IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COPY

In re

JARVIS J. MASTERS,

On Habeas Corpus.

CAPITAL CASE
S130495

Related Automatic Appeal No. S016883
Marin County Superior Court No. 10467

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

SUPREME COURT
FILED

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
RONALD S. MATTHIAS
Supervising Deputy Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
State Bar No. 104400
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1361
Fax: (415) 703-1234
Email: gerald.engler@doj.ca.gov
Attorneys for Respondent

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re **JARVIS J. MASTERS,** On Habeas Corpus.	**CAPITAL CASE** S130495 (Related Automatic Appeal No. S016883)

INTRODUCTION

On June 8, 1985, San Quentin Prison Correctional Sergeant Dean Burchfield was murdered as he walked along a cell block tier. Petitioner and two codefendants were charged and convicted of murder and conspiracy to commit murder with the special circumstance that Sergeant Burchfield was a peace officer killed in the performance of his duties. (Pen. Code, §§ 182, 187, 190.2, subd. (a)(7).) Petitioner's codefendants were sentenced to life without parole. On July 30, 1990, petitioner was sentenced to death. It took more than nine years until the record was certified on August 19, 1999, and briefing on direct appeal took another four years, with petitioner's reply brief being filed on November 24, 2003.

On January 7, 2005, more than 13 months after he filed his reply brief, petitioner filed a habeas corpus petition raising eight claims for relief. Since the petition was not filed within 180 days of the reply brief and is therefore not entitled to a presumption of timeliness (see Supreme Court Policies Regarding Cases Arising From Judgments of Death, Policy 3.1-1.1), the question arises whether the petition should be defaulted as untimely.[1] We will address this

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1. We note that petitioner's counsel was appointed to handle both the direct appeal and any habeas proceedings on January 21, 1993, making the date

issue first before turning to discussion of each claim.

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of the filing of the reply brief the trigger date for applying the presumption of timeliness. (See Policy 3.1-1.1.)

ARGUMENT

I.

CLAIMS I AND III-VII ARE UNTIMELY

Respondent believes that all of the claims should be defaulted as untimely with the exception of two claims: Claim II, which is a claim of factual innocence that may be raised at any time "regardless of delay" (*In re Clark* (1993) 5 Cal.4th 750, 796-797), and Claim VIII, which is not really a claim for relief at all, but rather is a request for discovery based on a speculative complaint that there may be an on-going discovery violation.

As to the remaining six claims, petitioner tacitly recognizes that these claims are not entitled to a presumption of timeliness by attempting to provide justification for their delay. (See Petition at 14-17.) As this Court stated in *Clark*, "It has long been required that a petitioner explain and justify any significant delay in seeking habeas corpus relief." (*Id.* at p. 765.) Petitioner's attempted justification is set forth in the declaration of counsel appearing as Exhibit 7 in his habeas exhibits. This declaration focuses primarily on the investigation relating to his Claim V, which alleges witness Johnny Hoze has recanted his penalty phase testimony that petitioner admitted he murdered San Quentin prisoner David Jackson.[2/]

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2. In addition to the Jackson/Hoze investigation, counsel's purported justification briefly alludes to two other factors: (1) "interviews of witnesses who had information concerning one of the State's principal witnesses and further efforts aimed at locating witnesses who could corroborate some of the information being provided by one of our other witnesses" and (2) interviews with "members of the jury and . . . work with a handwriting expert who is currently in the process of evaluating certain of the documents in evidence." (HC Ex. 7 at 36.) In reference to the first factor petitioner fails to identify any of these "witnesses" or explain why they could not have been interviewed earlier. Moreover, it is impossible to connect any of the allegations or exhibits in the petition to these belated interviews. As to the second, petitioner again fails to state why these steps could not have been taken earlier. In addition, he

Evidence relating to Jackson's murder was introduced at petitioner's penalty phase as an unadjudicated crime of violence. (See Pen. Code § 190.3, subd. (b).) Jackson was stabbed to death on a San Quentin exercise yard in February 1984. (See RT in S016883 [RT] 20180, 20194, 20233.) Appellant was among a group of five inmates congregated near Jackson immediately before Jackson staggered away from the group with a shank stuck in his neck – a wound that proved fatal. (RT 20192-20194, 20224, 20233, 20260.) While prison authorities were unable to determine who stabbed Jackson at the time of the crime, in 1986 witness Hoze told prison authorities that petitioner had admitted the stabbing. (RT 20403-20404, 20475-20477.) At trial, Hoze testified that petitioner repeatedly admitted the crime. (RT 20355-20367, 20409.)[3]

In counsel's declaration in support of the petition, he states that hundreds of hours of investigation were performed both before and after the lapse of the presumptive period of timeliness delving into the Jackson murder. (See Exh. HC-7 at 33-37;[4] see also Petition at 14-17.) This investigation included an attempt to locate and interview the inmates who were on the prison yard at the

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includes no declaration from any juror or handwriting expert in his petition. These statements, therefore, do nothing to explain or justify delay. Any justification must stand or fall on the Jackson investigation.

3. Because evidence relating to Jackson's murder was obviously an important part of the prosecution's penalty case, we discuss below, in Argument VI, directed exclusively to this claim, whether it comes within the exception for false or perjured testimony which causes "such a grossly misleading profile of the petitioner" that absent the testimony "no reasonable judge or jury would have imposed a sentence of death." (*In re Clark*, *supra*, 4 Cal.4th at p. 798 & fn. 34.) Since this exception – like that for a claim of actual innocence – is claim specific, it cannot serve as a general excuse for an entire petition.

4. Throughout this opposition, we cite to petitioner's habeas exhibits using the sequential pagination in the lower right-hand corner of the exhibits rather than the individual page number for the exhibit.

time of Jackson's murder. (See Ex. HC-7 at 34; Petition at 16.) While we have no reason to dispute that petitioner has expended a considerable amount of time reinvestigating the Jackson murder, the problem with relying on that investigation to justify the delay in filing the petition is that petitioner took *more than 10 years* to conclude it before filing his petition.

According to the Court's docket sheet in S105569, counsel was appointed to represent petitioner on both direct appeal and habeas on June 21, 1993. Associate counsel was appointed on September 7, 1993, to represent petitioner on both direct appeal and habeas. As early as November 1999, associate counsel informed the court that they were "focused on fast-moving developments in the habeas corpus investigation." (See Applications for Extension of Time to File Opening Brief in S016883 dated Nov. 24, 1999.) Thereafter, appellant's counsel repeatedly stated that lead counsel was focused on the habeas petition while associate counsel assumed primary responsibility for the opening brief on direct appeal. (See, e.g., Application for Extension of Time to File Opening Brief in S016883 dated March 27, May 26, and July 28, 2000, and March 31 and June 2, 2001.) Nevertheless, even though the opening brief was filed on December 7, 2001, and the reply brief on November 24, 2003, petitioner did not file his habeas petition until January 7, 2005. As mentioned, this was more than 10 years after counsel's appointment, five years after counsel told the court they were focused on the habeas investigation, and 13 months after filing of the rely brief on direct appeal.

Not only does the sheer passage of time strongly suggest the untimeliness of the petition, but examination of the exhibits submitted in support of the petition also demonstrates that there is nothing that justifies that delay. The petition demonstrates that petitioner and his representatives have known of witness Hoze's recantations since at least October 1990, when trial counsel filed a petition for writ of habeas corpus in the trial court alleging Hoze

had admitted to another inmate that he had lied in his trial testimony. (See HC-Ex. 23.) At the time, Hoze denied that allegation. (See HC-Ex. 24.) However, Hoze has since made a series of recantations – beginning perhaps as early as 1991 – all of which have been disclosed to petitioner. (See HC-Exs. 26-27 [allegation of 1991 recantation]; HC-Exs. 28-29 [1994 recantation]; HC-Ex. 30 [1995 recantation]; HC-Ex. 31 [1997 recantation]; HC-Ex. 32 [2002 recantation].) It is inconceivable that petitioner could file his habeas petition no earlier than 2005 when he has in fact known of Hoze's recantations for many years. Finally, apart from the exhibits reflecting Hoze's recantations, there is a single additional declaration that reflects on the Jackson murder, namely, an August 2004 declaration from Robert Brewer. (See HC-Ex. 15.) However, Brewer, who was a prisoner among the group congregated near Jackson when he was stabbed, merely states that he "did not see who had stabbed Jackson." (HC-Ex. 15 at 67.) Brewer does not purport to relate knowing anything about petitioner's later admissions to Hoze or Hoze's recantations. Brewer's declaration is therefore probative of neither whether petitioner stabbed Jackson nor whether Hoze testified truthfully.

Clark and the rules it sets forth are plainly designed to ensure that a habeas petitioner does not wait indefinitely before bringing his claims. Here, petitioner has filed a long-delayed petition and sought to justify that delay based on his investigation of an aggravating act shown at the penalty phase. Yet, petitioner has known of the underlying basis for this claim for many years. He sets forth no evidence of a recent vintage sufficient to justify his failure to bring this and the other claims of his petition in a timely fashion. Accordingly, except for his claim alleging actual innocence (and the claim of an ongoing discovery violation), the claims in the petition should be defaulted as untimely. In the event the court decides to reach the merits of petitioner's claims, we turn to a discussion of each claim in turn.

II.

PETITIONER'S CLAIM THAT EVIDENTIARY RULINGS BY THE MAGISTRATE AND TRIAL COURT DENIED HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE SHOULD BE DENIED AS REPETITIVE OF A CLAIM ON DIRECT APPEAL

In his first claim, petitioner alleges that "evidentiary rulings by the magistrate and trial court denied petitioner his due process right to present his defense." (Petition at 19-45.) Petitioner goes on to identify the following specific rulings: (1) the preliminary hearing magistrate's refusal to order a live lineup (Petition at 20); (2) the trial court's exclusion of so-called third party confessions and admissions by Harold Richardson (Petition at 27) and Charles Drume (Petition at 30); (3) the trial court's exclusion of evidence showing inmate Montgomery was a leader of the Crips gang and of an anonymous note purportedly authored by a Crips member (Petition at 36); and (4) the trial court's exclusion of evidence that prosecution witness Bobby Evans received a quid pro quo in exchange for his testimony (Petition at 39). All of these issues are fully preserved in the appellate record and have in fact been raised as issues on direct appeal. (See AOB in S016883 at 49-79 [denial of lineup at preliminary hearing]), 80-121 [exclusion of Richardson and Drume's statements], 165-195 [denial of opportunity to present additional evidence on the subject of Bobby Evan's alleged benefits for testifying], 228-232 [exclusion of evidence regarding inmate Montgomery], and 232-238 [exclusion of anonymous note].) Petitioner introduces nothing of factual or legal significance in his habeas petition that adds to the contentions on direct appeal or makes habeas review preferable to direct appeal. Respondent therefore submits that Claim I should be denied in its entirety in reliance on the familiar rule that issues that are raised on direct appeal may not be relitigated on habeas corpus. (*In re Waltreus* (1965) 62 Cal.2d 218, 225; see also *In re Harris* (1993) 5

Cal.4th 813, 827.)

Examination of each particular sub-claim demonstrates that there is no reason to depart from the *Waltreus* rule barring relitigation of appellate issues. As to Claim I.A (magistrate's denial of lineup), the only information petitioner adds to the appellate record is a reference to witness Rufus Willis's declaration that the prosecution kept his whereabouts secret by moving him from prison to prison. (See Petition at 22; Ex. HC-1 at 9.) He relies on this fact in an attempt to justify why he did not seek a lineup before the preliminary hearing. Willis's declaration is both legally and factually irrelevant to the claim that the magistrate erred. It is legally irrelevant because this excuse was never proffered to the magistrate to explain the delay in seeking a lineup, and therefore cannot be considered in deciding whether the magistrate erred. It is factually irrelevant because (1) nothing about petitioner's lack of knowledge of Willis's exact location explains why he did not timely seek a lineup – the very purpose of such a request is to seek the court's intervention and assistance, rather than relying on self-help; and (2) the record shows petitioner's access to Willis's whereabouts was in fact litigated before trial – demonstrating that this is not a new fact, but something that was known to the defense all along. (See CT 1197-1208; RT [Oct. 12, 1988] pp. 36-37.) Accordingly, there is nothing new to petitioner's sub-claim in this habeas petition that suffices to take it outside the *Waltreus* rule. As to the merits, we have fully addressed this issue in our Respondent's Brief in S016883 (RB) at pages 64-74.

As to Claim I.B(1) (exclusion of Harold Richardson's statement), petitioner adds nothing to the argument he made on direct appeal. We have fully addressed the merits at RB 75-77. *Waltreus* bars relitigation of the claim on habeas.

As to Claim I.B(2) (exclusion of Charles Drume's statement), petitioner refers to declarations from Drume (HC-Ex. 4) and codefendant Andre Johnson

that are not part of the appellate record. While these exhibits may have relevance to petitioner's cognizable claim of actual innocence (addressed below), they are irrelevant to the issue whether the trial court erred in excluding Drume's statement for the obvious reasons that they were not before the trial court at the time of its ruling. The merits are fully discussed at RB 77-78. *Waltreus* bars relitigation of the claim on habeas.

As to Claim I.B(3) (alleged limitation on testimony regarding Crips leader Montgomery and exclusion of anonymous note), petitioner adds nothing to the record on appeal. The issue was fully addressed on appeal at RB 115-119, and *Waltreus* bars its relitigation on habeas.

Finally, as to Claim I.C[5] (alleged exclusion of evidence regarding quid pro quo for Bobby Evans's testimony), petitioner does not cite to anything outside the record on appeal or exhibits entered at trial. We fully addressed the claim on direct appeal at RB 91-97. *Waltreus* bars its relitigation on habeas.

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5. Petitioner mistakenly denominates this claim as I.B (see Petition at 39), which duplicates an earlier heading in his petition (see Petition at 27). For clarity, we refer to the Evans's claim as I.C.

III.

PETITIONER FAILS TO MAKE A PLAUSIBLE SHOWING THAT THE DECLARANTS WHO CLAIM HE IS FACTUALLY INNOCENT ARE ACTUALLY WILLING TO TESTIFY AND SUBJECT THEMSELVES TO CROSS-EXAMINATION

In his second claim, petitioner alleges he is factually innocent. As stated above, we do not seek to raise a bar of untimeliness to this claim.

Petitioner supports his innocence claim with declarations from codefendants Woodard and Johnson, prosecution witness Rufus Willis, and B.G.F. drop-out Charles Drume. (See HC-Ex. 1-4.) These declarations purport to absolve petitioner of any responsibility for the murder of Sgt. Burchfield. Woodard declares that petitioner opposed the plan to attack a correctional officer (HC-Ex. 2 at 13, ¶ 3) and was "not trusted with any part in the Burchfield killing." (*Id.* at 15, ¶ 9.) Johnson declares that, to his knowledge, petitioner "had no knowledge of any involvement in the killing of Sgt. Burchfield." (HC-Ex. 3 at 17, ¶ 3.) Willis declares that petitioner had "nothing to do with the planning of the Burchfield killing" (HC-Ex. 1 at 1, ¶ 6) and "did not play any part in the death of Sgt. Burchfield." (HC-Ex. 1 at 11, ¶ 31.) Willis states that the incriminating "kites" written by petitioner were not composed from petitioner's personal knowledge, but were merely "compiled . . . from many reports I had written and sent to him." (HC-Ex. 1 at 6, ¶ 15.) B.G.F. member Drume declares that he, not petitioner, sharpened the weapon used to kill Sgt. Burchfield and that petitioner "was not involved in either the planning or carrying out of the attack on Sgt. Burchfield." (HC-Ex. 4 at 20, ¶¶ 2-3.)

We are aware that, in other cases, the Court has ordered a reference hearing when a claim of actual innocence is supported by adequate facts. (See, e.g., *In re Johnson* (1998) 18 Cal.4th 447, 451.) Notwithstanding the

declarations submitted by petitioner, we question whether his showing is adequate to require an evidentiary hearing. The bias of Woodard and Johnson is so evident as to make it highly likely no fact-finder would credit their declarations – assuming they are willing to testify and submit to cross-examination. Both have exhausted all state and federal appellate and post-conviction remedies and are now imprisoned for life without possibility of parole or any hope of obtaining court relief. They have nothing to lose by now claiming their fellow B.G.F. member and convicted co-conspirator had nothing to do with Sgt. Burchfield's murder. Their declarations are so inherently suspect as to make an evidentiary hearing of doubtful utility.

The Willis and Drume declarations are equally suspect. As with the Woodard and Johnson declarations, neither Willis nor Drume give any indication that each would be willing to testify and submit himself to cross-examination to the facts averred. It seems highly improbable that either would do so. Drume claims full participation and culpability in the Burchfield murder, which theoretically subjects him to prosecution for a capital crime. Willis's declaration likewise theoretically subjects him to capital prosecution, not to mention perjury as well. By claiming he lied at petitioner's trial, Willis may have admitted a violation of his immunity agreement requiring his truthful testimony. (See RT 12648-12649.) Absent immunity, Willis could be subject to prosecution for the Burchfield murder.

We recognize that, typically, evaluation of a claim of factual innocence based on new declarations not presented at trial depends on credibility findings. (*In re Johnson, supra*, 18 Cal.4th at p. 461.) Generally, those findings should be made sooner rather than later in the interests of justice for all parties. Our question here, however, is whether the petition makes an adequate showing that credibility findings will even be possible in the absence of any showing that the declarants will actually agree to testify and subject themselves to cross-

examination. Without such a showing, a reference hearing would be pointless.[6] Respondent submits that absent a plausible showing that the witnesses who now support petitioner's claim of innocence are actually willing to testify, he has failed to demonstrate entitlement to habeas relief.

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6. The question perhaps arises whether any of the four declarations relied on by petitioner would be admissible as a declaration against penal interest even if the declarants are not willing to testify. (Evid. Code, 1230.) Under settled principles, the declarations "lack sufficient indicia of trustworthiness to qualify for admission" under that hearsay exception. (See *People v. Duarte* (2000) 24 Cal.4th 603, 614.) As noted, Woodard and Johnson having nothing to lose by seeking to aid their codefendant; in other words, those two declarations are no longer against the penal interest of the declarants because they pose no threat of actual criminal liability beyond what the two have already suffered. Drume's attempt to claim responsibility for making the murder weapon is not new; it has already been found unreliable by the trial court. (RT 15336-15342.) For the same reasons set forth in our respondent's brief on direct appeal in support of the trial court's ruling excluding Drume's pre-trial hearsay statement (see RB 83-84), Drume's present declaration does not satisfy Evidence Code section 1230. Similarly, Willis's present declaration lacks sufficient indicia of trustworthiness given that he fully incriminated petitioner in his trial testimony and now has an obvious motive to fabricate because he has and will receive no consideration for his trial testimony in terms of shortening his prison sentence.

IV.

PETITIONER FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF BASED ON ALLEGED PROSECUTORIAL MISCONDUCT

In a multi-faceted claim (Petition at 59-97), petitioner seeks habeas relief based on various allegations of prosecutorial misconduct. We have already argued that the claim is not timely. The claim, and all its subparts, also fails to state a prima facie case for relief.

A. Alleged Coercion Of Witness Willis

Relying largely on a declaration from prosecution witness Rufus Willis, petitioner alleges that Willis was coerced by the prosecution to give false testimony and to manufacture evidence against petitioner. (Petition at 59-73.) Willis declares that he conformed his testimony to what a district attorney's inspector wanted him to say; that most of the incriminating "kites" in petitioner's handwriting were simply copies from Willis's own writings and were not from petitioner's own personal knowledge; that an inmate named Vaughn – not petitioner – made the weapon used to kill Sgt. Burchfield; and that petitioner had no role in the murder or conspiracy. (HC-Ex. 1 at 1-6.) Willis also declares that the prosecutor effectively threatened him with death if he stopped cooperating by telling him he would return him to San Quentin prison. (*Id.* at 7, ¶ 20.) Willis also declares that in his trial testimony he "tried not to lie, but . . . limited my answers to what I knew [the prosecution] wanted." (*Id.* at 8-9, ¶ 23.)

Respondent submits that Willis's declaration fails to support a prima facie case of prosecutorial misconduct for the same reason it does not support a claim of actual innocence: there is no showing that Willis would subject himself to cross-examination at which his allegations could be tested. Absent

such a showing, his declaration is entitled to no credence. This is especially true since recantations are inherently suspect. (See *In re Roberts* (2003) 29 Cal.4th 726, 742.)

Petitioner's claim of prosecutorial misconduct is dependent on crediting Willis's recantation.[7] Willis's recantation is inherently incredible. It is contradicted not only by Willis's trial testimony, but also by the highly incriminating notes (or "kites") in petitioner's own handwriting that were written before Willis ever approached the authorities. (See RB at 5-6, describing how and when Willis turned the notes over to investigators, and RB at 10-13 quoting the kites at length, including two in petitioner's handwriting [in one petitioner brags about sharpening a weapon to a "razor edge double edge"; in the other he states he approved codefendant Johnson as the hit man].) Willis now claims that petitioner was merely copying reports setting forth "a complete history of the Burchfield killing" that Willis himself had compiled. (HC-EX. 1 at 6, ¶ 15.) This, of course, raises the question why petitioner would ascribe a prominent role to himself if he was simply copying Willis's reports. Willis attempts to explain this improbability by stating that he wrote the report (allegedly later copied by petitioner) in such a way as "to give [petitioner] a role to put him in good standing" with BGF leadership because petitioner "was in trouble with Woodard for being incompetent and insubordinate." (*Ibid.*) However, according to the declaration submitted by Woodard, Woodard claims he knew all along that petitioner had no role in the Burchfield murder. (HC-Ex. 2 at 14, ¶ 4.) Petitioner therefore could not have gained "good standing" with Woodard by claiming to have done something which (Woodard says) Woodard

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7. It is worth noting the utter inconsistency between this claim, which presupposes that Willis knew exactly who petitioner was and set him up as a coconspirator even though he knew he had no role in the crime, and petitioner's first claim, which alleges that Willis did not know who petitioner was and misidentified him for inmate Richardson.

knew he did not do. Willis's recantation is thus not only inconsistent with the kites written by petitioner, it is inconsistent with the companion declaration of codefendant Woodard. Given these inconsistencies and the inherent untrustworthiness of such post-trial recantations, petitioner has failed to demonstrate a prima facie case that the prosecution coerced Willis or coaxed him to testify falsely or manufacture evidence. (See *In re Roberts, supra*, 29 Cal.4th at p. 743.)

B. Alleged Subornation Of Perjury From Inmate Brewer

Appellant alleges that the prosecution attempted to suborn perjury from inmate Robert Brewer by alternately accusing him of involvement in the murder of inmate David Jackson, telling him they believed him when he said he was not involved, and offering to protect him and his mother if he agreed to testify that petitioner killed Jackson. (Petition at 73-74.) Petitioner supports these allegations with a declaration from Brewer. (HC-Ex. 15.) We fail to see any impropriety in the prosecution's conduct, even assuming the truth of Brewer's declaration. Investigators may lawfully use a wide variety of techniques in seeking to obtain a statement, even exaggerating or lying about the known evidence in a case. What makes an interrogation unlawful is when it overbears the free will of the person being questioned and therefore leads to an involuntary and inherently unreliable statement. (See, e.g., *People v. Engert* (1987) 193 Cal.App.3d 1518, 1524.) Even if there were any impropriety in the questioning of Brewer – which, we maintain, there was not – Brewer's free will was obviously not overborne since he never gave any statement implicating petitioner and did not agree to testify against him. In addition, because the prosecution never obtained any testimony from Brewer, any conceivable impropriety in their conduct towards him had no effect on the verdict. No basis for relief exists in this sub-claim.

C. Alleged Failure To Disclose Benefits To Witness Bobby Evans

Petitioner alleges that the prosecution failed to disclose benefits to witness Bobby Evans. This issue has been briefed from the trial record. (See RB 91-97.) Petitioner adds to the trial record excerpts of transcripts from testimony Evans gave at unrelated proceedings in 1996 and 1998 to argue that Evans admitted he received probation in his Alameda County case "as a result of having testified" (Petition at 76) in petitioner's case. Petitioner's characterization of Evans's testimony is not supported by his exhibits. Examination of the transcript excerpt cited by petitioner fails to disclose any nexus between Evans's Alameda County probation and his testimony against petitioner. (See HC-EX. 18 at 94-95.)[8]

Petitioner also claims – based on these testimonial excerpts – that Evans admitted he had served as an informant in other cases predating the present case and was going to be indicted by the federal government at the time he testified in petitioner's case, "facts" which petitioner claims were not disclosed to him. (See Petition at 75-77.) As to the claimed impending indictment, examination of the transcript excerpts again yields no support for his allegations. Evans merely stated that he disassociated from and agreed to testify against the Black Guerilla Family because of an alleged indictment. (HC-Ex. 18 at 96.) He does not in any way tie that purported indictment to his testimony in petitioner's case.

Petitioner's allegations that he was not informed Evans had worked as a paid informant for law enforcement prior to his testimony in petitioner's case

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8. Petitioner also cites to testimony in another case as to which Evans stated he was "granted immunity . . . in State Court" for testimony he gave regarding the murder of a prison guard. (See HC-Ex. 16 at 82-85.) While we do not know what Evans meant when he said he was "granted immunity," petitioner has never made any allegation, and does not allege now, that Evans received undisclosed immunity in any case in exchange for his testimony in petitioner's case.

are contradicted by the trial record. Evans, in fact, admitted on cross-examination at trial that he had previously informed on others, including a BGF sympathizer. (RT 13796, 13836.) This demonstrates that petitioner was aware of Evans's history and used it as impeaching evidence. In addition, Evans was subjected to a great deal of other impeaching evidence including an abundance of prior violent criminal activity. (See RT 13801, 13811-13813, 13834, 13872-13873, 13881, 13908.) The jury had a complete picture by which to assess Evans's credibility. Petitioner has failed to demonstrate either that the prosecution failed to disclose relevant impeaching information concerning Evans or that the information could have affected the trial outcome. (See *United States v. Bagley* (1985) 473 U.S. 667, 676; *People v. Coddington* (2000) 23 Cal.4th 529, 589.)

Petitioner makes one additional set of allegations regarding Bobby Evans. He claims his counsel spoke with Evans in 1999 and that Evans admitted lying in petitioner's case, claiming he was threatened by the prosecution. (Petition at 79-80.) These allegations are supported only by the hearsay declaration of counsel (HC-Ex. at 31) and are therefore insufficient to warrant habeas relief. (See, e.g., *In re Fields* (1990) 51 Cal.3d 1063, 1070.) This is doubly the case given the inherent suspicion that must be accorded Evans's recantation. (*In re Roberts, supra*, 29 Cal.4th at p. 742.) None of petitioner's allegations concerning Bobby Evans states a prima facie case for relief.

D. Alleged Threats Against Charles Drume

Petitioner alleges that prison officials failed to protect Charles Drume and pressured him to change his story that he was involved in the fashioning of the murder weapon. (Petition at 81-82.) He supports this allegation with a declaration from Drume executed in 2000. (HC-Ex. 4 at 21.) Drume's

declaration contains vague time references regarding when prison authorities allegedly failed to protect him. He states that he has been trying to "dis-affiliate from the BGF and de-brief since 1988," but that prison officials would not let him do so at Corcoran in 1991 and again at some unspecified later time at Pelican Bay because he would not change his story. (*Ibid.*) He claims that he was attacked on multiple occasions because prison officials failed to protect him. (*Ibid.*) Finally, he says he did change his story in 1999 in order to gain protective custody. (*Ibid.*) If Drume's allegations are true (which we do not concede), they may support some civil action by him against prison authorities. But they are ineffectual to gain petitioner any habeas relief. The prosecution disclosed Drume's statement inculpating himself to petitioner before trial. Petitioner attempted to use that statement, but the trial court excluded it as inadmissible hearsay. Petitioner has argued on direct appeal that the statement was admissible; respondent argues it was not. (See RB 77-86.) Any action by corrections officials regarding Drume does nothing to change this record or to support petitioner's claim that he is entitled to habeas relief due to prosecutorial misconduct. The Drume sub-claim fails to state a prima facie case for relief.

E. Alleged *Brady* Violations

Petitioner alleges multiple violations of the prosecution's duty to disclose favorable, material evidence to the defense. (*Brady v. Maryland* (1963) 373 U.S. 83, 87.) These allegations – including all of their subparts – are based entirely upon materials extant in the trial record. (See Petition at 82-97.) There was a great deal of litigation at trial concerning these discovery matters. (See, e.g., CT 167-227, 279-288, 371-436, 474-477, 478-500, 501-571 [motion to dismiss based in part on alleged discovery violations], 602-606, 692-702, 1025, 1045, 1235-1250, 1406-1418, 2658-2678, 4045-4058.) Petitioner is simply rearguing the issues from the trial record. These *Brady* allegations,

therefore, may not be made on habeas corpus since they could have been raised on direct appeal. (*In re Dixon* (1953) 41 Cal.2d 756, 759.) In any event, we submit the trial court correctly resolved these various discovery issues.

V.

PETITIONER'S UNSUPPORTED CLAIM OF JURY MISCONDUCT FAILS TO STATE A PRIMA FACIE CASE FOR RELIEF

In his fourth claim, petitioner alleges that he is "aware of information" to the effect that an unidentified correctional officer either (1) overheard jurors discussing the case during a lunch break at some unspecified time during the trial, "and/or (2) was asked by one of the jurors what he thought of the case." (Petition at 97.) Petitioner supports this claim with nothing. It is entirely speculative and apparently based on multiple levels of hearsay from unknown sources. The claim fails to state a prima facie case for relief. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [conclusory allegations do not warrant relief or an evidentiary hearing].)

VI.

PETITIONER'S CLAIM REGARDING THE RECANTATIONS BY PENALTY WITNESS HOZE IS UNTIMELY AND INSUFFICIENT TO WARRANT RELIEF

In his fifth claim, petitioner alleges he is entitled to habeas relief from the death penalty because penalty phase witness Johnny Hoze has recanted his trial testimony. (Petition at 98-105.) This is not a new claim. It first came to light shortly after petitioner's trial and sentencing. As indicated above, petitioner filed a habeas corpus petition in the superior court seeking a new penalty trial or modification of his sentence to life without possibility of parole based on the statement of an inmate name Leroy Patton that Hoze had recanted his penalty phase testimony incriminating petitioner in the uncharged murder of inmate David Jackson. (See HC-Ex. 23 at 117-119.) Hoze executed a declaration denying the recantation and reaffirming his trial testimony (HC-Ex. 24 at 134-135), and the superior court denied the habeas petition without holding an evidentiary hearing. (HC-Ex. 25 at 136.) Hoze has since made a series of statements recanting his trial testimony. (See HC-Exs. 26-32.)

Petitioner relies on his investigation of the Hoze claim in an attempt to justify his delayed petition. We have argued above that his attempted justification is inadequate and that the petition should be denied as untimely save for Claim 2, which falls within the actual innocence exception to this Court's timeliness bar. (As to that claim, we have urged it be denied on other grounds.) Here, we address whether the Hoze claim should also fall within a timeliness exception. We submit it does not.

In *Clark*, this Court stated that a petitioner may establish an exception to the timeliness bar if "the death penalty was imposed by a sentencing authority which had such a grossly misleading profile of the petitioner before it that absent the error or omission no reasonable judge or jury would have imposed

a sentence of death. . . ." (*In re Clark, supra*, 5 Cal.4th at p. 759.) If Hoze's recantations were credited and a factfinder determined that he lied at trial when he said petitioner had admitted stabbing another inmate to death, the question arises whether this would bring the claim within the above exception.

We acknowledge the question is close. Hoze directly implicated petitioner in the killing of another person in prison, which was highly relevant penalty phase evidence to the jury's determination whether to sentence petitioner to death or to life imprisonment without parole. Hoze's testimony implicated petitioner as the actual killer of another in prison, as opposed to the evidence at the guilt phase which showed he was a crucial coconspirator in Sgt. Burchfield's murder and fashioned the murder weapon, but was not the actual killer. Absent Hoze's testimony, the penalty phase evidence placed petitioner in a group of five inmates from which inmate Jackson staggered away with a shank stuck in his neck, but did not identify petitioner or any of the other four as the actual killer.

Standing alone, the Hoze claim might be sufficient to come within the penalty phase exception specified in *Clark*. But it does not stand alone. The Jackson murder was one of more than two dozen incidents involving the use or threat of violence shown against petitioner at the penalty phase. These included eleven adult convictions for armed robbery, covering multiple occasions in which petitioner variously threatened to kill his victims, discharged his weapon, and pistol whipped one of his victims. Evidence in unadjudicated adult crimes implicated petitioner in a liquor store robbery murder, a gas station robbery, a shooting at a police officer who interrupted the gas station robbery, multiple incidents of possession of stabbing weapons in jail and prison, attempted assault of another prisoner with a prison-made spear, and altercations with jail and prison guards. There was also an abundance of aggravating evidence of petitioner's violent juvenile activity – both adjudicated and unadjudicated –

including robberies, assaults with weapons, and sexual assault against a CYA ward. In addition, even apart from Hoze's testimony, we submit that evidence of Jackson's murder was admissible and supported an inference that petitioner was part of a group that decided to murder Jackson. (See RB 23-38 for a summary of the prosecution's penalty phase evidence.) Thus, the penalty jury had overwhelming evidence of petitioner's violent nature, including multiple assaults against guards and inmates and multiple incidents of weapons possession in prison. In light of this evidence, we do not think it can be said that absent Hoze's testimony, "no reasonable . . . jury would have imposed a sentence of death." (*Clark, supra*, at p. 759.) Accordingly, this claim should be denied as untimely.

Even if it were not untimely, the same evidence highlighted above would justify denial of the claim even without an evidentiary hearing to determine whether Hoze's trial testimony or his recantations are truthful.[9] In general, a witness's post-trial recantation must be viewed with suspicion. (*In re Roberts, supra,* 29 Cal.4th at p. 742.) This is even more true where the purported recantation has been disavowed by the witness. (*Id.* at p. 743.) Here, Hoze has both reaffirmed his trial testimony in a 1990 declaration (HC-Ex. 24 at 134-

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9. In this regard, we note that Hoze is currently embittered against correctional authorities and the Marin County District Attorney. In the course of a letter written in 2002 recanting his trial testimony, Hoze wrote, "the Department of Corrections, [t]he Marin District Attorneys Office and the Board of Prison Terms have done nothing but disrespect me and my family since the day I got off the [s]tand." (HC-Ex. 32 at 155.) More recently, at a 2004 parole hearing Hoze, referring to the 2002 letter, stated, "But what happened at my 2000 [sic] hearing I felt was a disrespect, total turnaround from my 2001 hearing and that's why I wrote the letter." (See *In re Hoze*, Transcript of Subsequent Parole Consideration Hearing, March 11, 2004, p. 68; see also *id.* at pp. 66-67.) Respondent disclosed this transcript to petitioner's counsel in May of 2004, but it was not included among the habeas exhibits petitioner submitted with the petition he filed in this court eight months later. Hoze's obvious bias gravely impairs the credibility of his recantations.

135) and more recently recanted it. (HC-Exs. 25-32.) The jury's verdict should not be disturbed based on these inherently untrustworthy and inconsistent recantations by Hoze. (*In re Roberts, supra*, at p. 743.) Furthermore, even if Hoze's recantations were to be believed, we submit that this would not warrant habeas relief given the mass of penalty phase evidence against petitioner briefly summarized above and set forth in detail in our respondent's brief on direct appeal at pages 23 to 38. Hoze's dubious recantation simply does not undermine confidence in the jury's penalty verdict. (*In re Roberts, supra*, at pp. 742-743 [habeas relief not warranted for "false evidence" unless, under the totality of circumstances, it undermines confidence in the trial outcome].) For the foregoing reasons, petitioner's claim relating to witness Hoze's recantation should be denied.

VII.

PETITIONER'S CLAIM REGARDING ADMISSION AT THE PENALTY PHASE OF EVIDENCE REGARDING THE UNCHARGED 1980 HAMIL MURDER DUPLICATES AN ISSUE RAISED ON DIRECT APPEAL

In his sixth claim, petitioner alleges that the admission at the penalty phase of evidence of the uncharged 1980 murder of Los Angeles liquor store owner Bob Hamil resulted in a denial of due process. (Petition at 106-107.) (See RB 31-33 for summary of evidence relating to that offense.) Petitioner acknowledges that this claim duplicates an issue raised on direct appeal. (Petition at 106; see also AOB 330-350.) He argues that he should nevertheless be permitted to raise the issue collaterally because he has supplemented the claim with a declaration from his investigator describing the difficulty of her pretrial investigation of the Hamil murder. (See HC-Ex. 33, pp. 156-157.)

Petitioner's trial counsel unsuccessfully sought to exclude evidence of the Hamil murder based, in part, on the difficulty of investigating the crime based on its temporal remoteness. (See CT 5266, 5387; RT 18864-18869.) The investigator's declaration reiterating this point adds nothing new to the trial record. The claim may not be relitigated on habeas corpus. (*In re Waltreus, supra*, 62 Cal.2d at p. 225.) In any event, as we pointed out in our brief on direct appeal, it is not true that petitioner was unable to defend against this charge. To the contrary, he presented the testimony of the Los Angeles police detective in charge of the Hamil investigation, eliciting the detective's opinion that the evidence against petitioner did not warrant charging him with the murder. (See RT 20583-20586.) In all events, this claim should be rejected.

VIII.

PETITIONER'S CLAIM THAT HIS CONVICTION AND SENTENCE "DIRECTLY AROSE OUT OF UNCONSTITUTIONAL CONDITIONS OF IMPRISONMENT" COULD HAVE BEEN RAISED ON DIRECT APPEAL

In his seventh claim, petitioner alleges that his conviction and sentence are unconstitutional because the "murder . . . directly arose out of unconstitutional conditions of imprisonment." (Petition at 108-116.) As factual support for this argument, petitioner relies solely on the trial record. Consequently, he may not raise this issue collaterally since it could have been raised on direct appeal from the trial record. (*In re Dixon* (1953) 41 Cal.2d 756, 759.) Even if the merits could be reached on habeas, this sort of claim is devoid of legal support. We know of no authority that suggests harsh, oppressive, or even unconstitutional prison conditions may serve as an excuse for murder. This Court has rejected the notion that duress can be a defense to murder, observing:

> If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified, at least by the actual killer. Persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting than would those who know they must face the consequences of their acts. Accepting the duress defense for any form of murder would thus encourage killing.

(*People v. Anderson* (2002) 28 Cal.4th 767, 777-778.)

This reasoning applies with equal force to petitioner's murder-justified-by-prison-conditions claim. The claim is both improper on habeas and meritless.

IX.

PETITIONER HAS FAILED TO DEMONSTRATE THAT THE PROSECUTION HAS VIOLATED ITS CONTINUING *BRADY* OBLIGATION

In his eighth and final claim, petitioner alleges that three California prison inmates – codefendant Johnson, Charles Drume, and a prisoner named Jesse Brun – have made statements to California Department of Corrections (CDC) personnel in the course of "debriefing" from prison gangs which have tended to exculpate petitioner of involvement in the present case. (Petition at 116-117.) He further alleges that he is "informed and believes that there are any number of other debriefings, interviews or reports in the possession of the CDC in which the Burchfield killing is discussed and which provide other exculpatory information." (Petition at 118.) He does not seek issuance of a writ of habeas corpus based on these allegations, but instead asks that an order to show cause issue to allow him to review this alleged exculpatory information through use of the discovery and subpoena processes. (Petition at 119.) Petitioner's allegations do not warrant any form of relief.

First, we do not agree that respondent's duty to disclose exculpatory evidence extends to the "debriefing" interviews performed by Department of Corrections personnel long after the time of the crime, investigation, and trial in this case. While we fully accept our continuing obligation to disclose material information favorable to the petitioner (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261), we are unaware of any authority that would require us to monitor every report or interview produced by the Department of Corrections in matters wholly unconnected to this case on the chance that some prisoner might sometime say something that is potentially helpful to petitioner.

In *Kyles v. Whitley* (1995) 514 U.S. 419, 437, the United States Supreme Court stated that the prosecution has "a duty to learn of any favorable evidence known to others *acting on the government's behalf in the case*, including the

police." (Italics added.) *Kyles* has been interpreted as imputing to the prosecution any exculpatory evidence learned by others in the investigation of the case, whether or not the prosecutor actually learned of the information. "The individual prosecutor is presumed to have knowledge of all information *gathered in connection with the government's investigation*." (*United States v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1208 [italics added]; see also *In re Brown* (1998) 17 Cal.4th 873, 879.) But, as the italicized language from *Kyles* and *Payne* demonstrates, there must be some nexus between the information learned and the investigation of the case. We are aware of no case that has interpreted *Kyles* so broadly as to read out this nexus and impute knowledge to the prosecutor whenever any potentially favorable information might be present in some governmental file which is unconnected to the investigation of the case at hand. To the contrary, the cases have explicitly refused to take this step.

For example, in *Lavelle v. Coplan* (1st Cir. 2004) 374 F.3d 41, the court concluded that information in the possession of a child protective services agency – the Division of Children, Youth, and Families (DCYF) – could not be imputed to the prosecutor and therefore did not fall within the *Kyles* rule:

> DCYF is neither the police nor the equivalent of the police in assisting the prosecution. DCYF was not the prosecuting agency and is independent of both the police department and the prosecutor's office.

(*Id.* at 44-45.) The reach of *Kyles* may be limited even where the potential exculpatory information is contained within the files of the police agency that is investigating the crime at hand. Thus, in *United States v. Herring* (9th Cir. 1996) 83 F.3d 1120, the court concluded that *Kyles* does not place an independent duty on prosecutors to comb through police personnel files for potential impeachment information whenever an officer is expected to be a witness in a case. As the court explained, "There is no reason to believe that when the Supreme Court decided *Kyles*, it even had in mind the . . . question of a district court's authority to issue pre-trial discovery orders requiring

prosecutors to conduct searches for *Brady* material and to impose sanctions for noncompliance." (*Herring* at p. 1122.)

The same reasoning applies here. There is no reason to believe that the Supreme Court would extend *Kyles* to include all Department of Corrections records for all time whenever a prison crime was prosecuted. And – if petitioner's reading of the sweep of *Kyles* were correct – logic would extend the duty not just to prison crimes but to any crime, for it is always conceivable that some prisoner, somewhere, has given statements to prison officials about crimes past or present that are potentially favorable to some defendant charged with or convicted of some crime. (See, e.g., *People v. Gonzalez, supra,* 51 Cal.3d at p. 1260, fn. 56 ["Acceptance of defendant's contrary arguments [that discovery of law enforcement files be ordered in cases involving informants] would have enormous consequences."].)

Here, even though the Department of Corrections was plainly involved in the initial investigation of this case, the "debriefing" interviews referred to by petitioner are unconnected to that investigation. Any information that may be provided by an inmate during a "debriefing" interview is not information "obtained on the government's behalf in the case." (*Kyles, supra*, at p. 837.) Consequently, respondent submits that it does not have an independent duty to comb Department of Corrections' files to glean whether and to what extent any such information exists.

As to the specific information petitioner refers to – the Johnson, Drume and Brun statements – he obviously has received disclosure of the statements, whatever his source of information. The main point of petitioner's claim is to seek discovery of other, unspecified statements by unknown persons which he believes exist based "on information and belief." As we have already demonstrated, we do not believe *Kyles v. Whitley* imposes an obligation on the prosecution to seek out such information. Moreover, petitioner does not allege

that the claimed violation of the prosecution's continuing discovery obligation is itself a grounds for relief. Rather, he merely seeks further discovery. This Court rejected an analogous argument in *People v. Gonzalez, supra*, 51 Cal.3d at pp. 1260-1261, in which the defendant sought discovery of potentially favorable information regarding the use of informants. As the Court observed, habeas corpus "is not a device for investigating possible claims, but a means for vindicating actual claims." (*Id.* at p. 1261.)

Respondent understands and adheres to its duty to provide any potentially exculpatory information to petitioner that comes to light no matter how long after the trial. Indeed, in the years since petitioner's trial, we have on several occasions provided information to petitioner's counsel regarding penalty witness Johnny Hoze's recantations. However, we believe that requiring respondent constantly to monitor Department of Corrections files for inmate statements that are favorable to petitioner would extend this duty beyond the breaking point. For all of the foregoing reasons, petitioner has failed to make out a claim for habeas relief.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for writ of habeas corpus be denied in its entirety.

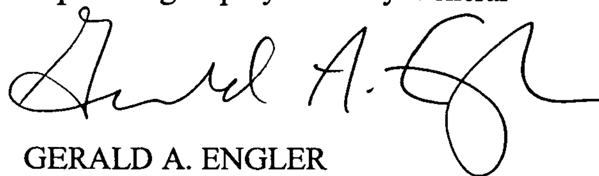
Dated: May 23, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General



GERALD A. ENGLER
Senior Assistant Attorney General

Attorneys for Respondent

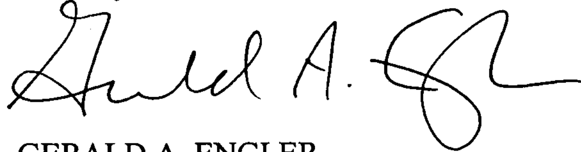
CERTIFICATE OF COMPLIANCE

I certify that the attached INFORMAL RESPONSE (HC) uses a 13 point Times New Roman font and contains 8152 words.

Dated: May 23, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



GERALD A. ENGLER
Senior Assistant Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY MAIL

Case Name: ***In re Jarvis Masters on habeas corpus***
Case No. **S130495**

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 23, 2005, I served the attached

INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

in the internal mail collection system at the Office of the Attorney General,455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102, for deposit in the United States Postal Service that same day in the ordinary course of business in a sealed envelope, postage fully prepaid, addressed as follows:

Joseph Baxter
645 Fourth Street, Suite 205
Santa Rosa, CA 95404

Richard I. Targow
Jeanetter L. Lebell
P.O. Box 1143
Sebastopol, CA 95473

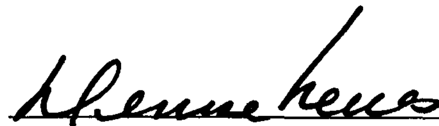
California Appellate Project
Attn: Michael Millman
101 Second Street
Suite 600
San Francisco, CA 94105

The Honorable Edward Berberian
District Attorney
County of Marin
3501 Civic Center Drive, Room 130
San Rafael, CA 94903

Clerk, Marin County Superior Court
Criminal Section
P.O. Box 4988
San Rafael, CA 94913-4988

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on May 23, 2005, at San Francisco, California.

Denise Neves



Signature