No: S 130496 DEATH PENALTY

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

PETITIONER'S INFORMAL REPLY TO RESPONDENT'S INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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I. CLAIMS I AND IV ARE NOT BARRED UNDER *WALTREUS*

In its Informal Response (Informal Response to Petition for Writ of Habeas Corpus, hereinafter "IR"), respondent argues that claims I and VI are procedurally barred under *In re Waltreus* (1965) 62 Cal.2d 218, 225, which provides that issues which were previously raised and rejected on direct appeal, and issues which could have been raised but were not, will not be considered on habeas corpus absent proof of certain exceptions. (IR at 7-9, 25) Contrary to respondent's claim, however, the *Waltreus* bar does not apply to petitioner's claims.

A. CLAIM I IS NOT BARRED UNDER *WALTREUS*

Respondent argues that Claim I is barred under *Waltreus* on the ground that the claim is repetitive of a claim on direct appeal. Respondent argues that (a) the issues underlying Claim I "are fully preserved in the appellate record and have in fact been raised as issues on direct appeal," and (b) that 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." (IR at 7)

Claim I asserts that evidentiary rulings by the magistrate and trial court denied petitioner his due process right to present his defense. (Petition at 19-45) Specifically, petitioner claims that "petitioner was deprived of his liberty and sentenced to death in a trial prejudicially tilted in the State's favor by rulings that, separately and together, amounted to the deprivation of petitioner's right to present his defense." (Petition at 19)

Regarding *In re Waltreus, supra*, as this Court has explained:

> "This rule does not, of course, apply to issues that could not be raised on appeal because they are based on matters outside the appellate record. In such cases, the *Waltreus* rule is not implicated."
>
> *In re Harris, supra*, 5 Cal.4th at 828, fn. 7, 834, fn.8.

The *Waltreus* rule, however, does not apply where, among other things, there has been a "clear and fundamental" constitutional error which "strikes at the heart of the trial process" (*In re Harris, supra*, 5 Cal.4th at 834) or where the petitioner is confined by a judgment rendered by a court lacking "fundamental jurisdiction." *Id.*, at 836-837.

Thus, the *Waltreus* rule does not apply because Claim I is clearly based on matters outside the appellate record. *Waltreus* also does not apply since the claim alleges "clear and fundamental" constitutional error which "strikes at the heart of the trial process." *In re Harris, supra*, 5 Cal.4th at 828, n. 7, 834, n. 8.

Paragraphs 22, 53, 79, and 80 of Claim I allege facts which are plainly outside the appellate record. Paragraphs 53 and 107, in turn, incorporate paragraphs 169, 170, 171, 173, 174, 175, 176, 177, 178, 179, 180, and 181, all of which allege matters outside the record.

Paragraph 45, moreover, incorporates paragraph 24 which incorporates all the exhibits appended to the petition. Paragraph 45 also incorporates paragraph 26, an allegation that petitioner is factually innocent of the crimes of which he was convicted.

Paragraph 45 also incorporates paragraph 27, an allegation that the State introduced evidence which it knew, or reasonably should have known, was inflammatory, unreliable, untrue, and/or misleading.

Paragraph 45 also incorporates paragraph 28, an allegation that the State withheld, concealed, delayed turning over, and destroyed material and critical evidence relative to the guilt and penalty phases of the trial, and to the investigation and pre-trial phases of the case.

Paragraph 45 also incorporates paragraph 31, an allegation that to the extent that an error or deficiency alleged was due to defense counsel's failures, petitioner was deprived of effective assistance of counsel.

Paragraph 45 also incorporates the allegation of paragraph 33 that, but for the misconduct of the State, the errors by the trial court, and the incompetence of trial counsel, petitioner would not have been convicted of murder and the special circumstances would not have been found true, and petitioner would not have been sentenced to death.

Paragraph 45 also incorporates the allegation that petitioner did not knowingly, voluntarily, or intelligently fail to raise these claims at an earlier time or deliberately bypass any available State proceeding.

Claim I is also based on the declaration of Rufus Willis. (See paragraphs 24, 45, and 53.) Thus, Claim I is founded upon the claim that any delay in seeking a lineup arose directly from the fact

that Willis was carefully kept hidden from the defense right up until the time of the preliminary hearing, so the defense had no opportunity to determine whether he could or could not identify Masters. Claim I is also premised on Willis' current admission that Masters is factually innocent. Thus, had the court ordered a lineup, it must be assumed that Willis would not have identified Masters as the fourth co-conspirator.

Claim I is also based upon the declarations of Charles Drume, Andre Johnson, and Lawrence Woodard that Jarvis Masters was not involved in the murder of Sgt. Burchfield. These declarations also support the conclusion that had a lineup been ordered, Rufus Willis would not have identified Jarvis Masters as the fourth co-conspirator. These declarations also support the conclusion that the Charles Drume and Harold Richardson confessions were actually trustworthy. Finally, these declarations establish the prejudice resulting from the exclusion of the Charles Drume and Harold Richardson confessions, and corroborate the prejudice resulting from the trial court's refusal to grant a lineup.

Claim I is also founded upon the newly discovered facts regarding the misconduct committed by the prosecution in concealing its deal with Bobby Evans, the principal corroborating witness for the prosecution. (Petition at ¶¶ 107, 167-181) These newly discovered facts, as well as the facts reported in the Willis declaration, show that the State interfered with defendant's opportunity to present his defense. The State employed unfair means to get a judgment. They got Rufus Willis and Bobby Evans

to lie on the witness stand, and they engineered the entire kite scheme.

Thus, Claim I alleges "clear and fundamental" constitutional error which "strikes at the heart of the trial process." *In re Harris, supra*, 5 Cal.4th at 834. Claim I also alleges that petitioner was denied his right of due process both as a result of what happened inside the court, and as a result of what the State and the prosecution engineered outside the court.

Claim I is not barred under the rule of *In re Waltreus*.

B. CLAIM VI IS NOT BARRED UNDER *WALTREUS*

Respondent also alleges that petitioner's sixth claim is barred under *In re Waltreus*. In the 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) Claim VI is supported by the declaration of Melody Ermachild, one of petitioner's trial investigators. (Ex. HC-33) In her declaration, Ermachild documents the scanty information available from police sources and the impossibility of carrying the investigation any further due to the passage of time. Respondent, however, argues that the investigators' declaration adds nothing new to the trial record, since trial counsel unsuccessfully sought to exclude evidence of the Hamil murder based, in part, on the difficulty of investigating that crime because of its temporal remoteness. (IR at 25)

Respondent essentially attempts to have their cake and eat it. If the declaration of Melody Ermachild is irrelevant, respondent must

accept its truth for all purposes of argument. Consider, therefore, what Melody Ermachild states in her declaration. She states that she "found it utterly impossible to conduct and investigation of the October 22, 1980 crime." (Ex. HC-33, at 157, ¶ 4) She states that "it was not possible to find any witnesses, including, but not limited to witnesses who could reveal the identities of suspects or witnesses." (*Id.*) She states that "Masters, who was living in a variety of locations in Long Beach in October, 1980, could not even remember his whereabouts on October 22, 1980." (*Id.*)

Petitioner submits that these facts, if true, establish that petitioner's rights to due process and a fair penalty hearing were violated by charging, as an aggravating circumstance, a ten-year-old crime which was not subject to meaningful investigation or the mounting of a viable defense. Thus, Claim VI is not barred under *Waltreus*.

As above noted, moreover, the *Waltreus* rule has stated exceptions. Issues raised and rejected on appeal will be heard on habeas corpus when there has been a "clear and fundamental" constitutional error which "strikes at the heart of the trial process." *In re Harris*, *supra*, 5 Cal.4th at 834. Issues raised and rejected on appeal will also be heard on habeas corpus when a petitioner is confined by the judgment of a court lacking "fundamental jurisdiction." (*Id.* at 836-37.) Executing petitioner because of an alleged prior offense for which there is no possibility of presenting a defense constitutes clear and fundamental constitutional error which strikes at the heart of the trial process. Executing petitioner under

these circumstances also creates a fundamental jurisdictional defect.

For all the above reasons Claim VI is also not barred under *Waltreus*.

The Petition for Writ of Habeas Corpus should therefore be granted.

II. PETITIONER'S CLAIMS ARE NOT BARRED UNDER *DIXON*

Respondent argues that Claims III and VII are barred under *In re Dixon* (1953) 41 Cal.2d 756, 579, in that issues which could have been raised on appeal, but were not raised, may not be reconsidered on habeas corpus absent proof of certain exceptions. (IR at 19, 26) Contrary to respondent's claim, however, the *Dixon* rules do not apply to petitioner's claims.

A. PETITIONER'S CLAIMS

Claim III alleges that the prosecution committed repeated instances of prosecutorial misconduct. Claim III is based upon evidence of the coercion of prosecution witness Rufus Willis, the manufacture of evidence, the subornation of perjury, and the violation of petitioner's *Miranda* rights. Claim III is also based upon the coercion and attempt to suborn perjury for penalty phase witnesses, the coercion of and failure to disclose the benefits received by Bobby Evans for his testimony, continuing threats and coercion of exculpatory witness Charles Drume, and the pervasive and systematic withholding and delay in disclosing evidence favorable to the defense. (Petition at 58-97)

Claim VII alleges that the State cannot, consistent with due process and the Eighth Amendment, prosecute and sentence to death petitioner for a murder which directly arose out of unconstitutional conditions of imprisonment. (Petition at 108-116)

B. RESPONDENT'S ARGUMENTS

Respondent argues that petitioner's allegations of multiple violations of the prosecution's duty to disclose favorable, material evidence to the defense – so called *Brady* violations – are barred under *In re Dixon, supra*, since many of these allegations are based on materials which are already part of the trial record. Thus, in respondent's view, these issues could have been raised on direct appeal. (IR at 18-19)

Respondent argues that Claim VII – petitioner's claim that his conviction and sentence directly arose out of unconstitutional prison conditions – is barred in its entirety since this issue could have been raised on direct appeal. (IR at 26) Thus, respondent argues that petitioner's argument is exclusively founded upon the trial record. (*Id.*)

C. CLAIMS III AND VII COULD NOT HAVE BEEN RAISED ON APPEAL

Respondent's *Dixon* arguments are misplaced. Petitioner's prosecutorial misconduct argument could not have been raised on appeal, at least not in its entirety, since it is principally based upon matters outside the record. While Claim VII – petitioner's claim that his conviction and sentence directly arose out of unconstitutional prison conditions – establishes a *prima facie* case based on the

record, the *Dixon* rule does not apply since the evidence in the record is not sufficient to support an appellate claim, unless respondents are willing to stipulate to the truth of petitioner's factual allegations in support of his claim. Since respondent presumably is not willing to accept the truth of these factual allegations, petitioner's seventh claim could not have been raised on appeal.

D. CLAIM III IS NOT BARRED UNDER *DIXON*

Under *In re Dixon, supra*, 41 Cal.2d 756, there can be no procedural default when references to matters outside the record are necessary to establish the denial of a fundamental constitutional right:

> "[W]hen reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right, resort to habeas corpus is not only appropriate, but required."
> *In re Bower* (1985) 38 Cal.3d 865, 872, citing *People v. Pope* (1979) 23 Cal.3d 412, 426; *In re Lewallen* (1979) 23 Cal.3d 274, 278.

While Claim III certainly includes matters already within the appellate record, it is principally founded upon matters outside the appellate record. Thus, paragraph 136 incorporates paragraph 24 which incorporates all the exhibits appended to the petition. Claim III, moreover, is founded upon paragraphs 140-143, 145, 148-150, 152, 154, 157-159, 160-166, 169-170, 174-180, and 182, all of which are directed to matters outside of the appellate record.

Claim III, moreover, is also founded upon detailed declarations by Rufus Willis, Andre Johnson, Lawrence Woodard, Robert A. Brewer, and Joseph Baxter. Claim III is additionally

founded upon the testimony of government witness Bobby Evans and the transcripts of three unrelated judicial proceedings. (Petition at ¶¶ 169-171)

While Claim III is certainly based *in part* on matters in the appellate record, the record portions simply document the State's withholding and delay in disclosing evidence favorable to the defense. The new evidence, however, establishes that prosecutorial misconduct permeates the State's entire case. Indeed, one can hardly imagine a more compelling case for habeas relief based upon prosecutorial misconduct.

E. PETITIONER'S SEVENTH CLAIM THAT HIS CONVICTION AND SENTENCE DIRECTLY AROSE OUT OF UNCONSTITUTIONAL PRISON CONDITIONS IS NOT BARRED BY *DIXON*

In the seventh claim, petitioner alleges that his conviction and sentence are unconstitutional because the murder of Sgt. Burchfield arose directly out of State-created, unconstitutional prison conditions which made the results of such conditions reasonably foreseeable. Petitioner alleges that given the State-created conditions are violations of both Due Process of Law and the Eighth Amendment to the United States Constitution, it is also a violation of the Constitution to charge and convict petitioner of first degree murder, and to sentence him to death, for encouraging or supporting what reasonably appeared to be an act of self-defense under the atmosphere of delusion and terror created by the unconstitutional prison conditions. (Petition at ¶ 257)

Respondent argues that this argument is barred by *In re Dixon*, *supra*, 41 Cal.2d 756, because "petitioner relies solely on the trial record." (IR at 26) Respondent's argument, however, is founded upon faulty analysis. Petitioner's argument would have been raised on appeal had the appellate record been sufficient for successful argument on appeal. The appellate record, however, simply provides a *prima facie* case for habeas relief. Thus, the claim must be raised on habeas corpus.

If respondent is willing to accept the truth of each and every factual allegation contained in Claim VII, then it may be possible to decide the matter on appeal. Petitioner, however, seriously doubts that respondent is willing to accept the truth of all of the factual allegations contained in paragraphs 235-255. Thus, respondent's argument must be summarily rejected. Petitioner must be allowed to prove the facts underlying Claim VII through the process of an evidentiary hearing.

For all the above reasons, Claims III and VII are not barred under *Dixon.* The petition should therefore be granted.

III. THE PETITION IS TIMELY

In his petition, petitioner asserted timeliness despite its having been filed after the presumptive six-months-following-reply-brief period had passed. (Supreme Court Policies Regarding Cases Arising from Judgment of Death, Policy 3, Std. 1-1.1; *In re Clark* (1993) 5 Cal.4th 750) Petitioner gave several broad reasons for this, including: (1) that the factual innocence investigation was delayed while the most logical investigator – because of her pre-

existing familiarity with the case and the potential witnesses – had other, prior commitments to complete; (2) that limits on how much the investigator might be paid further hampered her ability to commit her time fully to the case when she did work on it; and (3) that because a shift in the witnesses' willingness to speak about the case led to new and unexpected investigative strands to follow even while the presumptive deadline approached. (Petition at 14-18, ¶¶ 35-44)

Respondent, however, chooses to focus on and assert as a strawman only a very small portion of the investigation – that involving witness Johnny Hoze and the David Jackson murder, introduced as an uncharged prior during the penalty trial (IR at 3-6) – as if the entirety of petitioner's investigation and investigation-based claims concerned only this one matter. This is specious at best, and at worst, a concession that there are ample other grounds rendering the petition timely.

Respondent, by focusing on the Hoze investigation and then the fact that the juror interviews were not completed sooner completely ignores the massive number of hours put into the factual innocence investigation, both during the entire period following the reading of the record and, more intensely, since the filing of the opening brief, as well as the time spent (over 1,500 hours) on the opening brief itself.

Respondent also asserts the "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 [*sic*] brief on direct appeal." (IR at 5) This, too, ignores the

facts. Counsel were indeed focused on the investigation at the time they said they were. But that included years of frustration in contacts with inmate witnesses, characterized by outright refusals to speak with counsel or investigators; or private acknowledgments of the true facts coupled with refusals to state these facts in signed declarations. As set forth in the Baxter declaration, as the tenor of the contacts with these witnesses changed, new doors were opened which required further investigation. Many of those doors only began to open between September 2003 and April 2004, i.e., shortly before the presumptive due date for the filing of the habeas petition. (Declaration of Joseph Baxter, Ex. HC-7 at 8, ¶ 21) Counsel, therefore, in order to avoid a successive petition, elected to allow the investigation to continue until counsel felt confident that no new claims would be uncovered. (*Id.*)

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

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

Between mid-August 2004 and the middle of November 2004, counsel's investigators expended well over 100 hours of time in conjunction with the continued investigation of this case. This investigation included further work on the David Jackson matter, further interviews of witnesses who had information concerning one of the State's principal witnesses and further efforts aimed at locating witnesses who could corroborate some of the information being provided by one of our other witnesses. (*Id.* at 9, ¶ 24) Thus, counsel and their investigators expeditiously followed necessary leads right up until the date of the filing of the habeas petition. For this reason alone the petition is timely.

There are, moreover, additional grounds establishing the timeliness of the petition. They are to be found in the court's own payment records for both the appeal and habeas portions of this proceeding. These records show that the bulk of the $25,000 of investigative funds were spent by December 31, 2003, indicating, at the very least, that an active investigation had been pursued up until that time. In addition, the court, on April 17, 2002, following submission of counsel's final claim for payment for their work on Appellant's Opening Brief in the related appeal, withheld 801.25 hours ($100,156.25) in payments. (An additional payment for 150 of these hours, $18,750, was ordered by the Court on November 13, 2002, still leaving over 600 hours uncompensated.) Moreover, the last payment for counsel's habeas hours prior to the filing of the petition was on June 25, 2003; all further payments were deferred until the filing of the petition. No payment was made for hundreds of

hours of investigation required to follow up all necessary leads. It is impossible to imagine a context in which such withholding of funds to sole practitioners could not have an impact on counsels' ability to complete their work herein, in light of the foreseeable, nay inevitable, hardship caused and consequent necessity to work on other, income-producing case. All things considered, counsel's efforts were herculean, and the petition should be deemed timely-in-fact.

IV. THERE IS NO REQUIREMENT THAT PETITIONER SHOW THAT HIS DECLARING WITNESSES WILL TESTIFY

Respondent asserts, without citation to authority, that the court should not order a reference hearing because of the presumed bias of at least two of the declarants and the lack of guarantees that either they or the remaining declarants will be willing to testify at such a hearing. Surprisingly, respondent does so even while acknowledging that credibility findings are typically undertaken precisely at the reference hearing which they now oppose. (IR at 11, citing *In re Johnson* (1998) 18 Cal.4th 447, 451)

Petitioner noted (with regard to respondent's timeliness argument) that respondent was creating a strawman (*supra* at 12); now they are grasping at straws.

First, there are *never* any guarantees in any reference hearing that the witness will testify, or be believed – those determinations occur at the reference hearings themselves.

Second, the task of petitioner at this stage is to raise a *prima facie* case that he is factually innocent. That is, to state "facts, that, if true, entitle the petitioner to relief . . . ." (*People v. Romero* (2004)

8 Cal.4th 728, 737; *People v. Lawler* (1979) 23 Cal.3d 190, 194 ["If, taking the facts alleged as true, the petitioner has established a prima facie case for relief on habeas corpus, then an order to show cause should issue."]) It is difficult to imagine a stronger case than one in which both of the primary prosecution inmate-witnesses have recanted their inculpatory testimony and admitted lying at petitioner's trial, especially when their recantations are corroborated by other independent witnesses and a wide array of evidence. Other than the results of lie-detector examinations, it is difficult to know what more could possibly be sought or needed.

Third, respondent appears to assume that this is all the evidence that will be presented at a reference hearing, yet discovery has not yet taken place,[1] and the investigation continues.

Accordingly, a reference hearing is both entirely appropriate and, indeed, compelled by the evidence produced so far by petitioner.

V. THE PETITION ALLEGES A *PRIMA FACIE* CASE OF PROSECUTORIAL MISCONDUCT

Petitioner's third claim set forth a compelling case of egregious prosecutorial misconduct. Petitioner was deprived of his liberty and sentenced to death in a trial rife with prosecutorial coercion of witnesses, manufacture of evidence, withholding of

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[1] While this Court's decision clarifying the post-conviction discovery statute, Penal Code § 1054.9, was issued March 4, 2004 (*In re Steele* (2004) 32 Cal.4th 682), filing of a discovery motion at that point would necessarily have delayed filing of the petition even longer.

evidence favorable to petitioner, and subornation of perjury. Instead of acknowledging, as the State certainly should, that the claim sets forth a *prima facie* case for relief, respondent challenges the factual thrust of each of petitioners allegations. Respondent's approach, however, does not really avoid the need for a hearing. If petitioner's compelling facts are true, petitioner's conviction must be reversed. If, on the other hand, each and every factual allegation is at issue, a hearing must be held.

To clarify the differences between the positions of petitioner and respondent with respect to Claim III, petitioner offers the chart set forth on the following page.

The Elements of the Prosecutorial Misconduct Claim	Respondent's Informal Response
1. Coercion of Willis, manufacture of evidence, subornation of perjury, and violation of petitioner's *Miranda* rights (Petition at 59-73)	• "There is no showing that Willis would subject himself to cross-examination . . . ." (IR at 13) • "Willis' recantation is inherently incredible." (IR at 14)
2. The coercion of Robert Brewer and attempt to subom perjury for the penalty phase (Petition at 73-74)	"There was no impropriety in the questioning of Robert Brewer, and even if there was, there was no prejudice." (IR at 15)
3. The coercion of Bobby Evans and the failure to disclose the benefits received by Evans for his testimony (Petition at 75-82)	• "Petitioner fails to disclose any nexus between Evans' Alameda County probation and his testimony against petitioner." (IR at 16) • "There is no tie between Evans' purported indictment and his testimony in petitioner's case." (IR at 16) • "Petitioner has failed to demonstrate either that the prosecution failed to disclose relevant impeaching information . . . or that the information could have affected the trial outcome." (IR at 17)
4. The continuing coercion of exculpatory witness Charles Drume (Petition at 81-82)	"The Drume allegations, if true, do not provide a basis for habeas relief." (IR at 18)
5. The pervasive and systematic withholding and delay in disclosing evidence favorable to the defense (Petition at 82-97)	"Since there was a great deal of litigation at trial concerning these *Brady* allegations, petitioner's claim is barred by *In re Dixon*. (IR at 18-19)

Petitioner has already fully responded to two of respondent's arguments. Thus, petitioner has answered respondent's novel claim that petitioner must somehow prove that Willis will subject himself to cross-examination. (*Supra* at 15) Petitioner has also answered respondent's argument that Claim III is barred under *In re Dixon, supra*, 41 Cal.2d 756. (*Supra* at 7) Respondent's remaining arguments are answered below.

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

In addition to their novel claim that petitioner must somehow prove that Willis will testify at a reference hearing, respondent argues that there is no point in taking his testimony since Willis' recantation is inherently incredible. (IR at 14) This argument is fatally flawed since credibility determinations need to be made at a reference hearing. "When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive . . . ." *Blackledge v. Allison* (1977) 431 U.S. 63,82,n.25 (internal quotation marks and citations omitted).

Respondent's jaundiced views of Willis' declaration, in any case, are directly contrary to the record. Respondent argues that Willis' declaration is contradicted by incriminating kites "in petitioner's own handwriting that were written before Willis ever approached the authorities." (IR at 14) Whether the kites were written before or after Willis approached the authorities is a factual question which must be determined at a hearing. Nonetheless, according to Willis the kites were created at the State's request.

(Declaration of Rufus Willis, Ex. HC-1 at 2-3, 5-6) His declaration is corroborated by his own trial testimony. Thus, Willis testified that he received two kites from Masters, which were identified at trial as Peoples Exhibit 150-C and 159-C. According to Willis' trial testimony, both of these kites were written *after* District Attorney investigator Charles Neumark told Willis he needed a detailed admission from Masters:

> Q. That would mean that you, that you got both this 150-C and that 159-C after you talked to Mr. Numark? [*sic*]
>
> A. That's correct.
>
> Q. Okay. Because you basically had them in your cell at the same time, 150-C and 159-C at the same time, right?
>
> A. Well, I know that –
>
> The court: Is 159 still in front of him?
>
> Mr. Rotwein: Yes.
>
> The witness: See, I remembered, now that you mentioned it, that that note right there, I had sent them a note asking for a Usalama report. That was right before the – well, that was right after the conversation I had with Charlie Numark. [*sic*] So I remember that report right there, 'cause that's what he sent me back. I then wrote him another kite specifically stating I wanted a Usalama report. And that's what this is, the Usalama report. So, yes, I did have that in my cell at the same time. (RT 13088-89)

Respondent also raises the question of "why petitioner would ascribe a prominent role to himself if he was simply copying Willis's reports." (IR at 14) Respondent argues that Willis' explanation – that he wrote the report to give petitioner a role in the Burchfield murder to put him in good standing with BGF leadership – makes no

sense since Woodard's declaration claims he already knew that petitioner had no role in the Burchfield murder. (IR at 14) Respondent therefore argues that petitioner could not place himself in good standing with Woodard by claiming to have done something which Woodard knew he didn't do. (IR at 14-15)

Respondent confuses Woodard with the BGF leadership. Woodard was not the "BGF leadership" referred to by Willis in his declaration. The BGF leadership was in another section of the prison entirely. Willis was on his way out of C-section when he got the kites from Masters. Shortly thereafter, he was moved to the Adjustment Center. (Declaration of Rufus Willis, Ex. HC-1, at 7) Thus, he told Masters that he "would keister the report [transport the kite by hiding it in his anus] to get it to the BGF leadership . . . ." (*Id.* at 6)

Thus, Willis' recantation is not only credible, it is corroborated by the record. The credibility determination, in any case, is a matter for the reference hearing.[2]

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[2] Respondent also argues by way of footnote that Willis' declaration, "which presupposes that Willis knew exactly who petitioner was and set him up as a co-conspirator even though he knew he had no role in the crime" is inconsistent with Claim I of the habeas petition, "which alleges that Willis did not know who petitioner was and misidentified him for inmate Richardson" (IR at 14, n. 7.) These positions are not inconsistent. Willis could know of Masters without knowing what he looked like. Indeed, it is easier to betray someone one doesn't know, especially when one doesn't have to look the betrayed person "in the eye." Willis, in any case, is the State's witness. If there are flaws in his testimony it is because there are flaws in the State's entire case. Cursing at darkness will not solve the problem. Willis must be allowed to testify.

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

Respondent baldly claims that the coercion and attempt to suborn perjury from Robert Brewer is legally irrelevant, since Brewer never testified. Respondent misses the point.

To support his claim petitioner has an obligation to set forth all known instances of prosecutorial misconduct. Coercion of witnesses and attempting to suborn perjury against Masters certainly constitutes prosecutorial misconduct. While the particular incident may or may not have been directly prejudicial, it certainly establishes a pattern of misconduct, consistent with (a) the coercion of Rufus Willis, (b) the coercion of and failure to disclose the benefits received by Bobby Evans for his testimony, (c) the continuing threats and coercion of exculpatory witness Charles Drume, and the (d) pervasive and systematic withholding and delay in disclosing evidence favorable to defendant. Thus, the State's coercion and attempt to suborn perjury from Robert Brewer is relevant.

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

Respondent completely mischaracterizes the Bobby Evans evidence. To support the prosecutorial misconduct claim petitioner attaches excerpts from 1996 and 1998 trials in which Bobby Evans testified. In one trial, Evans testified that he was not prosecuted for fifteen to twenty shootings because he was "granted immunity in Court, in State Court, for testifying on a prison murder" of a prison

guard at San Quentin. (*People v. Williams*, Ex. HC-16, pp. 8-2 83) In a second trial, Evans testified that he got probation on his April 1989 Alameda charges as a result of having testified in a case arising out of a "prison homicide" of a prison "Sergeant" – undoubtedly this case – and for testifying for the federal government on a large drug case. (*People v. Bailey*, Ex. HC-18, pp. 94-95) Evans also testified that he was in the process of being indicted under the RICO Act when he decided to break the BGF rules and testify against the BGF. (*People v. Bailey*, Ex. HC-18, p. 96)

Respondent argues that these transcripts are not sufficiently convincing. "[W]e do not know what Evans meant when he said he was 'granted immunity' [since] 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." (IR at 16, n. 8)

Respondent's remarks are disingenuous. If respondent wants to know what Evans meant when he said he was granted immunity, respondent should ask Evans when he is on the witness stand at the reference hearing. The distinction between granting a witness immunity and promising a witness that he will not be charged for twenty shootings, and then not charging him, hardly matters. What matters is that the State failed to disclose extraordinary benefits granted to witness Bobby Evans. What also matters is the State's failure to disclose Bobby Evans' belief that he had received each and every one of these benefits in exchange for his testimony.

Respondent argues that the *People v. Bailey* transcript "fails to disclose any nexus between Evans's Alameda County probation and his testimony against petitioner." (IR at 16) Evans' testimony, however, supplies the connection. Evans was asked, "What happened in between 1987 and 1989 that you were getting probation in 1989?", referring to Evans' 1989 Alameda County probation. (Ex. HC-18 at 94) *Evans answered that he got probation* as a result of his testimony for the federal government on a large drug case, *and for his testimony for the government in conjunction with a prison homicide of a Sergeant.* (*Id.* at 94-95) The nexus could not be any clearer.

Respondent also feigns difficulty understanding the relevance of Evans' testimony in the same case, that he was in the process of being indicted under the RICO Act when he decided to break with the BGF oath and testify against the BGF and its members. (Ex. HC-18, p. 96) Respondent argues that this "does not in any way tie that purported indictment to his testimony in petitioner's case." (IR at 16) What matters, however, is that Bobby Evans himself made the connection: he decided to testify in petitioner's trial because he was being pressured with a RICO indictment.

Thus, this case does not simply involve failures to disclose benfits to a prosecution witness. It involves egregious failures to disclose extraordinary benefits to a key prosecution witness. As the petition makes clear, Bobby Evans *testified under oath* in 1996 and 1998 trials that he received three extraordinary benefits for his testimony against Jarvis Masters and his co-defendants:

1. He was granted immunity for fifteen to twenty shootings;

2. He received a 1989 Alameda County probation;

3. He was not indicted under the RICO Act.

None of this was disclosed at Jarvis Masters' trial. On the contrary, Evans testified that he did not receive any benefits whatsoever, and government witnesses supported his false testimony. Evans was a hugely important witness, both during the guilt phase and the penalty phase. (AOB 165) For these reasons the Petition for Writ of Habeas Corpus must be granted.[3]

D. THE CONTINUING COERCION OF EXCULPATORY WITNESS CHARLES DRUME

Petitioner's prosecutorial misconduct claim is also supported by the declaration of inmate Charles Drume. Drume states that he was attacked on a number of occasions in California prisons as a result of his coming forward for Masters, but against the BGF. (Declaration of Charles Drume, Ex. HC-4, p. 21, ¶ 7) Rather than

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[3] Respondent also challenges the Declaration of Joseph Baxter (Ex. HC-7 at 31) on the ground that the evidence simply constitutes a "hearsay declaration of counsel." Respondent claims that its position is supported by this Court's decision in *In re Fields* (1990) 51 Cal.3d 1063, 1070.

In re Fields does not support respondents' position. The decision, instead, holds that "an out-of-court declaration is hearsay" at a "reference hearing following issuance of an order to show cause" since the hearing was "subject to the rules of evidence as codified in the Evidence Code." *Id.* at 1070. Thus, counsel's declaration will not be admissible at a reference hearing following the issuance of an order to show cause. This hardly means that counsel's declaration may not be considered for purposes of determining whether a reference hearing should be held.

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

Respondent argues that Drume's allegations are irrelevant to any habeas relief in this case. (IR at 18) Respondent again fails to see the plain and obvious.

The Great Writ is designed to provide relief to individuals whose liberties have been, or are being unlawfully restrained. For nearly twenty years Charles Drume has attempted to come forward to provide evidence that petitioner is innocent and unlawfully incarcerated, but the State does everything in its power to prevent Drume from exonerating Jarvis Masters. Drume's testimony is extraordinarily relevant to this petition.

For all the above reasons, and for the reasons set forth in the Petition for Writ of Habeas Corpus, petitioner's third claim sets forth a *prima facie* case of prosecutorial misconduct. The petition should therefore be granted.

VI. PETITIONER'S JURY MISCONDUCT CLAIM IS SUFFICIENT TO RAISE A *PRIMA FACIE* CASE AT THIS STAGE OF THE PROCEEDINGS

Respondent asserts that petitioner's fourth claim regarding possible juror misconduct fails to state a *prima facie* case for relief. (IR at 20) Petitioner asserts that at this stage of the proceeding, prior even to the need to respond to a formal return and, more important, prior to the filing of a discovery motion, petitioner's allegations are sufficient.

It must be remembered that petitioner has made these allegations, reported to him by the percipient witness, in a verified petition. Thus, while it is true that "[c]onclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing" (*People v. Karis* (1988) 46 Cal.3d 612, 656), these are anything but conclusory allegations. Rather, they are allegations of specific misconduct, made by a percipient witness – a sworn officer of the State – the details of which are not yet fleshed out.

That the allegations are made in the alternative are an artifact of the time which has passed and understandably imperfect memory regarding the details of the allegations. In addition, investigative efforts to discover the full name of the officer (that is, more than his last name) and to find him and talk to him, have *so far* (again, without the benefit of discovery or subpoena or funds for further

discovery)[4] not borne fruit. That does not minimize the force of the allegations; either one would constitute juror misconduct of constitutional dimensions. As this court instructed, "A petitioner who is aware of facts adequate to state a prima facie case for habeas corpus relief should include the claim based on those facts in the petition even if the claim is not fully 'developed.'" (*In re Clark* (1993) 5 Cal.4th 750, 781.) That is precisely the case here.

VII. PETITIONER'S CLAIM REGARDING THE RECANTATIONS OF PENALTY WITNESS JOHNNY HOZE ARE NEITHER UNTIMELY NOR INSUFFICIENT TO WARRANT RELIEF

Respondent asserts that petitioner's fifth claim regarding the numerous recantations of Johnny Hoze are both untimely and insufficient to warrant relief. (IR at 21-24) Petitioner has answered respondent's assertions regarding timeliness (*supra* at 11-15), and will not repeat them here.

Regarding sufficiency, first, respondent acknowledges that the "question is close." (IR at 22) That, however, is an acknowledgment that a hearing is necessary, for if the question is close, it should be resolved in the context of a full reference hearing, especially since this is but one of the many claims for which petitioner has made out a *prima facie* case, including claims of actual innocence and prosecutorial misconduct.

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[4] Counsel long ago exhausted the funds available for investigations of this sort. Thus, counsel needs additional funds for investigation, discovery, and the power of subpoena to complete this and other investigations associated with each of the claims of this petition.

Second, respondent relies upon the remainder of the "other crimes" penalty phase evidence to minimize the effect of the Hoze evidence regarding the Jackson murder, by listing the other aggravating factors (IR at 22), conveniently ignoring, however, the mitigating evidence presented, especially petitioner's cruel childhood, as well as ignoring the fact that of the three co-defendants in the instant case, petitioner's role was neither that of leader nor of actual killer.

Third, respondent ignores the broader context of the other issues raised in the petition, including the due process issue with regard to the Hamil murder. If appellant is correct that introduction of that prior uncharged murder was inadmissible, then the importance of the Jackson murder, also uncharged, grows. Put another way, if Hoze is found after an order to show cause to have lied on the stand, and the Hamil murder is found to have been inadmissible, then the entire penalty-phase calculus must be found to have been profoundly altered, with both other (uncharged) murders no longer in the death equation.

Respondent claims that, even without the Hoze evidence, there was sufficient evidence to support "an inference that petitioner was part of a group that decided to murder Jackson." (IR at 23) This is ludicrous. There was no evidence whatsoever that there was a group decision to murder Jackson. Indeed, other than the fact of physical proximity to Jackson as he backed away from the inmate or inmates who wounded him, there was no evidence whatsoever linking petitioner to the case other than Hoze's now-recanted

testimony. Nor was the evidence one-sided: petitioner introduced testimony from the correctional officer who removed him from the yard and searched him, and found on him no contraband, blood, cuts or abrasions. (RT 20529.) He also introduced the testimony of three inmate witnesses who said that petitioner was not in fact near the stabbing *when it took place* (summarized at AOB 306-307). Accordingly, absent the Hoze testimony, there is little or no chance that a reasonable juror would be able to find petitioner guilty of the Jackson murder beyond a reasonable doubt.

Finally, respondent claims that Hoze's recantations are inherently untrustworthy and on that basis should not be worthy of a reference hearing. (IR at 23-24.) That conclusion, however, is one better left to a finder of fact in a reference hearing, as is the judgment regarding its impact on the totality of the case *after* such a hearing and this court's judgment regarding the findings therein. *People v. Romero* (2004) 8 Cal.4th 728, 737; *People v. Lawler* (1979) 23 Cal.3d 190, 194 ["If, taking the facts alleged as true, the petitioner has established a prima facie case for relief on habeas corpus, then an order to show cause should issue."]

VIII. CLAIM VII IS FOUNDED UPON CONTROLLING EIGHTH AMENDMENT PRINCIPLE

In addition to contending that Claim VII (petitioner's conviction and sentence arose directly out of unconstitutional prison conditions) is barred by the *Dixon* rule, respondent argues that the "claim is devoid of legal support." Respondent knows "of no authority that suggests harsh, oppressive or even unconstitutional prison conditions may serve as an excuse for murder." (IR at 26)

Respondent misunderstands petitioner's claim. Petitioner does not argue that unconstitutional prison conditions "may serve as an *excuse* for murder." Nothing excuses murder.

If the facts set forth in Claim VII are true, however, something is seriously wrong about what the State has done in this case. If the facts set forth in Claim VII are true, then petitioner has committed a crime, but petitioner is also a victim of State misconduct and some relief must be available. Death, moreover, is certainly not an appropriate sentence for encouraging or supporting what reasonably appeared to be an act of self-defense under unconstitutional prison conditions created by the State.

While the facts of this case are certainly unique, the underlying constitutional principle is certainly not novel. "[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Roper v. Simmons* (2005) ____ U.S. ____, 125 S.Ct. 1183, 1190, 161 L.Ed.2d 1, 16 (quoting *Weems v. The United States* (1910) 217 U.S. 349, 367). Thus, "[i]n capital cases, the Constitution demands that the punishment be tailored both to the nature of the crime itself and to the defendants 'personal responsibility and moral guilt.'" *Roper, supra,* (2005) _____U.S. _____ , 125 S.Ct. at 1206, 161 L.Ed.2d at 39 (O'Connor, J., dissenting, quoting *Enmund v. Florida* (1982) 458 U.S. 782, 801). The ultimate penalty of death cannot be justified unless the actions of a defendant reflect "a consciousness materially more 'depraved'

than that of . . . the average murderer." *Atkins v. Virginia* (2002) 536 U.S. 304, 319. "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability make them 'the most deserving of execution.'" *Roper, supra*, ____ U.S. ____, 125 S.Ct. at 1194, 161 L.Ed.2d at 21 (quoting *Atkins v. Virginia, supra*, 536 U.S. at 319)

As a result of this central guiding principle, the death penalty may not be imposed for "a number of crimes that beyond question are severe in absolute terms . . . . *Coker v. Georgia* (1977) 433 U.S. 584, 53 L.Ed.2d 982, 97 S.Ct. 2861 (rape of an adult woman); *Enmund v. Florida* (1982) 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (felony murder where defendant did not kill, attempt to kill, or intend to kill). Thus, the death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson v. Oklahoma* (1988) 487 U.S. 815; *Ford v. Wainwright* (1986) 477 U.S. 399, 91 L.Ed.2d 335, 106 S.Ct. 2595; *Atkins, supra.* These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders." *Roper, supra,* ____U.S.____, 125 S.Ct. 1194-95, 161 L.Ed.2d 21.

This result also follows directly from the legal justifications for the death penalty. "[T]here are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by perspective offenders.'" *Roper, supra,*____ U.S.____, 125 S.Ct. at 1196, 161 L.Ed.2d at 23 (quoting *Atkins, supra*, 536 U.S. at 319)

"Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree . . . ." *Roper, supra*, ____ U.S.____, 125 S.Ct. at 1196, 161 L.Ed.2d at 23.

As for deterrence, the question is "whether the death penalty has a significant or even measurable deterrent effect." *Roper, supra*, ____ U.S.____, 125 S.Ct. at 1196, 161 L.Ed.2d at 23. Thus, the high court concluded in *Thompson v. Oklahoma* (1988) 487 U.S. 815, 837, that "the likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."

Capital punishment, moreover, "can serve as a deterrent only when murder is the result of premeditation and deliberation . . . ." *Atkins, supra*, 536 U.S. at 319 (quoting *Enmund v. Florida* (1982) 458 U.S. 782, 799) Thus, the penalty of death is unconstitutional when the execution of a defendant does not measurably contribute to deterrence or retribution. "[U]nless the imposition of the death penalty . . . measurably contributes to one or both of these goals it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment." *Atkins, supra*, 536, U.S. 304, 319.

If the facts set forth in Claim VII are true, then capital punishment cannot be imposed since petitioner's actions do not reflect "a consciousness materially more 'depraved' than that of . . . the average murder." *Atkins v. Virginia* (2002) 536 U.S. 304, 319. If

the facts alleged in Claim VII are true, then petitioner does not have the "extreme culpability" of those murderers "most deserving of execution." *Roper v. Simmons* (2005) ____ U.S. ____, 125 S.Ct. at 1194, 161 L.Ed.2d at 21. Claim VII therefore clearly makes a *prima facie* case for habeas corpus relief. The petition should therefore be granted.

IX. THE STATE'S DUTY TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE CONTINUES AFTER CONVICTION

Petitioner's eighth claim is premised on an inviolable principle: the State's duty to disclose material exculpatory evidence continues after conviction. *Imbler v. Pachtman* (1976) 424 U.S. 409, 472 n. 25; *Thomas v. Goldsmith* (9 Cir. 1992) 979 F.2d 746; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1261; *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179. Respondent fully accepts this "continuing obligation to disclose material information favorable to the petitioner" (IR at 27) but prefers that the obligation remain an abstraction.

Petitioner documents two instances in which information exculpatory to Jarvis Masters should have been, but never was, provided by the CDC or the prosecutors. (Petition at 117) Petitioner also documents a logical basis for its belief that the State has failed to provide exculpatory information from Andre Johnson. (Petition at 117-118) Respondent does not deny the truth of any of this. Respondent, nonetheless, opposes our request for an order to allow petitioner to review all the exculpatory material in the possession of the State, including unredacted versions of the Brun, Johnson, and Drume debriefings, on the ground that the State

cannot be required "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." (IR at 27)

Petitioner is not expecting and does not request that respondent be ordered "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 some time say something that is potentially helpful to petitioner." This case, however, and the death of Sergeant Burchfield has had a deep and lasting imprint upon the Department of Corrections. As anyone associated with this case who has passed through the gates of San Quentin over the past twenty years surely knows, Sergeant Burchfield is memorialized at the prison checkpoint itself. Twenty years later, he remains the last San Quentin correctional officer slain in the line of duty. The deep seated feelings stirred by his death may help to explain the pervasive and systematic withholding and delay in disclosing evidence favorable to the defense in this case. (Petition at 82-97) It may help to explain why the trial judge herself declared "I've never seen a police authority do the kind of evidence collection that was done in this case." (RT 13283) It may help to explain the coercion of Rufus Willis, the manufacture of evidence, the subornation of Willis' perjury, and the violation of petitioner's *Miranda* rights. It may help to explain the coercion and attempt to suborn perjury of inmate Robert Brewer. It may help to explain the coercion and failure to disclose the benefits received by Bobby

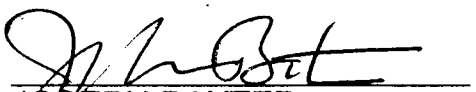
Evans for his testimony. And as the Declaration of Charles Drume also makes clear, the CDC case against Jarvis Masters remains alive and well even in the northernmost regions of the California prison system. (Ex. HC-7)

Petitioner does not expect respondent to search through the files of child protective service agencies to uncover exculpatory information regarding Jarvis Masters. But given the notoriety of this case within the State prison system, and the State's history of withholding exculpatory evidence, and the limited numbers of inmates who are potential witnesses to the June 1985 events underlying this case, it is reasonable to ask the California Department of Corrections to monitor all of the exculpatory information in the possession of its prison system, including unredacted versions of the Brun, Johnson, and Drume debriefings, and any other debriefing of individuals who were housed in San Quentin in 1985, or who claim knowledge of the murder of Sergeant Burchfield. Otherwise, the State's continuing duty to disclose material exculpatory evidence will be a meaningless abstraction.

CONCLUSION

For all the reasons set forth herein and for the reasons set forth in the Petition for Writ of Habeas Corpus, petitioner respectfully prays that the Petition for Writ of Habeas Corpus be granted.

Dated: September 16, 2005



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

On September 16, 2005, I served a true copy of the document entitled:

PETITIONER'S INFORMAL REPLY TO RESPONDENT'S INFORMAL RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

on opposing counsel/interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon fully prepaid in the United States Post Office mail box at Santa Rosa, California, addressed as follows:

Bill Lockyer
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Jarvis J. Masters
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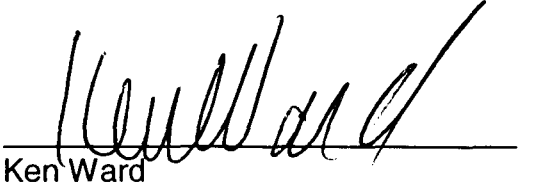
I declare under penalty of perjury that the foregoing is true and correct and that this document was executed at Santa Rosa, California on September 16, 2005.



Ken Ward