IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re

JARVIS MASTERS,

On Habeas Corpus

CAPITAL CASE
S130493

(Related to Pending Automatic Appeal No. S016883)
Marin County Superior Court No. 10467

RETURN TO ORDER TO SHOW CAUSE

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

RONALD S. MATTHIAS
Senior Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General
State Bar No. 104408

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-3664
Telephone: (415) 703-1361
Fax: (415) 703-1234
Email: gerald.engler@doj.ca.gov

Attorneys for Respondent

DEATH PENALTY

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

COMES NOW the Director of the California Department of Corrections and Rehabilitation to state in return to the order to show cause issued on February 14, 2007, as follows:

I.

On June 8, 1985, San Quentin Prison Correctional Sergeant Howell Burchfield was stabbed in the neck and killed by a prison-made spear as he walked along the tier of a cell block. (41 RT 11139-11149, 11157-11169; 42 RT 11247-11259.)[1/] Subsequent investigation established that Sergeant Burchfield was murdered as part of a conspiracy by a prison gang known as the Black Guerilla Family (BGF). (52 RT 12672, 12718-12719, 12729.) Petitioner was one of the conspirators. He drew up a plan that targeted Sergeant Burchfield as a potential victim (52 RT 12732-12740) and ultimately sharpened the metal weapon that was affixed to the spear used to kill the officer. (52 RT 12750, 12764, 12923-12932.)

After the murder, petitioner bragged in a clandestine note (or "kite") to

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1. All record citations are to the record on direct appeal in the related pending case S016883, which respondent hereby incorporates by reference in support of this return.

other BGF members that he had put a "razor edge double edge" on a weapon. The context of this note supports an inference that this was the murder weapon. (53 RT 12852-12859; Trial Exhibit 150-C.) Handwriting analysis confirmed that petitioner wrote this report. (65 RT 14839.) Two other members of the BGF conspiracy were prosecuted with petitioner: Andre Johnson, who was the actual assailant (53 RT 12908-12915; 62 RT 14447-14448), and Lawrence Woodard, who participated in the planning meetings and assigned Johnson to carry out the attack. (52 RT 12747-12760.)

II.

On January 8, 1990, a jury in Marin County Superior Court convicted petitioner of the first degree murder of Sergeant Burchfield (Pen. Code, § 187) and found true the special circumstances that Burchfield was a peace officer killed in the performance of his duties (Pen. Code, § 190.2, subd. (a)(7)); the jury also convicted petitioner of a separate count of conspiracy to commit assault and murder (Pen. Code, § 182). (18 CT 5121-5125.) Codefendants Lawrence Woodard and Andre Johnson were convicted of similar charges. (18 CT 5121-5125; 5 2nd Aug. CT 2904-2907.) On May 18, 1990, the jury returned a verdict of death against petitioner, and the court sentenced him to death on July 30, 1990. (22 CT 6559-6560; 23 CT 6719-6722, 6726.) Codefendants Woodard and Johnson, who had separate penalty trials, were each sentenced to life imprisonment without parole after Woodward's penalty jury deadlocked and the trial court reduced Johnson's death verdict pursuant to Penal Code section 190.4. (21 CT 6137; 12 2nd Aug. CT 3286-3287, 3390.) The Court of Appeal affirmed the judgments against Johnson and Woodard on October 20, 1993. (See *People v. Johnson* (1993) 19 Cal.App.4th 778, 780, 794.)

III.

Petitioner's case is pending on automatic appeal in case number S016883. Petitioner filed his opening brief on December 7, 2001; respondent filed its brief on March 3, 2003; petitioner filed his reply brief on November 24, 2003.

IV.

On January 7, 2005, petitioner filed the instant petition raising eight claims for relief. On May 23, 2005, respondent filed an informal response to the petition. On February 14, 2007, the Court issued an order to show cause directing respondent to show

> why petitioner is not entitled to relief because (1) material false evidence was admitted at the guilt phase of his trial; (2) newly discovered evidence casts fundamental doubt on the prosecution's guilt-phase case; (3) petitioner's trial was fundamentally unfair because prosecution witness Rufus Willis' testimony was unreliable due to improper coercion by the prosecution, (4) the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 by failing to disclose the promises of leniency to prosecution witness Bobby Evans and other facts bearing on Evans' credibility that have come to light after the judgment was imposed, (5) the prosecution knowingly presented the false testimony of Bobby Evans, (6) petitioner's trial was fundamentally unfair because Bobby Evans' testimony was unreliable due to improper coercion by the prosecution, (7) material false evidence–the testimony of Johnny Hoze–was admitted at the penalty phase regarding petitioner's participation in the murder of David Jackson; and (8) newly discovered evidence regarding Hoze's testimony casts fundamental doubt on the accuracy and reliability of the penalty-phase proceedings, as alleged in Claims II, III, and V of the petition.

V.

Petitioner is guilty in fact, is lawfully under a sentence of death, and is lawfully confined. The underlying judgment in Marin County Superior Court No. S016803 is valid and is neither infected nor impaired by error. Respondent denies petitioner's allegations to the contrary.

VI.

A.

With regard to whether "material false evidence was admitted at the guilt phase of his trial," petitioner has alleged the following:

1. Codefendant Woodard states in a declaration that "at least two of the 'kites'" used against petitioner at trial were false and were manufactured by inmate and prosecution witness Rufus Willis. (Petition at p. 50, ¶ 118; see also *id.* at pp. 65, 69, ¶¶ 149, 154.)

2. Codefendant Johnson states in a declaration that, "to his knowledge, Masters had no knowledge and took no part in the killing of Sergeant Burchfield. Masters did not communicate with him via note or kite, or verbally or in any other way about the crime." (Petition at p. 51, ¶ 119.) A kite written by Johnson and introduced at trial against petitioner, People's Exhibit 153-B, was "actually dictated by Rufus Willis" (Petition at p. 71, ¶ 171) and was fabricated and false testimony. (Petition at p. 72, ¶ 59; see also *id.* at pp. 70-73, ¶¶ 156-160.)

3. "Rufus Willis, the state's star witness, has recanted his testimony against Masters" and now states that "Masters 'had nothing to do with the planning of the Burchfield killing' . . ." (Petition at p. 52, ¶ 122.)

4. "Willis admits that his 'creation' of evidence against Masters included ordering him to write the 'kites which provided corroboration of

Willis' testimony." (Petition at p. 54, ¶ 127.) The kites at issue included People's Exhibits 150-C and 159-C. (Petition at p. 55, ¶¶ 128–129.) As to Exhibit 150-C, "Willis testified falsely that this kite showed that Masters was guilty as charged." (Petition at p. 62, ¶ 146.) As to Exhibit 159-C, "Willis, in his declaration, admits that this kite was purely and simply a fabrication, based on a compilation of false reports which Willis forwarded to Masters. . . ." (Petition at p. 67, ¶ 152; see also *id.* at pp. 67-69, ¶¶ 150-154.)

5. Inmate and prosecution witness Bobby Evans has told petitioner's counsel "that he knew that petitioner did not have anything to do with the killing of Sergeant Burchfield, and that Masters was not a member of the BGF commission, and that, contrary to Evans' trial testimony, Masters never told Evans that he voted for the killing of Burchfield." (Petition at p. 57, ¶ 133; see also *id.* at pp. 79-80, ¶¶ 177-179.) (See generally Petition at Claims II & III, pp. 45-97.)

B.

In response to these allegations, respondent alleges:

1. Rufus Willis did not provide false testimony against petitioner at trial.

a. Willis' trial testimony, which appears at 52 RT 12647 through 55 RT 13238 and 56 RT 13390 through 57 RT 13594, is truthful. Willis' trial testimony was corroborated by kites in petitioner's own handwriting showing that he had sharpened the murder weapon and approved the selection of codefendant Johnson to make the hit. These kites contained detailed descriptions of the planning that went into the attack upon Sergeant Burchfield. In addition, Willis' testimony contained detailed information connecting petitioner to the crime, including knowledge of the cell in which petitioner was confined before the murder. (See 53 RT 12852-12857, 12886-12899; 54 RT 13102; 56 RT 13482-13484; Exhibits 150-C, 159-C, 318-A-1.) Willis

expressly testified at trial that "everything I've testified to here on the s... been as accurate to the best of my recollection." (55 RT 13149.)

b. Willis' purported recantation, set forth in petitioner's Exhibi... Petition for Writ of Habeas Corpus [HC Exhibit] 1, pp. 0-12, is false ... only conflicts with his sworn testimony at trial, but is internally inconsist... demonstrated by the following:

1) Willis inconsistently states that petitioner had "nothing to ... with the murder plot, attended at least one meeting regarding the plot, ... played a "minor role" in the plot. (Compare HC Exhibit 1 at p. 2, ¶ 6 ["M... had nothing to do with planning of the Burchfield killing"] with *id.* at p. ... ["Masters had knowledge of a plan, but he had no authority in the plann... Sergeant Burchfield's death;" note that the original typed languag... Masters had "nothing to do with" the planning of Burchfield's m... crossed out and a handwritten interlineation is inserted to read as quote... ["Masters was present at least once" at a yard meeting to plan the hit] at p. 7, ¶ 8 [ascribing an unspecified "minor role" to petitioner].)

2) Willis inconsistently declares that he falsely im... Masters and that he merely "limited my answers" to what the authorities ... while trying "not to lie." (Compare HC Exhibit 1 at p. 8, ¶ 20 ["I felt I ... choice but to testify and to say what Numark and Berberian wante... implicate Masters along with the others though I knew that Masters had ... to do with planning the killing of Sgt. Burchfield,"] with *id.* at pp. 8-9, ¶ ... tried not to lie, but I limited my answers to what I knew they wanted."]

2. Bobby Evans did not provide false testimony against petitio... trial.

a. Evans' trial testimony, which appears at 58 RT 13661 throu... RT 13997, is truthful. Evans and Willis corroborate one another's testim... There is no evidence in the state trial record or in the habeas record sugge...

that Evans and Willis collaborated somehow to falsely implicate petitioner. The kites written by petitioner and the other codefendants also corroborate the testimony of Evans and Willis and cohere together to paint a convincing picture of guilt.

b. Evans purported recantation to petitioner's counsel is not credible. The purported recantation is an unsworn hearsay statement. Petitioner has submitted no declaration or other first-hand account from Evans purporting to recant his trial testimony.

3. Codefendant Woodard's declaration, appearing at HC Exhibit 2, purporting to exonerate petitioner is not credible. By the time Woodard executed this declaration, on May 19, 2004, all avenues of direct and collateral review in his case had been exhausted. Woodard's judgment was affirmed on direct appeal on October 20, 1993; this Court denied review on January 13, 1994; and the remittitur issued on February 3, 1994. (See Court of Appeal docket at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist+1+doc_no=A052254.) A search of the on-line docket for this Court and the Court of Appeal produces no match for any state habeas corpus petition ever filed by a Lawrence Woodard. A search of the on-line dockets for the United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuits produces no match for any federal habeas corpus petition ever filed by a Lawrence Woodard. Accordingly, Woodard has nothing to lose from this belated declaration purporting to exonerate petitioner. In addition, Woodard's declaration is not credible because it contains no admission by Woodard of his own role in the murder of Sergeant Burchfield. Rather, Woodard merely states that Willis told him of a plan to attack rival inmates and asked for his advice. Woodard admits only to being at a yard meeting also attended by petitioner at which a plan was discussed to attack rival gang members. He admits to no role in the ultimate decision to

attack Sergeant Burchfield. The kites admitted at trial in Woodard's own handwriting demonstrate that, contrary to his declaration, Woodard directed other BGF inmates "to get off on K-9s" (i.e., prison guards) before attacking Burchfield and boasted afterward that while "the K-9s lost a 8 year veteran of oppression, we've lost no one." (People's Exhibits 151-A, 151-B; see also RT 12831-12848.) The facts that Woodard's own conviction is final and that in his declaration he carefully skirts accepting any responsibility for Sergeant Burchfield's murder – in contrast to the trial evidence in his own handwriting – make his declaration unworthy of belief.

4. Codefendant Johnson's declaration, appearing at HC Exhibit 3, is not credible. By the time Johnson executed this declaration on April 2, 2004, all avenues of direct and collateral review in his case had been exhausted. Johnson's judgment was affirmed on direct appeal on October 20, 1993; this Court denied review on January 13, 1994; and the remittitur issued on February 3, 1994. (See Court of Appeal docket at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=4160&doc_no=A052254.) Thereafter, Johnson collaterally attacked his judgment in federal court. The United States District Court denied his petition for writ of habeas corpus on November 13, 2001; the United States Court of Appeals for the Ninth Circuit denied his appeal from that decision on January 29, 2004; and the United States Supreme Court denied certiorari on October 8, 2004. (See http://pacer.ca9.uscourts.gov/cgi-bin/reports.pl?CASENUM=02-15206&paid=01184357651; https://ecf.cand.uscourts.gov/cgi-bin/login.pl.) Johnson therefore has nothing to lose from his belated declaration purporting to exonerate petitioner. Johnson's declaration stating that he has "no idea who passed the knife" to his cell that was used to attack Sergeant Burchfield or "who made it" is contradicted by the trial evidence. (See People's Exhibit 153-A; RT 12923-12932.) Johnson's declaration is further suspect because he

carefully refrains from ascribing any role to codefendant Woodard, contrary to the trial evidence, instead stating that he was pressured to assault Sergeant Burchfield by unnamed "high ups" in the BGF. (See HC Exhibit 3 at ¶ 4.) In addition, Johnson qualifies his purported exoneration of petitioner by stating, "To my knowledge, Jarvis Masters had no knowledge of any involvement in the killing of Sergeant Burchfield." (*Id.* at ¶ 3.) Johnson also attempts to minimize his own role by suggesting that he killed Burchfield under "duress" and that the killing was "unintentional." (*Id.* at ¶ 9.) For these reasons, Johnson's declaration is not believable.

C.

Based on the facts alleged above, there is good reason to question the credibility of the declarations of Rufus Willis, Lawrence Woodard and Andre Johnson as well as the hearsay statement of Bobby Evans, which allege that false evidence was introduced at the guilt phase of petitioner's trial. If petitioner disputes the material facts alleged in this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

VII.

A.

With regard to whether "newly discovered evidence casts fundamental doubt on the prosecution's guilt-phase case," petitioner has alleged the same facts set forth above in section VI. A.1-5. (See generally Petition at Claims II and III.)

B.

In response to these allegations, respondent alleges the same facts set forth above in section VI.B.1-4 of this Answer. Any newly discovered evidence in the form of declarations from Willis, Woodard, and Johnson and hearsay statements from Evans is not credible for the reasons stated in section VI.B.1-4 of this Answer.

C.

Based on the facts alleged above, there is good reason to question the credibility of the declarations of Rufus Willis, Lawrence Woodard, and Andre Johnson, as well as the hearsay statement of Bobby Evans, which purport to assert that newly discovered evidence casts fundamental doubt on the prosecution's guilt phase case. If petitioner disputes the material facts alleged in this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

VIII.

A.

With regard to whether "petitioner's trial was fundamentally unfair because prosecution witness Rufus Willis' testimony was unreliable due to improper coercion by the prosecution," petitioner has alleged: Marin County District Attorney's Investigator Numark secretly told Willis he would be granted immunity to get his cooperation, but then Deputy District Attorney Berberian refused to grant him immunity. Willis then wanted to stop cooperating, but Berberian told him that if he did not testify as to what he had already told the authorities, he would be returned to San Quentin Prison. Willis

believed this was "tantamount to a death threat" (Petition at p. 53, ¶ 124), and left him "no choice but to cooperate, and to testify falsely to implicate Masters." (Petition at p. 60, ¶ 141.) (Note: Petitioner alleges in separate places in his petition that District Attorney's Investigators Gasser and Numark secretly promised him immunity (see Petition at p. 52, ¶ 123 and p. 60, ¶ 141); however, the supporting declaration from Willis states only that Numark promised him immunity (see HC Exhibit 1).) Petitioner goes on to allege that the purported coercion caused Willis to falsely implicate petitioner through a series of kites he solicited from petitioner and Johnson in response to Investigator Numark's direction that "he needed a detailed admission from Masters." (Petition at p. 61, ¶ 145.) (See also Petition at pp. 52-55, 59-73, ¶¶ 122-129, 139-160.)

B.

In response to these allegations, respondent alleges that Willis was not improperly coerced to testify against trial. These allegations are not new and were fully explored at trial.

1. Willis in fact testified under a grant of immunity, and this fact was disclosed to the jury and to petitioner and his counsel. (See People's Exhibit 195 and 195A; 52 RT 12649.) In addition, Willis testified that Investigator Numark had secretly promised that he would be released from custody upon the completion of his testimony. (52 RT 12651.) Willis further testified that when Deputy District Attorney Berberian learned of this promise he told Willis that he would not honor such a promise, but could only promise Willis' safety by confining him in facilities outside of California. (52 RT 12651-2652.) Petitioner's counsel fully explored the terms of Willis' immunity on cross-examination as well as the failed secret deal with Numark. (54 RT 13062-13067.) Willis reiterated that there was no deal with Berberian beyond the express terms of the immunity agreement: "Mr. Berberian has only agreed to

terms stated forth in the immunity papers. Nothing outside of that. There's no secret agreement between me and Mr. Berberian." (54 RT 13067.) A letter written by Willis to Numark in 1986, several years before trial, was also read to the jury. In this letter, Willis implored Numark to inform Berberian of the secret promise and complained that his life was in danger within the Department of Corrections. (56 RT 13444-13447.) Willis stated in this letter: "But now realizing the danger my life has been placed in as well as my future behind these walls[,] I strongly advise you to let Barberian [*sic*] read this letter so he'll have some ideal where my head is at, because I asked you, Numark, not to try to fuck me, and you obviously didn't pay attention. I trusted you only to be betrayed. Now they're messing me around behind these walls. They already tried to set me up once when I first arrived here." (26 RT 13446.) Willis further testified under cross-examination that he felt he had "no other alternative but to continue to cooperate" after his deal with Numark fell through:

> Q. By that time you had given basically all the information you had about the event, right?
>
> A. That is correct.
>
> Q. You had no choice but to testify, right?
>
> A. Well, I had a choice. I didn't have to do anything.
>
> Q. You knew that if you didn't testify, and the case was somehow dismissed, or the district attorney lost this case, the Department of Corrections would set you up and have you hit?
>
> A. That's very possible, yes. Well, that the—I thought I had went that far with Numark that I didn't have no, no other alternative but to continue to cooperate.

(54 RT 13066-13067.)

2. Willis was also cross-examined at trial about how he obtained the

kites from petitioner and codefendant Johnson. Willis acknowledged that Numark told him that "he needed some corroborating evidence" (57 RT 13593) and that he obtained incriminating kites from both petitioner and codefendant Johnson after first talking to Numark. (54 RT 13088-13090; 57 RT 13593-13594.) Willis never testified that the kites were fabricated, that he had dictated the contents to petitioner or Johnson, or that they contained false information about petitioner's role in the murder plot. Petitioner's counsel had full opportunity to cross-examine Willis about these subjects.

3. Petitioner did not seek to call Investigator Numark at trial despite the fact that he was available and testified at a discovery hearing out of the presence of the jury. (See 50 RT 12501.)

4. The issues concerning what promises were made to Willis and what motivations were behind his testimony were fully explored before the jury, as demonstrated by the above facts. The jury was fully capable of assessing whether Willis' testimony was reliable in light of the immunity agreement, the false promise made to him by Investigator Numark, and any fear for his personal safety he may have felt in light of the fact that he had incriminated his fellow gang members. Petitioner has not argued on direct appeal that Willis' testimony was inherently untrustworthy based on the trial record. The allegations of the habeas petition and Willis' supporting declaration do not add material new facts that were unknown or unexplored at trial.

C.

Relief is precluded on the question set forth in the Court's order to show cause because petitioner's claim regarding the alleged coercion of Rufus Willis as set forth in Claim III of the petition is untimely. Respondent incorporates pages 3-6 of its Informal Response to Petition for Writ of Habeas Corpus filed on May 23, 2005, in support of this averment.

D.

Based on the facts alleged above, there is good reason to question the credibility of the declaration of Rufus Willis which purports to assert that his trial testimony was coerced. If petitioner disputes the material facts alleged in this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

IX.

A.

With regard to whether "the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 by failing to disclose the promises of leniency to prosecution witness Bobby Evans and other facts bearing on Evans' credibility that have come to light after the judgment was imposed," petitioner has alleged that Bobby Evans has testified at unrelated proceedings subsequent to petitioner's trial to the following:

1. He was doing undercover drug buys for San Joaquin County since at least 1988, or before his testimony in petitioner's trial (Petition at p. 75, ¶ 170(1);

2. He was "granted immunity" in state court in a case involving the murder of a prison guard in San Quentin (Petition at p. 76, ¶ 170(2);

3. He received probation on an Alameda County case as a result of having testified in a case involving the murder of a prison guard and for testifying in a federal drug case (Petition at p. 76, ¶ 170(3); and

4. He was in the process of being indicted under the RICO Act when he decided to testify against the BGF (Petition at p. 76, ¶ 170(4).

B.

In response to these allegations, respondent alleges that no undisclosed promises of leniency were made to Evans and that no other material facts within the meaning of *Brady* and relevant to Evans' credibility were withheld from the defense.

1. The subject of what promises, if any, were made to Evans in exchange for his testimony was fully explored in the trial court. Respondent hereby incorporates the testimony of Evans and other record evidence relevant to this question that appears at 58 RT 13661 through 59 RT 13997, 78 RT 16878 through 79 RT 17092, 89 RT 20576-20612, and People's Exhibit 212 and Petitioner's Trial Exhibit 1230. Respondent further incorporates the discussion of this issue appearing at pages 91 to 97 of its Respondent's Brief on direct appeal. This record establishes that the Marin County District Attorney made no promises to Evans in exchange for his testimony. Evans expressly testified that he was not granted immunity or given any promises in exchange for his testimony. (58 RT 13672-13673; see also People's Exhibit 212 ["I wish to reiterate the fact that no commitments or favors have been, or will be extended by this office to Mr. Evans with regard to" Evans' Alameda County case].) Evans' trial testimony was true. The record further establishes that, in respect to pending probation revocation charges in Alameda County, Evans himself admitted to the jury that he planned to "put off my sentence until the time runs out," i.e., until he had served all of his potential prison sentence in local custody. (59 RT 13983; see also 59 RT 13959-13960, 13982-13983.) In addition, Department of Corrections Agent Hahn testified at a hearing outside the jury's presence that he told Evans he would do what he could to keep Evans out of prison in connection with the Alameda County case, that he would take care of Evans' safety, and that he would talk to Alameda County authorities about postponing Evans' sentence. (79 RT 17012-17022.) Hahn

did not consider these promises, so he told defense counsel that while the Department of Corrections would take care of Evans' safety, he had no made promises or guarantees to Evans. (79 RT 17012, 17030, 17051, 17090; Petitioner's Trial Exhibit 1230.) After conducting an extensive hearing on the subject, the trial court concluded that the defense failed to show any promises were made to Evans that had not been effectively disclosed to the defense or revealed by Evans himself in his trial testimony. (79 RT 17089-17091.)

2. With respect to whether Evans was doing undercover drug buys for San Joaquin County authorities prior to his testimony in appellant's case, petitioner has submitted an excerpt of Evans testimony before a San Joaquin County grand jury in March 1998. At this proceeding, Evans testified that he had worked as an undercover drug purchaser for the Stockton Police Department on 10 to 12 occasions. Petitioner bases his allegation that Evans had worked in this capacity before testifying at petitioner's trial on Evans statement at that hearing that he "started working in 1989" and was still working at the time of his testimony. However, the context of the brief excerpt submitted by petitioner makes the reference to 1989 implausible. It is much more plausible that any work by Evans for the Stockton Police occurred long after his testimony at petitioner's trial. Referring to his own use of heroin while working for the Stockton police, Evans states that he started using heroin "once work started getting slow," explaining the slowdown "started around—I believe it was February, somewhere around there, January, February it started, the program was beginning to end." (HC Exhibit 17 at p. 90.) This testimony that the Stockton Police program was "getting slow" and "beginning to end" in the early part of 1998 makes no sense if Evans had made only 10 to 12 controlled buys over a period of a decade. Instead, it is more plausible that Evans' work for the Stockton Police Department covered a much shorter interval closer in time to his 1998 grand jury testimony. The jury was nevertheless informed of

the essential impeaching value of this type of information by Evans' admission that he had previously informed on numerous other people prior to this case. (58 RT 13796, 13836; 59 RT 13868-13869.) In other words, the jury knew that Evans' informant activities – whatever their exact timing and sequencing – were not limited to this case.

3. With respect to the allegation that Evans was granted immunity in exchange for his testimony in petitioner's case, petitioner bases this allegation on a transcript excerpt from Evans' testimony in 1996 in a Yolo County case reflecting Evans' assertion that he was "granted immunity" in state court for his testimony in a case involving the killing of a prison guard in San Quentin in 1984. (HC Exhibit 17 at pp. 83-84.) To the extent that this testimony supports an inference that Evans was granted immunity in connection for his testimony in this case, his testimony is either false or mistaken. Evans testified at trial that he was not granted immunity in exchange for his testimony. (58 RT 13672.) Evans' trial testimony was true.

4. With respect to whether new information shows Evans' received probation in the Alameda County case in exchange for his testimony in this case, petitioner bases this allegation on an excerpt from Evans' testimony in a 1998 case in Yolo County. In the course of a review of Evans' criminal history, including a 1987 parole violation for possession of a gun in Alameda County and a 1989 Alameda County attempted robbery conviction that resulted in a grant of probation, Evans was asked, "What happened in between 1987 and 1989 that you were getting probation in 1989?" Evans replied, "Well, I testified for the federal government on a large drug case and they granted me that, and also I testified on a prison homicide" involving a prison sergeant. (HC Exhibit 18 at pp. 94-95.) This brief excerpt does not support the inference that Evans received probation in Alameda County in exchange for his testimony in petitioner's case. This transcript excerpt does not call into question the trial

testimony establishing that the Marin County District Attorney made no promises to Evans. Nor does it shed any further light on Agent Hahn's statements to petitioner and whether those statements can be fairly characterized as promises or guarantees.

5. With respect to whether petitioner was about to be indicted under the federal RICO Act when he decided to testify against the BGF, petitioner bases this allegation on an excerpt from Evans' 1998 testimony in a case in Yolo County. In response to the question, "What caused you to disassociate from that gang?," Evans replied, "Well, I was going to be indicted under Enrico (phonetic) Act, the government was going to indict me and I said I would testify." (HC Exhibit 18 at p. 96.) This bare reference is insufficient to show that Evans was facing any federal indictment and that this purported pending indictment was the motivation for his testimony in this case.

6. None of petitioner's allegations of undisclosed promises or impeachment evidence against Evans which have purportedly come to light after the judgment in petitioner's case are material within the meaning of *Brady v. Maryland*. The trial record demonstrates that Evans admitted that he had previously informed against others (including a BGF sympathizer), that he had suffered numerous prior felony convictions, that he had committed numerous acts of violence including ordering the murder of another, that he had been a drug seller, that he had been shot as a result of a failed extortion plot against another, that the BGF had threatened his life, that he had repeatedly tried to get some benefit for his testimony in this case, that he planned to avoid prison in his Alameda County case by doing all of his time locally, and even that he had received "cigarette money" from Agent Hahn. (58 RT 13669-13671, 13794-13801, 13811-13814, 13834, 13836; 59 RT 13863-13869, 13872-13873, 13883, 13908.) The jury had a complete picture by which to assess Evans' credibility. The alleged undisclosed information could not have affected this

assessment or changed the trial outcome. It is not material.

C.

Relief is precluded on the question set forth in the Court's Order to show cause because petitioner's claim regarding alleged promises or other factors affecting Bobby Evans' credibility as set forth in Claim III of the petition is untimely. Respondent incorporates pages 3-6 of its Informal Response to Petition for Writ of Habeas Corpus filed on May 23, 2005, in support of this averment.

D.

Based on the facts alleged above, there is good reason to question the credibility of the statements of Bobby Evans as set forth in the transcript excerpts relied on by petitioner to support his allegations in Claim III of the petition regarding undisclosed promises and other factors relevant to credibility. If petitioner disputes the material facts alleged in this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

X.

A.

With regard to whether "the prosecution knowingly presented the false testimony of Bobby Evans," petitioner has alleged that Evans admitted to petitioner's attorney that "he was basically told what the prosecution wanted him to say when he testified against Masters and his codefendants," that petitioners and his codefendants "never spoke to him about the Burchfield matter," and that his testimony "was something the DA's office just made up."

(Petitioner at p. 78, ¶ 174.) According to counsel, Evans said he told the district attorney about his concern that Masters was not involved in the plot, but that he was told, "We need all three." (Petition at pp. 78-79, ¶ 175.) In addition, Evans told counsel that kites in Masters' and Johnson's handwriting used at trial were "engineered" by the prosecution. (Petition at p. 80, ¶ ¶ 178-179.)

B.

In response to these allegations, respondent alleges the hearsay statements made by Evans to petitioner's counsel are false. The prosecution did not manufacture Evans' testimony, did not tell him what to say, did not make up any testimony by Evans, and did not make up the kites written by petitioner or his codefendants. Evans' trial testimony, which appears at 58 RT 13661 through 59 RT 13997, is truthful. Evans and Willis corroborate one another's testimony. There is no evidence in the state trial record or in the habeas record suggesting that Evans and Willis collaborated somehow to falsely implicate petitioner. The kites written by petitioner and the other codefendants also corroborate the testimony of Evans and Willis and cohere together to paint a convincing picture of guilt. Evans purported statements to petitioner's counsel are not credible. The statements are unsworn hearsay. Petitioner has submitted no declaration or other first-hand account from Evans, further adding to the untrustworthiness of his statements.

C.

Relief is precluded on the question set forth in the Court's order to show cause because petitioner's claim regarding alleged false testimony by Bobby Evans as set forth in Claim III of the petition is untimely. Respondent incorporates pages 3-6 of its Informal Response to Petition for Writ of Habeas Corpus filed on May 23, 2005, in support of this averment.

D.

Based on the facts alleged above, there is good reason to question the credibility of the hearsay statements of Bobby Evans asserting that the prosecution told him what to say and otherwise manufactured his testimony as alleged in Claim III of the petition. If petitioner disputes the material facts alleged in this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

XI.

A.

With regard to whether "petitioner's trial was fundamentally unfair because Bobby Evans' testimony was unreliable due to improper coercion by the prosecution," petitioner has alleged that Evans was "threatened with the prosecution of various crimes if he didn't testify against Masters and that this was not disclosed to the defense." (Petition at p. 79, ¶ 176; see also Petition at pp. 80-81, ¶ 180.) This allegation is supported by the declaration of petitioner's counsel who states that Evans twice told him that he had been threatened with criminal prosecution if he did not testify against petitioner. (See HC Exhibit 7 at pp. 31-32, ¶¶ 11, 15.) Petitioner also alleges that Evans was threatened with prosecution under the RICO Act if he did not testify, relying on an excerpt of a transcript in which Evans testified in a 1998 case in Yolo County. (See HC Exhibit 18 at p. 96.)

B.

In response to these allegations, respondent alleges that the hearsay statements by Evans are false. Evans' hearsay statements do not contain any specifics about what crimes he supposedly could have been prosecuted for had

he refused to testify. Counsel does not purport to relate that Evans gave him any details about the supposed threats apart from the generalized statements that he had been threatened with the prosecution of "various" or "numerous" crimes. Petitioner's attempted reliance on Evans' testimony in a 1998 Yolo County case does not corroborate his allegations. In the referenced excerpt, Evans does not state that he agreed to testify in this case because of a threatened RICO prosecution. Rather, he states only, in answer to a question about why he "disassociated" from the BGF, "I was going to be indicted under Enrico (phonetic) Act, the government was going to indict me and I said I would testify." (HC Exhibit 18, p. 96.) This statement is insufficient to warrant an inference that Evans was coerced to testify in this or any other case. To the extent that such an inference might be drawn, it is not true. Petitioner's allegation is also inconsistent with the trial record. Evans was cross-examined extensively at trial and never gave the slightest indication that his testimony was coerced in any way. To the contrary, his testimony indicates that it was he who first mentioned to Department of Corrections Agent Hahn that he had information about this case. (59 RT 13865-13866.) Evans' trial testimony is credible and was not the product of coercion.

C.

Relief is precluded on the question set forth in the Court's order to show cause because petitioner's claim regarding alleged coerced testimony of Bobby Evans as set forth in Claim III of the petition is untimely. Respondent incorporates pages 3-6 of its Informal Response to Petition for Writ of Habeas Corpus filed on May 23, 2005, in support of this averment.

D.

Based on the facts alleged above, there is good reason to question the credibility of the hearsay statements of Bobby Evans asserting that his trial testimony was coerced. If petitioner disputes the material allegations of this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

XII.

A.

With regard to whether "material false evidence—the testimony of Johnny Hoze—was admitted at the penalty phase regarding petitioner's participation in the murder of David Jackson," petitioner has alleged in Claim V of the petition that Hoze has recanted his penalty phase testimony "in writing at least five separate times" (Petition at p. 105, ¶ 233), that the recantations show Hoze's testimony was "at its worst, a lie and, at its least, seriously undercut by his subsequent recantations" (Petition at p. 105, ¶ 234), and that the recantations "cast[] such grave doubt on his crucial penalty phase testimony that petitioner must be considered factually innocent of a major prior uncharged crime." (Petition at p. 105, ¶ 233). (See also Petition at pp. 98-105, ¶¶ 218-234.)

B.

In response to these allegations, respondent alleges:

1. Johnny Hoze did not provide false testimony against petitioner at the penalty phase. Hoze's trial testimony, which appears at 88 RT 20346 through 89 RT 20500, is truthful.

2. Hoze's recantations are false.

3. Hoze has repeatedly admitted that he is embittered against the Marin

County District Attorney and correctional authorities because they have "disrespected" him following his penalty phase testimony. Although Hoze was never promised any benefit in exchange for his testimony, he now subjectively believes that the Marin County District Attorney and correctional authorities should have provided him privileges such as single-celling and should release him from his prison commitment as a reward for his testimony.

4. Hoze's false recantations are motivated by his animosity toward the Marin County District Attorney and correctional authorities.

5. On December 20, 1990, Hoze signed a declaration under penalty of perjury stating, "I stand by my testimony . . . As I said before, what I testified to was true." (HC Exhibit 24, p. 135.) Hoze's subsequent written recantations are not executed under penalty of perjury.

6. Hoze's bias against the Marin County District Attorney and correctional authorities is apparent in his recantations. On November 19, 2002, he wrote a letter addressed "To Whom It May Concern," that demonstrates his motivation for now stating that his trial testimony was false:

> The reason that I am bringing this information forward at this time, is all of the lies have been very hard to live with. And the fact that the Department of Corrections, The 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 of the Stand. During the time that I was testifying two car loads of BFG members went to my mothers house. She wasn't there but drove up while they were in her drive way, But she did not stop at the house and the neighbors in their yards saw that my mother didn't stop at her own home begin to question the men in the drive way so they left. Nothing was done about this. No security measures were taken. Over the years I have been told that if Masters ever gets a date to be executed that I would be killed. Yet and still the Department of Corrections has constantly forced me to double cell with inmates who have been place on this yard because they couldn't pay a drug debt or something of that nature. I have had to fight three of them but only two were not reported, the last one happen in Oct. of 2001. I was attacked

> because of the testimony I gave in court for the state. I didn't hurt the inmate because others put him up to it and he was young. No inmate should be put under that kind of pressure, made to live with an inmate who put a black inmate on death row for killing a white correctional sergeant. It will always end badly. Over the years the only thing that I have ask of the state is to be placed on single cell status. But again today the Chief Deputy Warden told me to find another cell partner. So in my mind the CDC here at Mule Creek are attempting to get me hurt or killed and/or to get me hurt someone.

(HC Exhibit 32, p. 155, original spelling and punctuation.)

7. More recently, at a March 11, 2004 parole hearing, Hoze discussed the letter dated November 19, 2002, stating that he wrote the letter "[i]n response to the change of attitude" authorities had taken against him in continuing to oppose his parole. The following colloquy occurred at the March 11, 2004, hearing:

> **DEPUTY COMMISSIONER DININNI:** This letter is November 19, '02.
> **ATTORNEY MONTGOMERY**: Yes. I was thinking that this particular letter dated February 19th of '03 was in error. I'm not — Sorry.
> **PRESIDING COMMISSIONER MOORE**: Submitted, counsel? Have you completed, counsel?
> **ATTORNEY MONTGOMERY**: I have. Thank you.
> **PRESIDING COMMISSIONER MOORE:** Thank you. And now, Mr. Hoze, it is your opportunity to make a statement if you'd like.
> **INMATE HOZE**: I would like to make a statement about this letter. I do not wish to discuss the contents.
> **PRESIDING COMMISSIONER MOORE:** Mr. Hoze, Mr. Hoze. You chose not to respond to the questions about the letter, so what I'd like you to do at this point is to respond in regards to your suitability for parole at this time, why you're suitable for parole.
> **INMATE HOZE**: Okay. I'm going to ask you a question. I would like to make a statement about why I wrote the letter, not the contents of it. It that okay?
> **PRESIDING COMMISSIONER MOORE:** If it has to deal

with how you're, why you're suitable for parole, Mr. Hoze.
INMATE HOZE: It does. It does.
PRESIDING COMMISSIONER MOORE: Then you may do that.
INMATE HOZE: The last District Attorney that came to my hearing, I don't know his name.
ATTORNEY MONTGOMERY: Roldan.
INMATE HOZE: Roldan, he talked to me in a real positive manner. I mean, I felt like we had an understanding, we had a nice discussion. He came from the Sacramento District Attorney's Office and as my attorney read in the record, he told me that if I continue along the same path that I was that his office would not have a reason to come in here and oppose me, parole he meant. And my last hearing, Ms. Shakely shows up. And with a totally different attitude and I, you know, I know they're working for the same people, so I didn't understand it. That's why I wrote the letter. In response to the change of attitude that they had taken against me.
ATTORNEY MONTGOMERY: And again, I would remind you that my advice is not to address the letter.
INMATE HOZE: I'm not going to address it. 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. That's all I going to say about it.

(Respondent's Exhibit in Support of Return to Order to Show Cause 1 at pp. 66-68.)

8. Hoze's penalty phase testimony was not substantially material and probative because there is not a reasonable probability that had Hoze's testimony not been introduced, the result of the penalty trial would have been different. (See *In re Cox* (2003) 30 Cal.4th 974, 1008-1009; *In re Sassounian* (1995) 9 Cal.4th 535, 546.) Absent Hoze's testimony, other properly admitted penalty testimony placed petitioner in a group of five inmates from whom inmate David Jackson staggered away, mortally wounded, with a prison-made shank sticking from his neck. Although the other penalty evidence did not identify petitioner or any other of the four as the actual killer, this evidence was sufficient to permit a rational inference that petitioner was involved in the

murder of Jackson. In addition, the Jackson murder was but one of more than two dozen incidents involving the use or threat of force of violence introduced against petitioner at the penalty phase, including eleven adult convictions for robbery, covering incidents where petitioner threatened to kill victims, discharged a firearm, and pistol-whipped a victim; unadjudicated adult crimes implicating petitioner in the ambush-shooting of a police officer and a robbery-murder; multiple unadjudicated prison crimes, including possession of prison-made stabbing incidents, attempted assault of another prisoner with a spear, and altercations with prison guards; and adjudicated and unadjudicated juvenile crimes, including robberies, assaults with weapons, and sexual assault upon a CYA inmate. Respondent incorporates its respondent's brief in S016883, including record citations appearing at pages 23-38, in support of this averment. In view of this evidence there is not a reasonable probability the result of the penalty trial would have been different had Hoze not testified.

C.

Relief is precluded on the question set forth in the Court's order to show cause because petitioner's claim regarding Johnny Hoze as set forth in Claim V of the petition is untimely. Respondent incorporates pages 3-6 and 21-23 of its Informal Response to Petition for Writ of Habeas Corpus filed on May 23, 2005, in support of this averment.

D.

Based on the facts alleged above, there is good reason to question the credibility of Hoze's recantations. If petitioner disputes the material allegations of this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

XIII.

A.

With regard to whether "newly discovered evidence regarding Hoze's testimony casts fundamental doubt on the accuracy and reliability of the penalty-phase proceedings," petitioner has alleged in Claim V of the petition that Hoze has recanted his penalty testimony "in writing at least five separate times" and that "had Hoze's recantations been presented to the jury, it is certainly probable that the jury, which was unable to impose death on the much-more-culpable Woodard, would have been unwilling to impose it on petitioner." (Petition at p. 105, ¶ 233; see also Petition at pp. 98-105, ¶¶ 218-234.)

B.

In response to the allegations, respondent alleges:

1. Johnny Hoze's recantations are false. In support of this averment respondent hereby incorporates paragraphs XII.B. 1-7 of this return, set forth above.

2. Johnny Hoze's recantations do not constitute newly discovered evidence that casts fundamental doubt on the reliability of the penalty phase proceedings. The mere making of a recantation is insufficient to disturb a jury's verdict, even though the recantation demonstrates that the declarant lied at some point–either at trial or in making the recantation–and therefore is generally relevant to the declarant's credibility. Rather, given that, as a matter of law, recantations of sworn trial testimony must be viewed with suspicion and are entitled to little credence, Hoze's false recantations—even though oft-repeated—are insufficient to cast fundamental doubt on the jury's verdict. (See *In re Roberts* (2003) 29 Cal.4th 726, 742-743.)

3. Hoze's recantations do not cast fundamental doubt on the reliability of the penalty phase proceedings for the additional reasons set forth in

paragraph XII.B.8 of this return, which is hereby incorporated by reference.

C.

Relief is precluded on the question set forth in the Court's order to show cause because petitioner's claim regarding Johnny Hoze as set forth in Claim V of the petition is untimely. Respondent incorporates pages 3-6 and 21-23 of it's Informal Response to Petition for Writ of Habeas Corpus filed on May 23, 2005, in support of this averment.

D.

Based on the facts alleged above, there is good reason to question the credibility of Hoze's recantations. If petitioner disputes the material facts asserted in this return, to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings.

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for writ of habeas corpus should be denied and the order to show cause disch arged, unless petitioner disputes any material assertion contained herein. If petitioner does deny any material fact asserted herein, a referee should be appointed and an evidentiary hearing should be convened to resolve such disputed fact or facts, after which the petition for writ of habeas corpus should be denied and the order to show cause discharged.

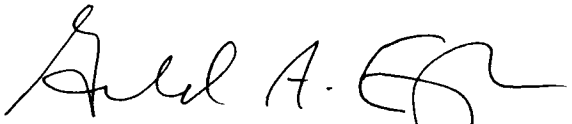
Dated: July 16, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

RONALD S. MATTHIAS
Senior Assistant Attorney General



GERALD A. ENGLER
Senior Assistant Attorney General

Attorneys for Respondent

GAE:dmn

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO PETITI0N FOR WRIT OF HABEAS CORPUS uses a 13 point Times New Roman font and contains 8385 words.

Dated: July 16, 2007

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

GERALD A. ENGLER
Senior Assistant Attorney General

Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In re Jarvis Masters On Habeas Corpus*** No.:**S130495**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. 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 July 16, 2007, I served the attached **RETURN TO ORDER TO SHOW CAUSE** and **RESPONDENT'S EXHIBIT IN SUPPORT OF RETURN TO ORDER TO SHOW CAUSE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Joseph Baxter
645 Fourth Street, Ste. 205
Santa Rosa, CA 95404

Richard I. Targow, Esq.
Attorney at Law
P.O. Box 1143
Sebastopol, CA 95473-1143

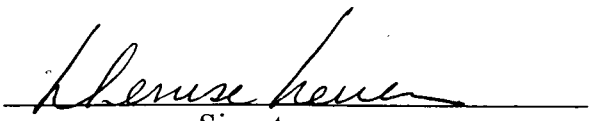
Michael G. Millman
Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

County of Marin
Hall of Justice
Superior Court of California
P.O. Box 4988
San Rafael, CA 94913-4988

Hon. Edward Berberian
District Attorney
Marin County District Attorney's Office
3501 Civic Center Drive, Room 130
San Rafael, CA 94903

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 16, 2007, at San Francisco, California.

Denise Neves
Declarant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