Id.* at 1455.

Perry and Crenshaw thus suggest that an excluded misidentification defense presents a strong case of constitutional error when a third party has admitted a role ascribed to the defendant, a witness has identified the third party as responsible, or the third party fits the description of the identified responsible party. In the instant case, of course, appellant satisfies not simply one, but all three of these criteria.

7. The Right to Present a Critical Defense – Conclusions

Certain conclusions can be drawn from the above discussion:

1. Numerous decisions of the United States Supreme Court guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690.

2. While all of the Justices of the high court accept this rule as a general principle, four Justices offer a more restrictive view that "*Crane* does nothing to undermine the principle that the introduction of relevant evidence can be limited by the State for a 'valid' reason . . . ." *Egelhoff v. Montana,* 518 U.S. 37, 53.

3. "[E]rroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Egelhoff v. Montana, supra,* 518 U.S. at 53.

4. *People v. Cudjo,* 6 Cal.4th 585, which suggests that a "mere erroneous exercise of discretion" in applying an evidentiary role does not implicate the federal constitution, has been silently overruled by *People v. Fudge,* 7 Cal.4th 1075 and *People v. Cunningham,* 25 Cal.4th 926. *Cudjo, supra,* is also inconsistent with *Delaware v. Van Arsdall,* 475 U.S. 673, *Webb v. Texas,* 409 U.S. 95, and *Olden v. Kentucky,* 488 U.S. 227. *Cudjo* is likewise inconsistent with the common ground expressed by at least eight of the Justices of the Supreme Court in *Egelhoff v. Montana,*

518 U.S. 37, the plurality opinion in *Lilly v. Virginia,* 527 U.S. 116 and numerous decisions of the United States Court of Appeals.

5. "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and the right to present all relevant evidence of significant probative value to his or her defense." *People v. Cunningham*, 25 Cal.4th 926, 999.

6. "[T]he complete exclusion of evidence intended to establish an accused defense may impair his or her right to due process of law. . . ." *Id.*

7. A number of decisions either expressly or impliedly suggest a balancing test. Weight must be given to valid state interest, but where there is no valid state interest, no weight can be given to the state's interest. *Franklin v. Henry*, 122 F.3d 1270, 1273. On the defense side, the exclusion is more likely of constitutional dimension where the ruling goes "to the heart of the defense." *DePetris v. Kuykendall*, 239 F.2d 1057, 1062.

8. Where the evidence relates to the possible misidentification of defendant, greater weight must be given to the defendant's interest where a witness has identified a third party as the culprit and/or the culprit himself has admitted a role which the state associates with the defendant. *Perry v. Rushen*, 713 F.2d 1447, 1454-55; *United States v. Crenshaw*, 698 F.2d 1060.

B. THE STATE DENIED MASTERS HIS CONSTITUTIONAL RIGHT TO PRESENT A CRITICAL DEFENSE

1. Masters Was Not Allowed to Present his Version of the Case

Judged by these eight standards, the State denied Masters his right to present his defense. Indeed, the State denied both his principal defense *and* the heart of his defense: that Masters was not the person identified by Rufus Willis, the prosecution's main witness.

2. Far More than Simply "Erroneous Evidentiary Rulings . . . in Combination" Are Involved

At each and every turn, the State of California, its agents and its courts denied and compromised Masters' ability to present this defense. This is not a case of appellant claiming constitutional error from a single evidentiary ruling. Indeed, far more than simply "erroneous evidentiary rulings . . . in combination" were involved. *Egelhoff v. Montana, supra,* 518 U.S. at 53. Many evidentiary rulings were involved, but even that is not all that was involved. The nexus of the rulings also included a pretrial denial of a lineup which could have resolved the case in Masters' favor forever. That ruling arose out of the State's failure to disclose the Richardson evidence. The pretrial error was also exacerbated by further pretrial error denying Masters the opportunity to recall Willis in order to point out Richardson and have him identify Richardson as the person he confused with Masters.

What happened outside the courtroom is also significant. From the very outset, investigating officers and state witnesses lost, destroyed, or elected not to report potentially exculpatory evidence. Lieutenant Spangler, the San Quentin officer in charge of the Burchfield investigation, knowingly concealed evidence. During the crucial 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, the site of the murder, prompting the trial court to declare: "I would like to cite the whole prison in here for why . . . they shouldn't be held in contempt, and it's outrageous . . . ." (8-10-88 RT 325)

The evidentiary errors were many. In addition to excluding three letters – Richardson's letters to Jeanne Ballatore and Drume's letter to the county clerk – the trial court excluded testimony by ten witnesses: Jeanne Ballatore, Lieutenant Spangler, and Broderick Adams with respect to Richardson's admissions to them, and Deputy District Attorney Berberian, District Attorney Investigator Gasser, Captain Everly, Lieutenant Watkins, Lieutenant Amos, and Barry Simon, concerning Drume's admissions to them.

Without a doubt, the *Crane v. Kentucky* standard has been satisfied. Appellant has not received "a meaningful opportunity to present a complete defense." *Crane v. Kentucky, supra,* 476 U.S. 683, 690. The case also does not fall within the exception to the *Crane* general rule

where evidence has been excluded by the state for a valid reason. *Egelhoff v. Montana, supra,* 518 U.S. 37, 53. Since Evidence Code section 1230 had been doubly violated, there is no exception to the general rule, and no weight can be given to a valid state interest.

Evidence Code section 352 does nothing to diminish the constitutional error. The evidence at issue is highly probative. It goes to the heart of Masters' defense. If Richardson is believed, and if Willis' identification testimony is taken at face value, the State's case against Masters disappears. If Drume is believed, Masters was not involved, and Drume was the chief of security, not Masters. "Evidence Code section 352 must yield to a defendant's due process right to a fair trial and the right to present all relevant evidence of significant probative value to his or her defense." *People v. Cunningham, supra,* 25 Cal.4th 926, 999.

The same result is produced by a balancing test. Since state error has occurred, no weight can be given to the State's interest. By contrast, great weight must be given to the defense side of the balance since the exclusion goes "to the heart of the defense." *DePetris v. Kuykendall* (9 Cir. 2001) 239 F.3d 1057, 1062. Even greater constitutional weight must be given to the exclusion of evidence critical to a misidentification defense since Drume admitted a role which the State associates with Masters, Drume said Masters was not involved, Willis did not know Masters' name, and Willis' description of Masters fit Richardson. *Perry v.*

Rushen, 713 F.2d 1477, 1454-55; *United States v. Crenshaw*, 698 F.2d 1060.

Thus, by every test, the State has denied Masters' constitutional right to present a defense.

C. THE ERROR WAS PREJUDICIAL

1. The Error was Prejudicial Under *Chapman v. California*

Given the constitutional nature of the error, prejudice must be measured under the *Chapman v. California* (1967) 368 U.S. 18, "harmless beyond a reasonable doubt" test. *Id.* at 24. This standard is overwhelmingly satisfied. The denial of once-in-a-lifetime crucial lineup and cross-examination opportunities by itself satisfies this standard. Under no circumstances can these errors be deemed harmless. Nor can it be deemed harmless to deny Masters his principal defense. His entire case was tied to this defense. Indeed, as a measure of the centrality of this defense, his attorney sought to have his case severed from that of co-defendant Woodard.

The testimony of the ten witnesses excluded by the trial judge would not have been taken lightly by the jury. Richardson was identified by Willis himself as a co-conspirator. Willis also identified Drume as one of his men. Both Richardson and Drume violated a blood oath and put their lives at risk when they came forward. Both also exposed themselves

to the death penalty. The exclusion of this crucial evidence can hardly be described as "harmless beyond a reasonable doubt."

2. The Error Was Prejudicial Under *People v. Watson*

Even assuming, *arguendo*, that the exclusion of the Richardson and Drume evidence, the denial of a lineup, the denial of preliminary hearing cross-examination of Willis regarding Richardson, and the denial of the motion for severance do not cumulatively violate the Due Process Clause, the errors must still be deemed prejudicial since there is a "reasonable probability" of a different outcome had the errors not occurred. *People v. Watson* (1956) 46 Cal.2d. 818, 836.

There is such a reasonable probability when there is "merely a reasonable chance, more than an abstract possibility." *College Hospital, Inc. v. Superior Court* (1984) 8 Cal.4th 704, 715. *Accord, People v. Elize* (1999) 71 Cal.App.4th 605, 616; *In re Willow* (1996) 47 Cal.App.4th 1080, 1098; *Downing v. Barrett Mobile Home Transport, Inc.* (1974) 38 Cal.App.3d 519, 525.

Since the trial court's evidentiary and severance rulings prevented Masters from putting on his version of the case, the credibility of his case should be presumed. *Cf., Edwards v. Centex* (1997) 53 Cal.App.4th 15, 26-28 (appeal from *in limine* non-suit); *Stratton v. First Nat'l Life Ins. Co.*

(1989) 210 Cal.App.3d 1071, 1083 (appeal from summary judgment); *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (appeal from demurrer).

> "[E]rrors at a trial that deprive a litigant of the opportunity to present his version of the case . . . are . . . ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment." (Traynor, [The Riddle of Harmless Error (1970)] at p. 68.) A conviction under such circumstances is a "miscarriage of justice" within the meaning of article VI, section 13 of the California Constitution. . . .
>
> *People v. Barrick* (1982) 33 Cal.3d 115, 130, quoting *People v. Spearman* (1979) 25 Cal.3d 107, 119.

See also, *People v. Minifie* (1996) 13 Cal.4th 1055, 1071-1072 (prejudice found where "the excluded evidence was central to the defense"); *People v. Mathews* (1994) 25 Cal.App.4th 89, 100-101 (prejudice found where error was at "the heart of the defense case").

This is a case in which the error affected "the heart of the defense case." *People v. Mathews, supra,* 25 Cal.App.4th at 100-101. Defendant was not allowed the opportunity to present his "version of the case." *People v. Barrick, supra,* 33 Cal.3d at 130. The defense made this clear at the very outset. Appellant wanted his case severed from Woodard's, because he wanted to separate himself from Woodard, Johnson, Richardson, and the other co-conspirators involved in the murder of Sergeant Burchfield. His case was based upon Willis' obvious misidentification of him. The fact that (1) Richardson admitted his role and (2) Willis' identifi-

cation fit Richardson made Masters' case compelling. Drume's admission that Drume was the Chief of Security and Masters wasn't involved further buttressed this evidence. Willis himself corroborated Richardson's role and Drume's involvement in other gang matters on his behalf.

It was only after the heart of Masters' case had been excluded and the severance motion had been denied that the Masters defense was forced to join the Woodard defense which proffered the utterly unavailing argument that the Crips, rather than the BGF, were responsible for the murder of Sergeant Burchfield. This defense never really had the slightest chance of success.

3. Significant Cumulative Prejudice

By any standard, the cumulative prejudice due to the errors and State action was massive. The defense had their hands tied behind their back for the first two years of the case, and well into the preliminary hearing. *The State failed to turn over exculpatory information relating both to the BGF and to the second tier– the site of the Burchfield murder– until it had its case against Masters under lock and key.* Even so, and notwithstanding the State's intractable behavior, a lineup was sought at the moment the defense learned of the potential misidentification.

The benefits of a lineup at this point in time were inestimable. Given Willis' inability to describe Masters and the fact that he never knew him by his actual name, a lineup could have resolved the case in Masters'

favor. After this point in time — once Willis viewed the three defendants — a lineup would not be of any use. Willis knew who Johnson and Woodard were. He identified them first at the preliminary hearing. (PHRT 8409-10) Thus, the moment Willis viewed the three defendants, he would then know who Masters was – the one who was not Woodard or Johnson – even if he could not have identified him before. Because Willis would have then committed himself to the identification, he would be "reluctant to recede from such a position, even if in error, at later proceedings in court." *Evans v. Superior Court*, *supra*, 11 Cal.3d at 621.

The prejudice was exacerbated by denying Masters the opportunity to recall Willis. After Richardson appeared and his statements — in which he took responsibility for much of what had been pinned by Willis on Masters — were disclosed, Masters sought to recall Willis to show him Richardson and have him identify Richardson as the person he confused with Masters. (PHRT 14840-43) This request was also denied.

Once Willis — who was himself responsible for the Burchfield murder and, thus, entirely beholden to the State for his protection and immunity from prosecution — was committed to his misidentification of Masters, which by the end of the preliminary examination neatly fit the prosecution's theory of the case, no amount of time or defense preparation could have cured the error. In this way, the magistrate's actions both

closed a window of opportunity and "locked in" the prejudice, which thereafter affected the entire trial, up to and including the verdict.

The prejudicial effect of these errors – the denial of a lineup and the denial of an opportunity to question Willis regarding Richardson at the preliminary hearing – is sufficient to warrant reversal under *People v. Watson*. Given that fact that Willis identified someone grossly different than Masters, there is more than a "reasonable probability" that he would have identified someone fitting his own description, i.e., Richardson or someone looking like Richardson, and thus not Masters. Had this been allowed – had probabilities been allowed to run their course – Masters would be a free man today.

As great as this prejudice may be, the total prejudice is even greater since Masters was also denied opportunities in the trial court. While the record does not indicate the totality of Masters' misidentification case, we know that, at a minimum, appellant had at least ten witnesses he could have called:

1. Jeanne Ballatore, concerning Harold Richardson's admissions against interest in her presence;

2. Lieutenant Spangler, concerning Richardson's admissions against interest in his presence;

3. Broderick Adams, concerning Harold Richardson's admissions against interest in his presence;

4. Deputy District Attorney Berberian, concerning Charles Drume's admissions against interest in his presence;

5. District Attorney Investigator David Gasser, concerning Charles Drume's admissions against interest in his presence;

6. Captain Everly, concerning Charles Drume's admissions against interest in his presence;

7. Lieutenant Watkins, concerning Charles Drume's admissions against interest in his presence;

8. Barry Simon, concerning Charles Drume's admissions against interest in his presence;

9. Lieutenant Amos, concerning Charles Drume's coming forward in June, 1986, to stop the murder of another guard;

10. James Lawless, concerning Richard Ingram's admissions against interest in his presence.

Masters also had three letters he could introduce in evidence: Richardson's inculpatory letters to Jeanne Ballatore and Drume's letter to the Marin County Clerk's Office. Presumably San Quentin's records would also document Drume's June, 1986 meeting with Lieutenant Amos.[48]

---

[48] The defense also indicated that had it been allowed to introduce Richardson's statements it would have submitted additional evidence. (RT 15773) Thus, the defense "would have brought Mr. Richardson in physically and presented him before the jury." (*Id.*)
(continued...)

Since Masters was not allowed to present his defense, we do not know which of the ten witnesses he would have called. Like the State's witnesses, Richardson, Drume, and Ingram[49] differ in their details. This should not be surprising since each of them were locked up, and for the most part each inmate touched "different parts of the elephant." Differences between the admissions also constitutes evidence of veracity, since it tends to prove that the three inmates were not working together. Defense counsel could have brought out all of these matters and placed the admissions into a larger whole, emphasizing Masters' non-involvement, or utilized the admissions more selectively. Such choices, in any case, would have been entirely a matter of trial strategy.

Whatever choices defense counsel might have made, the net effect of the admissions would have been compelling. Viewed in light of Willis'

---

[48](...continued)
The defense would have also "presented evidence that on August 22, 1988, Harold Richardson came into court and he refused to be weighed and measured." (RT 15772-73)

[49] While the trial court never specifically excluded Lawless' testimony concerning Ingram's admissions, the trial court's rulings were tantamount to an exclusion of the Ingram evidence. Thus, the Lawless evidence (pertaining to inmate Ingram) was no more admissible than the evidence pertaining to Richardson and Drume. Denying the motion for severance founded upon the evidence pertaining to Richardson, Drume, and Ingram effectively constituted a ruling excluding the Lawless evidence. In any case, the Lawless evidence gained its meaning from the Richardson and Drume evidence. Once the court excluded the Richardson and Drume evidence, the Lawless evidence would have had only limited probative value.

inability to name or describe Masters, and the fact that his description of defendant fit Richardson, Richardson's admission provided dramatic evidence that the State had the wrong man.

The details of the Richardson, Drume, and Ingram admissions, moreover, tended to nullify the State's entire case against Masters. Its case was based on the claim (1) that Masters fashioned the knife, (2) that he voted for and planned the hit, and (3) that he was Chief of Security. Richardson's statements undercut the first two of these elements. Drume's admissions undercut the third.

Willis testified that Masters insisted on sharpening the knife. (RT 12760-61, 12763) Richardson, by contrast, stated that Ingram sharpened the knife under Richardson's direction.

> CARRUTHERS C20634 cut the bed frame and sent it down to RICHARDSON to sharpen. RICHARDSON sent the metal to INGRAM B95647 to cut. (CT 1909)

Both views can't be true. If Ingram sharpened the knife under Richardson's direction, then Masters didn't sharpen the knife.

More than anything, the State's case against Masters was based on the claims that he both drew up the plans and voted for the hit. (CT 4520-23; RT 13726, 16045, 16047-52, 16054) Thus, Willis testified that one person, Masters, drew up diagrams and the hit list. (RT 12732-34, 12740, 12891, 13479) According to Ballatore, however, Richardson said,

"[t]he hit was planned by WILLIS C71184, JOHNSON C71184, WOODARD C21690, and himself on the Carson Section yard." Both views can't be true. If Masters diagramed the attack, and prepared the hit list, one would expect him to be named as a planner, if not the principal planner.

In the same way, Drume's admission that he was Chief of Security tended to nullify the third leg of the State's case against Masters. Willis clearly implied that there was only one Chief of Security. If Drume was the Chief of Security, then Masters was not Chief of Security.

Even more significantly, Drume denied Masters' involvement. (CT 5046-47) Had Masters played the key roles attributed to him by the State, Drume would have known about Masters involvement. Coupled with the mis-description evidence, the fact that co-conspirators Richardson and Ingram make no reference to Masters in their description of the events, and the fact that Willis's testimony tended to corroborate the Richardson, Ingram, and Drume admissions, a vivid picture emerges of the prison murder without Masters as a co-conspirator.

The jury was not allowed to see this vivid picture. Denying Masters his right to put on his version of the case also allowed the trial court to deny Masters' motion for severance of his trial from Woodard's, and thus, more than likely provided the final nail in the coffin of Masters' right to put on his version of the case. Unable to defend himself, Masters was forced

to go to trial with a BGF Lieutenant at a time when San Quentin offered almost no protection from gang coercion. This left Masters, a BGF foot soldier, with a constitutionally unacceptable option: joining Woodard's unconvincing defense that the Crips did it.

The trial court's denial of the severance motion also tended to narrow available options. Having allowed a joint trial to go forward, no trial court would have been inclined to grant a mistrial in the middle of trial to allow the Richardson, Drume, and Ingram evidence.

Thus, the cumulative effect of the errors denying appellant his opportunity to put on his version of the case – the denial of a crucial lineup, the denial of an opportunity to cross-examine Willis about Richardson at the preliminary hearing, the exclusion of the Richardson and Drume admissions, and the denial of the motion for a severance – satisfies and exceeds the *People v. Watson* standard. There is far more than a "reasonable probability" that these errors affected the outcome.

D. CONCLUSION

Under any standard of prejudice, reversal is required.

VI. THE STATE'S FAILURE TO DISCLOSE EVIDENCE OF EVANS' BIAS AND THE TRIAL COURT'S RULING PREVENTING MASTERS FROM PRESENTING THIS EVIDENCE REQUIRE REVERSAL

The testimony of convicted felon Bobby Evans was crucial to the State's case because it provided the needed corroboration for much of Rufus Willis' testimony about the planning and execution of the hit on Sergeant Burchfield. Evans' stature was bolstered by the trial court's finding that he was an expert in BGF activities. (RT 13711) Bobby Evans' testimony turned the tide in the State's favor. (People's Exhibit 298 at p. 2) The importance of his testimony was strikingly emphasized when the jury, on the 9th day of deliberations, returned its verdicts shortly after a readback of Evans' testimony. (CT 5124-25)[50]

What the jury did not know, however, because it was not disclosed to the defense, was that Evans had a deal with the state to avoid prison time, and for release from jail after he testified. This became abundantly clear when Evans was released after the close of testimony. When the defense discovered this after the jury had begun deliberations, a motion was filed to reopen evidence to alert the jury to the now-obvious deal (still denied by Evans and the State) and Evans' false testimony. The court's

---

[50] The read-back of Evans' testimony, begun on the previous court-day (CT 5120), resumed on the morning of January 8, 1990, and was completed at 2:00 p.m. The record does not reflect the precise time that the jury reached its verdicts; court was convened for the reading of them at 4:30 p.m. (CT 5124)

failure to grant the motion was the final link in the chain of errors leading to Masters' conviction.

A. EVANS' IMPORTANCE TO THE PROSECUTION'S CASE

Evans' testimony, as the trial court noted when asked to reopen during deliberations was, for the prosecution,

> fairly critical, because Bobby Evans' testimony obviously at least is playing a part in the thinking of this jury, from their question, or the read-back they just asked for. And it was his testimony . . . that each defendant in both cases spoke to him and admitted their participation, admitted each participation. (RT 16912-13)

Indeed, as noted above, Evans' critical role in the jury's decision-making was confirmed by the fact that the jurors requested a read-back of his testimony and then promptly returned the guilty verdict against Masters. (CT 5124)

The admissions Evans claimed to have heard were damning. He testified that Masters sat on the BGF commission and had voted in favor of the plan to murder Sergeant Burchfield. (RT 13726) Evans also claimed that Woodard admitted giving the order for the hit, (RT 13725-26) and that Evans had received notes from Johnson in which Johnson claimed he killed Sergeant Burchfield. (RT 13764-65) Evans, thus, was the principal source of corroboration for accomplice Rufus Willis' testimony.

B. FACTUAL BACKGROUND

CDC Special Service Unit Agent James Hahn's part in the Burchfield investigation has already been mentioned. While Hahn played a key role in developing the State's principal informants, he elected not to report exculpatory information until he forgot what had been told. (PHRT 10061, 10065, 10068, 10129-31) He played a similar role with Bobby Evans.

1. Hahn's Methods

Hahn's methods could be brutal.[51] When Evans was paroled from San Quentin in 1986, Hahn welcomed him home by kicking down the door at Evans' mother's place, on Bobby Evans' first night home, just to remind Evans that Hahn owned him. (RT 13800, 13865) Then, when Evans was again released from San Quentin two years later, Hahn elicited information from Evans as to BGF member Roy Smith. (RT 13798, 13870) *Significantly, Evans did not say anything about the Burchfield killing.* (RT 13799)

---

[51] In the *Price v. Woodford* habeas proceeding a veteran Department of Justice special agent also reported an incident in which James Hahn committed perjury to cover up an undisclosed debriefing with a witness in a death penalty case heard by this Court. *People v. Price* (F069684, "on exhaustion," USDC SF no. C930277 CAL). Our habeas petition will document Hahn's continuing unlawful activities in this case.

Bobby Evans has also graduated to his own notoriety. A June 29, 1998 *Sacramento Bee* editorial (at page 84) credits Evans with a perjury threatening the dismissal of eighty-eight cases in which his testimony was a factor.

2. Evans' Parole Violation

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) (*See* Pen. Code § 3057, subd. (a)) 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 terms were supposed to run concurrent. (RT 13671, 13808, 16945-46) At this point agent Hahn met with Evans. (RT 13863-64)

For the first time, Evans 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) Evans testified that he wasn't concerned about the possibility that he might have to do extra time on the parole violations. (RT 13858, 13863)

3. Evans' False Testimony

Testifying at trial without a grant of immunity, *Evans claimed that he had not been promised anything and he expected no reduction in his*

sentence. (RT 13672) *He had no anticipation of receiving anything for his testimony*. (RT 13673) Hahn had simply told him that he would assist in his protection and help him "down the line." (RT 13799, 13832, 13931)

Evans' veracity was corroborated by State documentation. During discovery the prosecution furnished defense counsel with a memorandum from agent Hahn in which he denied that any promises were made and noted that Evans' safety would be "taken care of by the Department of Corrections." (Masters' Exhibit 1230)

Evans' original sentencing date on the attempted robbery conviction was set for July 27, 1989. (RT 13809) On that date, however, sentencing was postponed until September. (RT 13809) Evans denied that agent Hahn or anyone from CDC had spoken to the judge. (RT 13809) The September sentencing was postponed until October. (RT 13809-10, 13884) Once again, Evans denied that agent Hahn or CDC had spoken to the judge. (RT 13810)

4. Defense Discovery of Evans' False Testimony

(a) Hahn had promised postponements

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), 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)

(b) Evans firmly believed that his two state prison sentences would be "taken care of"

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 Evans in fact believed he would *not* serve any time in prison:

> Q. [by the court] Mr. Costain, on the morning of July 27th when you had a conversation with Mr. Evans, was that your first conversation with him?
>
> A. [by Mr. Costain] Yes, it was.
>
> Q. Did you discuss with him what his expectations were with regard to state prison?
>
> A. . . . [¶] He expressed – I don't remember his exact words – but that I'm not worried about that. That will get taken care of, speaking of the Morrissey time.[52]
>
> I got from him the understanding that should Judge Golde sentence him to sixteen months state prison that he felt that that would get taken care of, too.
>
> . . . . .
>
> Q. Anything more?

---

52 An apparent reference to the parole revocation hearing mandated by *Morrissey v. Brewer* (1972) 408 U.S. 471, 480-489.

A. No, no. Except – except he was – he was very clear to me I think that he felt that his Morrissey time was going to be taken care of by the Department of Corrections.

Q. So, the fact that that was going to be taken care of was simply part of the 16-month sentence?

A. No, no. I got the strong impression from him that he was going to modify – he felt the Morrissey time would be modified down.

Q. Did he use any particular words?

A. He said, "I'm not worried." I told him you really are going to be in danger going to prison. He said, "I know." You're going to do Morrissey time. He said, "Do not worry about that. That's going to be taken care of," something to that effect. (Sealed RT of 1/5/90 at 2-4)

(c) Hahn "took care of" the two state prison sentences

Hahn "took care of" Evans, as promised. Thus, when Evans came up for sentencing in November, 1989, Hahn contacted Alameda County Deputy District Attorney William Denny (the deputy in charge of Evans' prosecution) to see if Evans could be released with credit for time served. (RT 16942) Denny said no. (*Id.*) When Evans' sentencing came up again on December 13, 1989, Alameda County Deputy District Attorney Giuntini, who specialized in BGF prosecutions, personally contacted Denny. Giuntini told Denny that he knew Hahn and said that he was involved on his account. (RT 16948) Thus, Giuntini told Denny to be sure that Evans was released on his 16-month sentence with credit for time served. (RT 16947) That very day, Evans' sentenced was modified. His

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

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. By the trial court's calculation, Evans' 16-month sentence was reduced by four months. (RT 16891)

Hahn's work, however, still wasn't 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 CDC requesting a rescission of the parole hold on Bobby Evans. (People's Exhibit 268) The Memo noted that Evans still had five and one half months to serve on his parole violation[53]. (*Id.*) Hahn, however, praised Evans for his crucial work in the Masters' trial:

> EVANS' testimony obviously caused damage to the defense and the trial appeared to have turned in favor of the prosecution. In fact, it may have been the crucial factor in the outcome of the trial. (*Id.* at 2)

Noting his concerns about safety, Hahn "requested that EVANS' parole hold be rescinded and EVANS be released on parole for the remaining

---

[53] Under Penal Code section 3057, many violators do not receive work credits to reduce state prison time. Bobby Evans apparently knew this. (RT 13858)

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)

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.

5. The Trial Court's Three Rulings

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 found that Evans' testimony should have alerted the defense to the possibility of an *undisclosed* promise to postpone the sentencing hearing. (RT 17090).

> . . . . defendants on their own don't have their sentencing continued without a motion from counsel. And since Hahn said that he would try to help Evans serve his time locally, the only conclusion one can come to is that the prosecution was continuing the sentence so that . . . Evans' security concerns could be satisfied. (RT 17091)

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)

With respect to whether there was evidence that Hahn played a role in modifying the prison sentence, incredibly, the trial court found that "Hahn had nothing to do with the ultimate sentence, nothing." (RT 17609)

6. The Trial Court's Findings Were Contradicted by Undisputed Facts

The trial court's three findings were in error. To begin with, the findings were based upon false factual premises. The trial court finding that Evans' testimony should have alerted the defense to the possibility of an *undisclosed* promise to postpone the sentencing hearing was premised upon the finding that "Hahn said that he would try to help Evans serve his time locally." (RT 17091) Hahn, however, did not testify to that until after Evans' release, *i.e.,* after the close of evidence. Evans himself had not testified that Hahn said that he would try to help Evans serve his time locally.

The trial court's finding that its *in camera* meeting with Mr. Costain had revealed "nothing new" and "nothing exculpatory" (RT 17046) was also plainly incorrect. Costain testified that Evans believed that his two prison sentences would "be taken care of." He firmly believed that his one year state prison sentence on the parole violation "was going to be taken care of by the Department of Corrections" and that his 16-month

state prison sentence would also be "taken care of." (Sealed RT of 1/5/90 at 2-4) This evidence was both new and exculpatory. Evans not only testified that absolutely no promises had been made, he also testified that he expected no reduction in his sentence. (RT 13672) He had no anticipation of receiving anything for his testimony. (RT 13673) As far as he was concerned, 16 months on the crime was a solid figure. (RT 13808) Being placed on felony probation was not a possibility. (*Id.*) He also wasn't concerned about the fact that he would have to do another year on the violation. (RT 13863) These were all blatant lies.

Finally, the trial court's finding that "Hahn had nothing to do with the ultimate sentence" (RT 17609) *was contradicted by direct evidence. Thus, it is undisputed in the record that Hahn's efforts secured Evans a five month reduction in his one year state prison term for violating his parole.* (People's Exhibit 268; RT 16901, 16951, 17070) The record also provides strong evidence that Hahn directly interceded with Evans' prosecutor, and indirectly interceded through Deputy District Attorney Giuntini. (RT 16942, 16947-48) These efforts culminated in Giuntini's December 13, 1989 request that Evans be released early with credit for time served. (*Id.*) That same day, Evans' sentenced was modified. His 16-month state prison sentence became a felony probation and Evans was released with credit for time served. (RT 16947) Up until this request by Giuntini felony probation was not even a possibility. (RT 18308)

Since the trial court's three findings and its denial of the defense request to reopen were based upon false factual premises, the decision below cannot stand. As we will also point out, the factually-flawed decision was also contrary to law.

C. THE PROSECUTOR VIOLATED DUE PROCESS BY FAILING TO DISCLOSE EVANS' LIES, WHAT EVANS ANTICIPATED FOR HIS TESTIMONY, AND THE TRUE NATURE OF THE UNDERSTANDING BETWEEN EVANS AND HAHN

At issue are Evans' lies, three non-disclosures by the State, and the right to re-open to cure tide-turning prejudice. First, Evans explicitly testified that because he had provided information on several BGF members, he was afraid he would be killed should he be sent back to state prison after his arrest in May of 1989. Evans then contacted agent Hahn and gave information incriminating Masters in the Burchfield killing. At trial, Evans denied receiving any type of benefits for this testimony. In truth, however, as the prosecution should at all times have known, agent Hahn had promised Evans he would postpone sentencing until a commitment to state prison could be avoided. This was an inducement to testify favorably for the prosecution no less than any other. *People v. Phillips* (1985) 41 Cal.3d 29, 46, *citing Giglio v. United States* (1972) 405 U.S. 150, 154-155.

Second, given Evans' fear for his life, agent Hahn's promises were critical to the jury's evaluation of Evans' testimony. As we point out below, the prosecution's failure to disclose the inducements that had been

offered Evans to testify, and its failure to correct Evans' false trial testimony regarding these inducements, violated Masters' federal and state right to due process and a fair trial.

Third, these same considerations apply with even greater force to Evans' anticipation that both of his sentences would be modified after he testified. As we point out below, that also should have been disclosed by the prosecution, and the State's failure to correct Evans' false testimony that he had no such anticipations violated Masters' federal and state right to due process and a fair trial.

These same considerations apply with overwhelming force to Hahn's intercessions to obtain Evans' early release. Evans' prosecutor William Denny admitted that there was a policy in his office "to make inference or implication that we'll make a deal, but not really word it specifically to a defendant or his counsel until after . . . the requested testimony of that witness." (RT 16987) Even assuming *arguendo* that Evans was not explicitly promised an early release, Evans' firm belief that such a deal would happen, Hahn's efforts to make this happen, and the ultimate outcome support a belief that Evans was encouraged to believe that such a deal would happen. As we point out below, the State's failure to correct Evans' false testimony on this subject and its failure to disclose this implied deal violated Masters' federal and state right to due process and a fair trial.

1. Due Process Mandates Prosecutorial Disclosure of Evidence Favorable to the Defense

The prosecution has a duty under the Fourteenth Amendment's Due Process Clause to disclose significant evidence to a criminal defendant. *United States v. Bagley* (1985) 473 U.S. 667, 674-678. Such evidence must be disclosed if it is both favorable to the defendant and material on either guilt or punishment. Evidence is "favorable" if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. *Id.* at 676. Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different." *Id.* at 682.

2. Due Process Mandates Disclosure of Evidence Bearing on the Credibility of a Prosecution Witness

Thes disclosure of evidence, including evidence relating to the credibility of a key prosecution witness, is required by the federal and the state constitutional guarantees of due process. *Brady v. Maryland* (1963) 373 U.S. 83, 87; *Giglio v. United States*, *supra*, 405 U.S. 150, 154; *People v. Phillips*, *supra*, 41 Cal.3d 29, 46. The duty exists regardless of whether the defense has made a request for the evidence. *United States v. Agurs*, (1976) 427 U.S. 97, 107. Suppression of such evidence violates due process regardless of the good faith or bad faith of the prosecution.

Brady v. Maryland, *supra*, 373 U.S. at 87; *Giglio v. United States*, *supra*, 405 U.S. at 153-154.

3. Evidence that a Witness May Be Currying the State's Favor Must Be Disclosed

The duty to disclose evidence relating to a witness' credibility manifestly includes

> any promises or inducements that have been made to obtain the witness' testimony. . . . Since a witness' credibility depends heavily on his motives for testifying, the prosecution must disclose to the defense and jury any inducements made to a prosecution witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements.
>
> *People v. Phillips*, *supra*, 41 Cal.3d at 46.

"It is a *Brady* violation to fail to disclose evidence that a witness is testifying solely to curry the government's favor in his own prosecution." *United States v. Williams* (8 Cir. 1999) 194 F.3d 886, 889 (*cert. denied*, 529 U.S. 1078.) In *Bagley v. Lumpkin* (9 Cir. 1986) 798 F.2d 1297, 1301-1302, the Ninth Circuit held that evidence of *any* promised benefit would "challenge the veracity" of the testimony of key witnesses and enable the defense to show the witnesses perjured themselves in denying the existence of the inducements. *See also*, *United States v. Abel* (1984) 469 U.S. 45 (a successful showing of bias on the part of a witness would

have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony).

4. The Prosecution Must Learn State Evidence Favorable to the Defense

As a representative of the government, the prosecution's "interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickler v. Greene* (1999) 527 U.S. 263, 281, quoting *Berger v. United States* (1935) 295 U.S. 78, 88. The prosecution's interest in ensuring that justice shall be done requires that it discover (as well as disclose) whether any promises of leniency were made to key witnesses. Intentional ignorance of such promises fails to satisfy the prosecution's duty.

> Moreover, the [*Brady*] rule encompasses evidence "known only to police investigators and not to the prosecutor." at 438. In order to comply with *Brady*, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police."
>
> *Strickler v. Greene*, *supra*, 527 U.S. at 280-281 (quoting *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438).

5. The Implied Understanding Needed to Be Disclosed

Evans clearly expected benefits from the State. Hahn had promised him sentencing postponements. Evans was also clearly of the belief that an implicit (and possibly explicit) understanding existed that his two

state prison sentences would be "taken care of" after his trial testimony had concluded. The fact that such an agreement may have been inferred or implied doesn't mean it can be lawfully concealed. It was the policy of the Alameda District Attorney to encourage such implied understandings. (RT 16987) Such winking arrangements are far more pernicious than explicit agreements since they encourage the witness to help the prosecution "to curry the government's favor . . . to win the implied deal." *United States v. Williams* (8 Cir. 1999) 194 F.3d 886, 889 (*cert. denied*, 529 U.S. 1078).

The fact that Hahn was an agent with the Department of Corrections, Special Services Unit, as opposed to being a District Attorney Investigator, is irrelevant.

> A contrary holding would enable the prosecutor "to avoid disclosure of evidence by the simple expedient of leaving relevant evidence in the hands of another agency while utilizing his access to it in preparing his case for trial," [citation]. [citations omitted]
>
> *In re Brown* (1998) 17 Cal.4th 873, 879 and n.3.

"Moreover, 'the duty to provide discovery is not limited to the time before trial; discovery is an ongoing responsibility, which extends throughout the duration of the trial and even after conviction. [citations]'" *In re Pratt* (1999) 69 Cal.App.4th 1294, 1312. The prosecution's failure to discover and disclose the existence of its promises to Evans, and the inferred agreement that his state prison sentences "would be taken care

of" were inexcusable violations of *Brady* which requires reversal of the conviction. *Kyles v. Whitley*, *supra*, 514 U.S. at 439 ; *United States v. Giglio*, *supra*, 405 U.S. at 154.

The failure to disclose evidence relating to a witness' motivation remains a *Brady* violation, even if there was other evidence admitted which called into question the witness' credibility. Evidence of a promise in exchange for testimony cannot be deemed cumulative and must be admitted. The materiality of such impeachment evidence is well-established, even when other impeachment evidence is available to the defense. *United States v. O'Connor* (8 Cir. 1995) 64 F.3d 355, 359 (citing *Napue v. Illinois* (1959) 360 U.S. 264, 270).

> The testimony here did not merely reinforce a fact that the jury already knew; the truth [regarding a promise of leniency] would have introduced a new source of potential bias. *See United States v. Sanfilippo*, 564 F.2d 176, 178 (5 Cir. 1977) ("The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony.").
>
> *Brown v. Wainright* (11 Cir. 1986) 785 F.2d 1457, 1466.

6. Evans' Lies Needed to Be Disclosed

Evans' attorney, Costain, made it clear that Bobby Evans expected benefits for his testimony. This was directly contrary to Bobby Evans' testimony, and thus exculpatory. Evans' lies therefore should have been disclosed to the defense under case law and the Constitution. The Ninth

Circuit has emphasized that where the prosecution witness lies at trial in order to conceal bias and prejudice "it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial." *Bagley v. Lumpkin*, *supra*, 798 F.2d at 1301.

This is precisely what happened here. Evans lied at appellant's trial claiming no promises or expectations of leniency. He also lied regarding the sentencing continuances. Appellant had a constitutional right to the exculpatory evidence regarding Evans' expectations of leniency. The fact that Evans lied on the stand regarding those expectations makes the undisclosed information all the more exculpatory since it shows both that Evans was beholden to the prosecution and was willing to conceal it even if it meant perjuring himself.

7. Placing the Responsibility on the Defense to Ferret out Hahn's and Evans' Lies Was Error

The trial judge, in ruling that Evans' testimony should have alerted the defense to the possibility of an *undisclosed* promise to postpone the sentencing hearing, turned her back on the case law which defines the prosecution's constitutionally mandated duty to disclose in absolute terms. The court ruled that there was no discovery violation here because the defense had some sort of obligation to piece together a jigsaw puzzle from Evans' in-trial testimony and Hahn's disclosed memoranda and figure out for themselves that Hahn had made a promise to Evans –

despite the explicit representations to the contrary in Evans' trial testimony and Hahn's disclosed memoranda.[54] (RT 17090-91)

As above noted (*supra* at 174) the trial court's ruling that the defense had been alerted was premised upon the finding that "Hahn said that he would try to help Evans serve his time locally." (RT 17091) Since Hahn didn't te not so testify until *after* the close of evidence, however, it could not alert the defense to anything. (*Supra* at 174)

The court's legal premise that the defense had some sort of obligation to piece together a jigsaw puzzle from Evans' in-trial testimony was also absolutely incorrect as well as fundamentally unfair. No case law, statute, or constitutional provision imposes on the defendant a duty

---

[54] For example, the trial court declared that since Evans testified that he had telephoned Hahn and since Evans' sentencing was continued and Hahn had (in disclosed documents) expressed a concern for Evans' safety, and since it was common knowledge among attorneys that defendants don't have their sentencing continued on their own, "the only conclusion one can come to is that the prosecution was continuing the sentencing." (RT 17091)

Evans, however, had an attorney, and his attorney could have sought and obtained a continuance for a variety of reasons which might have nothing to do with a deal, or which were not based on a specific deal. Indeed, the record establishes that Evans' attorney did seek a sentencing postponement. (RT 16951) Masters' counsel themselves assumed that Evans was trying to drag out his sentencing. (RT 16880) Such efforts, however, do not suggest or imply that a deal has been made.

Given Evans' testimony that absolutely no promises were made, the defense had the right to assume the truth of this testimony, since he was the State's witness.

to ferret out for himself promises that the prosecution might have made but has denied. The only duty, and an unconditional one at that, is on the prosecution, and for good reason. The prosecution knows whether promises or representations have been made (or implied). If so, they must be disclosed; if the prosecution or its witness denies any such promises, the defense must be able to rely on that representation. To cast onto the defense a parallel duty to sniff out falsities in the discovery by cross-comparing them with snippets of testimony here and there is absurd. First, it improperly shifts to the defendant's shoulders a duty the Constitution imposes on the prosecution. Second, it creates a haphazard rule: if the defense can put the pieces together, fine; if not, then material evidence goes undisclosed. Third, it requires the defense to *presume* the prosecution's constitutionally mandated disclosure is false. Fourth, it invites exactly the kind of semantic game-playing by the prosecution that the *Brady* rule forbids.

In *People v. Phillips*, *supra*, 41 Cal.3d 29, this Court was critical of a trial court's failure to allow the defense to present evidence regarding an agreement with a prosecution witness which was not in the form of a direct promise of leniency, where instead the witness had been given a rather nebulous reassurance: " 'have faith and trust' in her [attorney] and testify". *Id.* at 46. This court found that where there have been discussions of leniency, and the evidence regarding any such agreement is in

conflict, such conflict is for the jury to resolve. *Id.* at 47. Citing *People v. Westmoreland* (1976) 58 Cal.App.3d 32, 47, this Court sought to avoid due process violations which might otherwise be likely to occur.

> To hold otherwise would lead to post-trial charges and countercharges *and, what is worse, could pave the way to the type of double talk which ultimately could lead to the circumvention of the disclosure rules which have evolved to insure fair trial to all persons accused of crime.*
>
> *People v. Phillips*, *supra*, 41 Cal.3d at 47 (emphasis in original).

Therefore, *Phillips* says whenever the possibility arises that offers of leniency by the government were exchanged for favorable testimony, and there is a conflict in the evidence on this issue, " 'it is up to the jury to resolve the conflict and then to judge the credibility of the prosecution witness accordingly.' " 41 Cal.3d at 47, quoting with approval *People v. Westmoreland* (1976) 58 Cal.App.3d 32, at 47. "What matters here is not how the jury might have resolved these issues; what matters is that they were never given the opportunity." *People v. Morris* (1988) 46 Cal.3d 1, 31.

The duty to disclose, and the duty to present the issue to the jury, is not dependent on there being an explicit promise to the witness as a trigger for this due process protection. "While it is clear that an explicit agreement would have to be disclosed because of its effect on [the witness'] credibility, it is equally clear that facts which imply an agreement

would also bear on [his] credibility and would have to be disclosed." *United States v. Shaffer* (9 Cir. 1986) 789 F.2d 682, 690-691.

8. Evans' Belief that He Would Receive Benefits Needed to be Disclosed

Evans believed he would be "taken care of." This was both contrary to Evans' testimony and alone sufficient to require disclosure to the jury. Even if no promises had in fact been made, and even if there was no implied agreement with Hahn or the district attorney, it was critical for the jury to know if Evans *believed* he was going to receive any benefits from the State in exchange for his testimony. In other words, if Evans honestly believed he was going to receive benefits, he had a compelling motive to lie, even if unbeknownst to Evans his belief was unfounded. *Cf. In re Martin* (1987) 44 Cal.3d 1, 50-51 (in determining if a prosecutor's misconduct has caused a defense witness to refuse to testify, proper inquiry is into the witness' perception even where "the prosecution committed no misconduct aimed at [the witness] specifically."). As it turned out, moreover, Evans' beliefs were realized. He was released a few days after the close of testimony. (RT 16879-80)

> It is a constitution we deal with, not semantics. "The thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony" . . . *Smith v. Kemp*, 715 F.2d 1459, 1467 (11 Cir. [1983]), *cert denied* [citation omitted], which testimony "could . . . in any reasonable likelihood have affected the judg-

> ment of the jury." *Giglio*, 405 U.S. at 154, quoting *Napue v. Illinois*, 360 U.S. 264, . . . (1959).
>
> *Brown v. Wainright*, *supra*, 785 F.2d at 1465.

The instant case is not one in which disclosure was rendered unnecessary by the discussions being "too ambiguous, too loose or of too marginal a benefit to the witness to count." *Tarver v. Hopper* (11 Cir. 1999) 169 F.3d 710, 717. Indeed, even facts which imply an agreement also bear on the witness's credibility and must be disclosed. *United States v. Shaffer*, *supra*, 789 F.2d at 690. The trial court's refusal to reopen the case to allow the jurors to hear the evidence regarding the promises made to Evans, and his willingness to perjure himself regarding these anticipated benefits (which he actually received while the jurors were still deliberating) deprived the jurors of critical evidence which had a "reasonable likelihood of affect[ing] the judgment of the jury." *Brown, supra*, 785 F.2d at 1465.

The constitution clearly places the duty on the *prosecution* to disclose material impeachment evidence, including promises made to a key witness. Instead of complying with that duty, the prosecution disclosed false or misleading representations denying any such promises, and failed to correct Evans' false and misleading testimony denying the promises. This constitutes a due process violation, and it cannot be mitigated by blaming the defense for not wising up sooner.

D. NOT ALLOWING THE DEFENSE TO REOPEN WAS AN ABUSE OF DISCRETION

Penal Code section 1093 provides an order of procedure by which trial courts conduct trials. Section 1094, however, provides that "for good reasons, and in the sound discretion of the Court, the order prescribed in the last section may be departed from."

The general rule under section 1094 is that the trial court has discretion to allow either side to reopen its case to present additional evidence, even where both sides have rested, argument has begun, or the jury has started deliberating. *See, e.g.*, *People v. Christensen* (1890) 85 Cal. 568, 570; *People v. Ross* (1884) 65 Cal. 104; *People v. Carter* (1957) 48 Cal.2d 737, 742-743. When the new evidence establishes that the evidence which the jury has already been presented with, and on which it will be deciding defendant's fate, is incorrect, the appellate courts have not hesitated to hold that a trial court abuses its discretion in failing to allow a criminal defendant to reopen his case and present the additional evidence. *See*, *e.g.*, *People v. Carter*, *supra*, 48 Cal.2d at 742-743; *People v. Newton* (1970) 8 Cal.App.3d 359, 382-84 (*cert. denied*, 481 U.S. 1070); *People v. Frohner* (1976) 65 Cal.App.3d 94, 110-111.

In determining whether the trial court abused its discretion in refusing Masters' request to reopen the case, the following factors must be considered:

> (1) the stage the proceedings had reached when the motion was made; (2) the defendant's diligence (or lack thereof); (3) the prospect that the jury would accord the new evidence undue emphasis; and (4) the significance of the evidence. [citations omitted]
>
> *People v. Funes* (1994) 23 Cal.App.4th 1506, 1520.

In *People v. Newton* the court held that the trial court abused its discretion in denying defendant's motion to reopen the case since defendant presented material evidence which established that evidence the prosecution had presented was incorrect. *Newton* was a murder case in which an eyewitness who identified the defendant as the shooter was bolstered by a pretrial statement to police that he got a clear look at defendant. During jury deliberations the defense obtained an original copy of the witness's statement to police in which he told police that he did *not* get a clear look at defendant. The trial court denied defendant's prompt motion to reopen the case. Despite noting the inconvenience entailed by reopening during jury deliberations, the Court of Appeal held that the trial court had abused its discretion in refusing to allow defendant to reopen the case:

> Reopening – and its conceivably attendant consequences in terms of further proof, argument and instructions – would have been inconvenient because of the stage of the proceedings at which defendant moved, but it was neither impossible nor unreasonable. . . . Whether the new evidence . . . was vital and material is arguable either way. Still, [the witness] was the only eyewitness who positively

> identified defendant as [the assailant]. Whether he 'did' or 'didn't' see the assailant's face was material. . . . Under all the circumstances, we conclude that the trial court abused its discretion in denying defendant's motion to reopen the case.
>
> *People v. Newton*, *supra*, 8 Cal.App.3d at 384.

Under the *Fuenes and Newton* standards, the trial court's ruling in this case was an abuse of discretion. As in *Newton*, although reopening in this case would have been inconvenient because of the "attendant consequences in terms of further proof, argument and instructions," it was neither "impossible or unreasonable." Counsel for Masters, moreover, showed "diligence" by raising the issue as soon as it came to their attention. *People v. Funes, supra,* 23 Cal.App.4th at 1520. Since the jury had itself asked for a re-reading of the Evans testimony, "the prospect that the jury would accord the new evidence undue emphasis" was mitigated. *Id.* Indeed, reading back the Bobby Evans testimony without correcting it accorded the false testimony far too much emphasis. The jury rendered a guilty verdict shortly after completing the readback. As James Hahn himself told his superiors, Bobby Evans testimony turned the tide in favor of the prosecution. (People's Exhibit 298 at p. 2)

Thus, as in *Newton*, the excluded evidence in this case was of critical importance. Evans flatly denied promises and anticipated benefits for his testimony. As was made clear at the January, 1990 hearings, however, agent Hahn *had* promised to postpone Evans' sentencing. In

addition, Evans' testimony that he expected nothing in exchange for his testimony was patently false. In fact, Evans not only believed that his parole revocation time would "get taken care of," but he believed that should Judge Golde sentence him to sixteen months state prison on the attempted robbery, that would "get taken care of, too." (Sealed Tr. of 1/5/90 at 2-3) James Hahn "took care of" these matters. *Any rational jury presented with this testimony would have concluded that Evans had lied to them and his testimony would have been discounted.* Under this circumstance, the trial court's ruling precluding Masters from reopening his case to present this new evidence was an abuse of discretion and violated his right to a fair trial.

E. THE STATE MISCONDUCT AND JUDICIAL ERROR REQUIRE REVERSAL

Under the federal constitution, the prosecutor's failure to disclose exculpatory evidence requires reversal whenever that evidence is sufficiently "material in the sense that its suppression undermines confidence in the outcome of the trial." *United States v. Bagley, supra*, 473 U.S. at 682. The suppressed evidence is material if, in its absence, it does not appear that the defendant received a fair trial. *Id.* at 678.

This determination of materiality "is not a sufficiency of the evidence test." Such evidence is material and reversal is required if it is "show[n] that the favorable evidence could reasonably be taken to put the

whole case in such a different light as to undermine confidence in the verdict. *Kyles v. Whitley*, *supra*, 415 U.S. at 434-435. "[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." *Id. See also In re Brown*, *supra*, 17 Cal.4th at 886-887.

Where the credibility of a key prosecution witness is at issue, the failure to disclose evidence which casts doubt upon the witness' credibility constitutes reversible error. *See*, *e.g.*, *Reutter v. Solem* (8 Cir. 1989) 888 F.2d 578, 581-582; *Brown v. Wainwright*, *supra,* 785 F.2d 1457 (reversal of death sentence required because of the prosecution's failure to disclose the existence of an understanding with the key prosecution witness, and its subsequent presentation of false and misleading testimony denying that agreement); *Haber v. Wainwright* (11 Cir. 1985) 756 F.2d 1520, 1523. Where a key prosecution witness lies to conceal bias and prejudice "it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial." *Bagley v. Lumpkin*, *supra*, 798 F.2d at 1301. Moreover, even where the jury knows of a key witness immunity agreement, and thus his potential bias, concealment of the *extent* of the benefits extended undermines confidence in the outcome of the trial. *United States v. Shaffer*, *supra*, 789 F.2d at 690-691 (failure to disclose the full extent of benefits that could indicate the "tip of the iceberg" of a secret deal of leniency required reversal).

This case fully satisfies all the standards for reversal. Evans was a key prosecution witness. *Reuther v. Solem, supra*, 888 F.2d at 581-582. The prosecution failed to disclose the true nature of the understanding with the witness and the witness' subsequent presentation of false and misleading testimony about his expectations. *Brown v. Wainwright, supra*, 785 F.2d 1457. Evans lied to conceal the bias and prejudice. *Bagley v. Lumpkins, supra*, 798 F.2d at 1301. The full extent of the benefits received by Evans was not revealed. *United States v. Shaffer, supra*, 789 F.2d at 690-691. The jury's request for Evans' testimony to be re-read, moreover, shows that it placed great reliance on Evans' testimony. (CT 5108) Evans' testimony turned the tide. (People's Exhibit 298 at p. 2) Had the jury known that he lied to them, and had they known that he expected to be "taken care of" and was "taken care of," his testimony would have been discounted. Thus, the error necessarily undermines confidence in the outcome of this trial. *Bagley v. Lumpkin, supra*, 798 F.2d at 1301. Reversal is therefore required.

F. CUMULATIVE ERROR ALSO REQUIRES REVERSAL

Even assuming *arguendo* that the errors below associated with Bobby Evans' testimony do not by themselves require reversal, this is only the beginning of the inquiry. Reversal must still be required if the cumulative prejudice flowing from the errors below denied Jarvis Masters a fair trial. *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *People v.*

(Shawn) Hill (1998) 17 Cal.4th 800, 815. Appellant submits that this rule applies with special force in this case.

Masters was not allowed a crucial lineup to prove his innocence and was not allowed to put on his principal defense that he was not the person identified by Willis. (*See* p. 52, *supra.*) Willis' testimony by itself, however, was not sufficient to convict Masters. His testimony required corroboration. By providing that corroboration, Evans turned the tide in favor of the prosecution. (People's Exhibit 298 at p. 2) Denying Masters a lineup to prove his innocence at the outset, the opportunity to put on the heart of his case, and a fair opportunity to impeach the testimony of the State's principal corroborating witness, in combination, devastated Masters' ability to defend himself against the State's accusations. These cumulative errors denied Masters his right to a fair trial and require reversal.