In the Supreme Court of the State of California

In re

MIGUEL ANGEL BACIGALUPO,

On Habeas Corpus

CAPITAL CASE
Case No. S079656 — DEATH

Trial: Santa Clara County Superior Court, Case No. 93351
The Honorable Thomas Hastings, Judge

Reference Hearing: Contra Costa County Superior Court, Case No. S079656
The Honorable Richard C. Arnason, Referee

RESPONDENT'S EXCEPTIONS TO FINDINGS OF REFEREE AND BRIEF ON THE MERITS

Bill Lockyer
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General
JEFFREY M. LAURENCE
Deputy Attorney General
State Bar No. 183395
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5887
Fax: (415) 703-1234
Email: Jeff.Laurence@doj.ca.gov
Attorneys for Respondent

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INTRODUCTION

The referee's findings in this case must be set aside because they are based on insurmountable legal errors and are largely unsupported by the evidence. The referee demonstrated a fundamental misunderstanding of the nature of a reference hearing by repeatedly asserting his view that the traditional rules of hearsay do not apply in habeas cases. Consequently, the referee admitted significant amounts of inadmissible hearsay and based his findings on inadmissible evidence. The referee also ignored the applicable law on how to view the credibility of witnesses who recant prior sworn testimony. And the referee failed to consider, let alone evaluate, the original trial testimony in this case when assessing the credibility of key witnesses who offered accounts directly contradictory to the testimony presented at the original trial. Finally, the referee failed to take into account how the passage of 22 years from the original trial would cause events to become "obscured by the fog of time." (*In re Ross* (1995) 10 Cal.4th 184, 204.)

The referee's legal errors resulted in factual findings that were unsupported and cannot be reconciled with known truths. The referee credited the 2006 reference hearing testimony of a key witness, Gale Kesselman, notwithstanding that this testimony came 22 years after she originally met with prosecution investigators and was contrary to the actual taped record of her statements to the investigators in 1984, and notwithstanding that her 2006 testimony was a recantation of her sworn testimony from 1985, as well as a recantation of her 2001 reaffirmation of her earlier statements.

The referee also credited the 2006 testimony of another defense witness, Luis Laureano, despite the fact that his testimony contradicted the 1984 testimony of neutral witnesses at the original trial, and contained

descriptions of meetings and conversations he claimed to have had with individuals in San Jose, when objective evidence demonstrated that those individuals were not yet in the country and would not be entering the United States for several more months. The referee also failed to test Laureano's accounts against conflicting trial testimony of other witnesses because the referee failed to review the original trial testimony.

The referee's legal and factual errors infect his entire factfinding process and his conclusions. This Court must set aside the referee's findings and conduct his own independent review of the record, applying the correct rules of evidence and applicable guiding legal principles.

STATEMENT OF FACTS[1]

Orestes and Jose Luis Guerrero were murdered during the afternoon on December 29, 1983, in San Jose, California. Later that evening the Petitioner, Miguel Angel Bacigalupo was arrested for the murders in Palo Alto, California. In his post-arrest interviews, Petitioner made no reference to Jose Angarita. (Resp. Exh. 2.)[2]

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[1] In light of the excessive length and scope of the reference hearing, respondent confines the statement of facts to those generally pertinent to the *Brady* claim underlying the order for the reference hearing. (See generally *Brady v. Maryland* (1963) 373 U.S. 83.) Respondent has reordered the witnesses' testimony in an attempt to create more logical groupings. A detailed witness by witness description of the testimony was created by the referee as the 157-page appendix to the referee's findings of fact. An account of the underlying facts of the double murder is set out in this Court's opinion in *People v. Bacigalupo* (1991) 1 Cal.4th 103, 118-120.

[2] Citations to "Ref. Exh." refer to the exhibits submitted at the reference hearing, all of which were designated as court exhibits by the referee. Citations to "Pet. Exh." refer to the exhibits submitted in support of petitioner's second petition for writ of habeas corpus. Citations to "Resp. Exh." refer to the exhibits submitted by Respondent with our

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A. Sandra Williams

Sandra Williams was an investigator employed by the Santa Clara County District Attorney, and served as the lead investigator from the District Attorney's office for the Bacigalupo homicide prosecution. (18 RRT 1254.)[3] Williams testified over parts of six days during the reference hearing. Much of Sandra Williams's testimony came from brief notations she made in her activity log, which was a worksheet she used to account for her time during the investigation. (Ref. Exh. 22; 20 RRT 1657-1658.) Although the log was not created to serve as a comprehensive journal of events, Williams explained that, given the passage of more than 20 years since the events, it was now the most accurate account of her investigation. (19 RRT 1399; 20 RRT 1657-1658.)

Williams was assigned to petitioner's case on January 9, 1984. (Ref. Exh. 22 at p. 1; 18 RRT 1261.) She began looking into petitioner's history and the story he gave to the police. (18 RRT 1263, 1268-1269; Ref. Exh. 22 at p. 1.) On February 2nd, she located and interviewed Karlos Tijiboy in Palo Alto. (18 RRT 1269-1270; Ref. Exh. 22 at p. 1; Ref Exh. 26 at pp. 3-6 [report of interview of Tijiboy and signed statement by Tijiboy].) Tijiboy denied any involvement in the murders or connection to drug dealing. (18

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original opposition to the second petition for writ of habeas corpus. Respondent notes that many of the exhibits submitted at the reference hearing were also submitted as exhibits to either petitioner's habeas petition or respondent's opposition. For clarity, we will refer to them by their reference hearing exhibit number, rather than by their petition or opposition exhibit designation.

[3] Citations to "RRT" refer to the Reporter's Transcript of the reference hearing. Citation to "RCT" refer to the Clerk's transcript for the reference hearing. For clarity, citations to "RT" and "CT" will refer to the original record. Citations to "Ref. Rpt." refer to the referee's report of findings. Citations to "Ref. Appx." refer to the 157-page appendix to the referee's report.

RRT 1269-1270; Ref. Exh. 22 at p. 1; Ref Exh. 26 at pp. 3-6.)[4] Williams also conducted a records search and questioned local authorities in Palo Alto and determined that Tijiboy had no known criminal associations. (18 RRT 1266, 1268-1269, 1341.)

On February 10, 1984, Ronnie Ray Nance was arrested, and subsequently charged, with home invasion robbery of Ismael Ortiz, and burglary of a home located at 621 Kiely Boulevard, Santa Clara, California. (See Ref. Exh. 46.) On February 14th, San Jose Police Sergeant Brockman alerted Williams that Nance might have information pertaining to the Bacigalupo homicide investigation. (18 RRT 1274; 19 RRT 1441; 20 RRT 1661; 21 RRT 1717; Ref. Exh. 22 at p. 2.) Williams and Sergeant Brockman met with Nance on February 17, 1984, at the Santa Clara County Jail and conducted a tape-recorded interview. (18 RRT 1272-1273, 1360; 20 RRT 1662-1664; 21 RRT 1715-1717; see Ref. Exh. 29 [transcript of taped interview].)

Nance made clear during the interview that he had no personal knowledge relating to the homicides. His information came from two sources, Gale Kesselman[5] and Steve Price.[6] (Ref. Exh. 29.) Nance

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[4] Tijiboy indicated in his interview that he had already been questioned by a defense investigator. (Ref Exh. 26 at p.4.)

[5] Gale Kesselman, a.k.a. Barbara Gale Divine, is the identity of the confidential informant, previously designated "CI-2." Kesselman died of liver cancer before the reference hearing had concluded, but well after providing her testimony at the hearing. In light of her death, the referee ordered that her identity as the confidential informant be released. (See RCT 12/20/07 Minute Order.) The referee's report identifies her as Gale Kesselman, although she testified at the hearing that her true name was Barbara Gale Divine. (10 RRT 259.) She used the name Kesselman in the early 1980s, during the time frame of the murders. (10 RRT 260.) During the hearing, Kesselman was identified by the moniker, "Merry," to protect her identity. (10 RRT 259.) For consistency with the referee's report, we refer to her as Gale Kesselman.

explained he was recruited by his friend Steve Price, and Price's friend "Gale" to steal drug money from a house in Santa Clara. (Ref. Exh. 29 at pp. 13,16.) Although Nance at first stated he was recruited to "collect" money owed to Price from a "Jose," he later made it clear in the interview that the event was a planned rip-off of Gale's ex-boyfriend, "Jose." (Ref. Exh. 29 at pp. 3-5, 7-8, 16, 27.) Nance explained that Gale and Price planned to use the proceeds to set up business in the Los Angeles area. (Ref. Exh. 29 at p. 26-27, 29.)

Gale told Nance that Jose was a major Columbian drug dealer who moved roughly a million dollars of cocaine a month. Jose also owned jewelry stores in town as a front for his drug operation. (Ref. Exh. 29 at pp. 3-5.) Nance recounted that Gale was very irate about being replaced in Jose's life by another girl. (Ref. Exh. 29 at p. 55.) Nance explained that Price was a friend of Gale's and a drug dealer for Jose. (Ref. Exh. 29 at p.

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[6] Steve Price asked not to be identified at the hearing because he had concerns regarding his testimony. The referee acceded to his request and ordered that his true name not be used by the court reporters. The referee directed that Price be identified in the transcript as "John." (14 RRT 745-762.) Apparently, the referee's order pertained only to the hearing itself because the referee later revealed "John's" identity as Steve Price in his public report submitted to this Court. (Ref. Rpt. at 1.) Notwithstanding the referee's accommodation of Steve Price at the hearing, Price has never been designated a confidential source during these proceedings and has been identified by his true name since petitioner's habeas petition was first filed.

The referee granted Luis Laureano, a.k.a. Luis Albarran-Arnal, similar consideration in light of his request for confidentiality, and directed that Laureano be designated "Joseph" in the reporter's transcript for purposes of his testimony. (34 RRT 3334-3343.) As with Price, the referee's order was limited to the transcript of the reference hearing and the referee's report to this Court explains that "Joseph" is Laureano. (Ref. Rpt. at 2.) As with Price, Laureano's identity has never been treated as confidential in any of the earlier proceedings or pleadings.

13-14, 18-19.) Nance also described Price as burnt out from using cocaine for too long. (Ref. Exh. 29 at p. 33.)

Two days before the job, Gale took Nance and Price around to different locations in San Jose, apparently hoping to find Jose and determine where Jose's recent shipment was hidden. (Ref. Exh. 29 at pp. 4-5, 7-8.) Gale drove Nance past Jose's apartments and his gold store as part of the planning. (Ref. Exh. 29 at pp. 15-16.) Price supplied Nance with a gun. (Ref. Exh. 29 at pp. 5-6.)

Nance explained that, although Jose controlled the drug operation, Gale and Price ended up targeting a cousin of Jose's named "Ortez." Nance was told that Ortez made deliveries and collected money for Jose. Gale and Price believed Ortez was currently holding money for Jose. Their plan was for Nance to "collect" that money by claiming it was owed to Price. (Ref. Exh. 29 at pp. 7-8, 19-21, 27, 33.) Gale directed Nance to an apartment which she said belonged to Jose. (Ref. Exh. 29 at p. 26.) Nance went up to the apartment and demanded the money. The occupant pulled out a gun, and Nance fled. (Ref. Exh. 29 at pp. 6-7, 21-23.) The occupant chased Nance and fired a shot at him as he fled down the street. Nance returned fire. The police were alerted and arrived to arrest Nance. (Ref. Exh. 29 at pp. 22-23, 34-35.)

When the investigators asked if Nance knew Jose's last name, Nance responded that he checked a name chart down by the door buzzers at the apartment he visited. He initially recalled the name as something like "Laura Maro," but later in the interview he remembered the name on the mailbox at the apartment was "Laureano." (Ref. Exh. 29 at pp. 29, 55.)[7]

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[7] It is clear from the Nance interview that the name "Jose Angarita" was never mentioned. Nance believed that the drug dealer's name was

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In addition to describing the drug rip-off, Nance recounted his conversations with Gale about the murder of the Guerrero brothers that took place the previous December. (Ref. Exh. 29 at pp. 13, 54.) He recalled that Gale talked about the murders while they were out drinking at Black Angus. According to Nance, Gale said one of the victims was working for Jose for a long time and lost a large quantity of cocaine. (Ref. Exh. 29 at p. 11.) As a result, Jose hired someone to kill that victim, but the victim's brother was also present, and he was also killed. The killing was not supposed to be a robbery, but jewels were taken to mask the real motive. (Ref. Exh. 29 at p. 11.) Nance stated he first heard about the jewelry store crimes from Gale bragging about them. (Ref. Exh. 29 at p. 12.)

When pressed for more details about the homicide case, Nance stated that according to Gale, "Jose had him hit." (Ref. Exh. 29 at p. 36.) Nance stated that while having drinks with Gale and Price, Gale started talking pretty freely about Jose and his role in moving large quantities of drugs in the area. Then Gale turned to the jewelry store incident. Gale offered that the murders were a drug-related hit. She stated "one of the brothers owed Jose a lot of money, and told Jose to stick the bill," so "Jose had him hit." (Ref. Exh. 29 at p. 37.) The second brother happened to be there and was also killed. (Ref. Exh. 29 at p. 37.) According to Gale, one of the guys who owned the jewelry store was getting cocaine from Jose, they had a business relationship. (Ref. Exh. 29 at p. 38.)

Nance made it clear to the investigators that he knew nothing about the murders other than what Gale had said. (Ref. Exh. 29 at p. 37.) Nance

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"Jose Laureano" based on the first name given by Kesselman and the name listed on apartment mailbox and door buzzer. (Ref. Exh. 29 at pp. 29, 55.)

got the impression from Gale that she was present when Jose and the killer talked about the hit. (Ref. Exh. 29 at p. 54.)

Nance did not know how to get in touch with Gale. Nance told the investigators that Price and Gale lived in Boulder Creek, a rural community in Santa Cruz County. (Ref. Exh. 29 at pp. 25, 29-32.) He told the investigators that Price knew how to contact Gale, and gave them information on how to find Price. (Ref. Exh. 29 at pp. 29, 31-32, 48-50.)[8]

Sandra Williams then turned her attention toward locating Steve Price in order to make contact with "Gale," the source of Nance's information. Williams also explained that, following her interview of Nance, she believed she was looking for information about someone named "Jose Laureano." (18 RRT 1257, 1349; 20 RRT 1669, 1679; 21 RRT 1738.)

The first apparent reference to Jose Angarita by name in the course of the homicide investigation was most likely on March 6, 1984, some twelve days after the Nance interview. Williams' Activity Log, has an entry for 3/6/84 which states: "(checked) with Scott Burke @ coin store on 2nd St. gave Jose Angarita as dad's ex-partner – ran name." (Ref. Exh. 22; 21 RRT 1697.) Williams testified she probably knew that Scott Burke and his

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[8] Williams reinterviewed Nance on February 29, 1984, and she brought David Gonzales, a public defender investigator, with her for the interview. (18 RRT 1291; 21 RRT 1746-1747; Ref. Exh. 22 at p. 2 [activity log notation].) At that interview, Nance provided the same information he had already recounted in Exhibit 29. (21 RRT 1747-1748.) Williams knew Gonzales was a defense investigator who worked on homicide cases, but she did not know if he was currently working on petitioner's case. Williams assumed that Gonzales would share this information with petitioner's public defender and defense team. (18 RRT 1291-1295; 21 RRT 1746-1748; 23 RRT 1947-1951; 25 RRT 2160-2163, 2224-2225; see also Ref. Rpt. at 14 [finding that public defender investigator Gonzales accompanied Williams to interview Nance, but finding Gonzales did not provide this information to petitioner's defense team].)

father, Dan Burke, had an ex-partner named "Jose," who was a Colombian, before March 6, 1984. She possibly got that information from the victims' family members. She also acknowledged she might have suspected that Jose was the same Jose referred to by Nance. (21 RRT 1691-1699.) She knew from the police reports of the homicides that Dan Burke had been to the crime scene and had contacted the police. However, her March 6, 1984 contact with Scott Burke was the first time she had the full name "Jose Angarita." (21 RRT 1697.)

After Burke identified his former partner as Jose Angarita, Williams made contact with the victims' family members and asked them questions about Angarita. She stated the family reacted emotionally to the questions about Angarita. They misinterpreted her inquiries as a reflection that the police suspected Angarita was involved in the murders. (18 RRT 1306-1307, 1324.) As a consequence, some of Orestes Guerrero's relatives later followed and confronted Angarita about the homicides, accusing him of being involved. That resulted in Angarita presenting himself at the San Jose Police Department and requesting an interview to clear his name and put a stop to the Guerreros' harassment. (18 RRT 1318-1323; 21 RRT 1679-1682, 1690-1706)[9]

Williams and another officer conducted a tape-recorded interview of Jose Angarita on March 19, 1984. (18 RRT 1318-1323; see Ref. Exh. 23A & 23B [two-part transcript of the interview].) In the interview, Angarita professed his innocence, denied any connection to the murders, and complained about being accused of involvement by the victims' family. (Ref. Exh. 23A at pp. 1-33.) He denied knowing Miguel Padilla. (Ref.

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[9] At that point Williams still had not made contact with Gale Kesselman. That first contact would not occur until March 31, 1984. (18 RRT 1318.)

Exh. 23A at pp. 35-36; Ref. Exh. 23B at p. 4.)[10] Angarita acknowledged being acquainted with a "Luis Loriano" [*sic*: Laureano]. (Ref. Exh. 23B at pp. 6-7.) He explained his prior business relationship with Orestes Guerrero. He had provided some commercial space for Orestes Guerrero to open his first jewelry exchange shop. (Ref. Exh. 23A at pp. 1-33.) The tape of Angarita's interview was kept in petitioner's police case file with the other interview tapes. (32 RRT 3156.)

Sandra Williams located Gale Kesselman on March 31, 1984, a Saturday. Williams explained that, at this initial meeting, Kesselman denied any involvement in the Nance attempted robbery of the drug house. (18 RRT 1373; 20 RRT 1669; 21 RRT 1724.) Kesselman did provide information about Angarita's drug operation, so Williams promptly connected her with DEA Rod Alvarez. (18 RRT 1356-1357, 1369, 1409-1410.) However, Kesselman's statements about the possibility that the Guerreros murders were a drug hit were "all over the map." (18 RRT 1390.) Kesselman first mentioned driving to San Francisco to meet a drug dealer from New York during Williams's second meeting with Kesselman. Although Kesselman's account was offered as nothing more than her own speculation, Williams investigated the claim. (18 RRT 1390; 19 RRT 1389, 1434.)

Williams met with Kesselman a few more times over the next several days. After her first few meetings with Kesselman, Williams asked the San Jose Police Department to assist in the investigation of Kesselman's claims, and on April 16th, Sergeant John Kracht was assigned to check into Kesselman's speculation regarding the possibility that the Guerrero murders were a hit by Angarita. (25 RRT 2294-2300.)

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[10] The prosecution had not yet learned petitioner's true name was Miguel Padilla Bacigalupo.

On April 18, 1984, Kesselman gave a tape-recorded interview detailing all she knew and suspected about the murders. (See Ref. Exh. 43 [digitized recording]; Ref. Exh. 3A [updated transcript of Kesselman interview].)[11] Present for the taped interview were District Attorney Investigator Sandra Williams, District Attorney Investigator Ron McCurdy, San Jose Police Sergeant John Kracht, and DEA Agent Rod Alvarez.

Williams explained that this taped interview on April 18th was the culmination of her prior meetings with Kesselman, and the purpose of that interview was to cover everything that Kesselman knew about the murders. (21 RRT 1792.) Williams and Kracht tried to get on the record as much information as possible about the murders from Kesselman at that interview. (21 RRT 1836.)

At the outset of the interview Kracht prompted Kesselman to describe what Jose Angarita said to her the day of the murders. (Ref. Exh. 3A at p. 35.) Kesselman was not quite sure whether the conversation was at Angarita's apartment or at her brother's house. (Ref. Exh. 3A at p. 35.) She quoted Angarita as saying the following:

> Well, what he said was some, he was, you know, real excited, he said, "Two, there was some friends of mine, were just killed." He goes, "They say it was a robbery." He goes, "But I know it wasn't." He goes, "If the police knew what I know," you know, they kind of like, they wouldn't be inquiring and, or you know, he just made that statement. You know, and he said, I said, "Well what, what do you mean?" And he told

[11] John Kracht testified that when he reviewed the tape, he discovered that the interview actually started with Side B, and then continued on Side A. (26 RRT 2386-2388.) Earlier transcripts made of that interview had the two segments transposed. Exhibit 3A corrects that error by transposing the two sections that transcribe Side A and Side B. Consequently, Reference Exhibit 3A starts with page 34 (the bottom portion), continues to page 68, then starts over at page 1 and ends at the top of page 34.

me that it was an organized murder. He told me, I asked him why, he said it happened, it was because of something that happened years ago, and I think he said three years ago or a few years ago. Um, and he didn't tell me what. He told me that, and he said that one of the people wasn't supposed to, one of the people was not supposed to die. He said that there was, he just said, "Why did that other guy have to be here?" You know. Um, and, my, you know, my brother remembered him saying to my sister-in-law, which I don't remember this.

(Ref. Exh. 3A at p. 37.)

The conversation occurred around 4:00 p.m., with no one else present. (Ref. Exh. 3A at p. 38.) Kesselman did not ask Angarita how he got the information, but assumed he had talked to someone who had been near the scene. (Ref. Exh. 3A at p. 38.) Kesselman assumed Angarita was upset at the death of his friends and, at the time, assumed he had nothing to do with the murders. By the time of this interview she thought Angarita did have something to do with the murders. (Ref. Exh. 3A at p. 40.) After being prompted by Williams about whether Angarita said the murders were "payback," Kesselman responded:

Yes, that was in the first conversation. He said it was just like a return thing . . . over bad—over something, over some type of bad blood between, you know, I got the impression that it was someone that was, they all seemed to know each other (inaudible) Colombia, that I knew.

(Ref. Exh. 3A at pp. 42 [interviewer interjection omitted].)

Kesselman next recounted a second conversation that took place, probably the next night, at her brother's home. (Ref. Exh. 3A at p. 42.)

Well he was there visiting and he just kind of, he came to my house and, usually the guy is always moving, you know, all day, all night and he was kind of, like he was gonna collapse and fall on the sofa. And I had built a fire in the fireplace, and um, this of course after Christmas, but before New Years, and there was a uh, like a Korbell Brandy uh, box. You know, the Christmas boxes liquor comes in, very ornate, and I'd thrown it into the fireplace, and I had gone to the kitchen to get

something to drink. And I came back into the living room, Jose was sitting there looking into the fire with this uh, really, you know this uh... peculiar uh, downcast look on his face. I (inaudible), and he was looking into the fire and I, you know, I seen him. . . .

I go, "Well, what's the matter?" And he goes, "I seen them," he said his friends were cremated that day. He said, "My friends, I can see my friend's face in the fire." He goes, "And, he's crying out to me, talking to me, and you need to, and I can hear the, all their kids, their children," he said he could hear their children crying for their fathers. And he said that um, it reminded him, he brought up, it reminded him of the times that he was a mercenary in Columbia, and, the army, and he, that reminded him of having, after they killed, you know, go out and had to kill someone in the mercenaries, and they'd hear the wives and the children crying, so, you know, I'd never seen him show even so much emotion before, you know, 'cause he was a very, he's a businessman, more, more so than anything. And he's even proud of not having any emotions and he always said, "Well, one thing I never told you, I'm such a son of a bitch, I'm such a son of a bitch." (Inaudible) But uh, I, then he said that he didn't, he felt really badly because he couldn't go to the, he didn't go to the services. And he told me that they were going, that he was considering starting a, he was gonna start a fund for the children because there were eleven children between the two brothers. . . . [¶] And that he was gonna start a fund. And I said well, I was asking him, I said, well you know, "How much are you going to contribute?" You know. He said, "Oh maybe twenty-five dollars." You know. . . . [¶] And he mentioned to me um, that he had been, oh, at that time too, you know, he explained the relationship and he also explained the murder scene to me.

(Ref. Exh. 3A at pp. 43-45 [interviewers interjection omitted].)

Kesselman explained she found out how Angarita knew his victims. According to Angarita one of the victim's wives had been a secretary in Angarita's business and the same man had worked for Angarita in the jewelry business and Angarita had helped set that man up in his own

business. (Ref. Exh. 3A at pp. 45-46.) Kesselman continued, explaining more about what Angarita told her of the murders:

> And then [Jose] got back into, "Well, I know that, that," he goes, "It, you know, I know it was a professional murder," he goes, but he kept, he told me that there was somebody else involved that got away. . . . He told me that somebody else got away. He told me that this guy that, that was picked up, was gonna take the uh, the fall for it. But he told me there was someone else involved that was already on their way back to New York, you know, and I don't know, you know, what that meant, or if any, if it was all bullshit or what, but at this, that time, I said, "Well, what do you mean, Jose?" And he kept saying there had to be somebody else. I don't know why he told me that, and so he got up and he showed me in my uh, he was sitting on the couch and there was a, uh, the fireplace was here. Uh, entryway to the front door is here, and then there's a formal dining room where there was a, a library table, then the doorway into the kitchen. And then he got up and he showed me, he went to the, to the library table, and he said that the friend that had worked for him was sitting there working and had been shot in the back of the head. And then he walked around, and then he said, and then that, he went through the kitchen and, and like around the corner of, where the refrigerator is, and he goes, "This is where the safe was." And he said, and that guy was still there, and he told me something about his life being (inaudible) or something, which. . . .

(Ref. Exh. 3A at pp. 46-47 [interviewer interjection omitted].)

At that point, Kesselman interjected that Dan Burke had told Angarita details about the crime scene. (Ref. Exh. 3A at p. 47-49.)[12] Kesselman then continued with what Angarita related about the murders:

> He told me that, that, that-that, according to uh, he told me that Dan Burke told him that, that (inaudible) so I do not know, but

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[12] Dan Burke was the ex-partner of Jose Angarita in a jewelry business and that, at the time of the murders in 1983, Burke was the employer of the wife of homicide victim Orestes Guerrero. Burke had arrived at the murder scene prior to the police arrival and notified the police. (20 RRT 1681-1682; 21 RRT 1698.)

> he told me that, that um, only a professional, if it were, you know, only a professional could, if it were one person, shoot that person and go around and shoot the other person and then be gone and be, be out, you know. And so I just assumed, you know, I mean I just took him for what he said, that [the victims] were friends of his. And that, you know, he was just showing remorse that, because they were friends.

(Ref. Exh. 3A at p. 47-48.)

Kesselman explained that at the time Angarita made these statements in these two conversations, she didn't think he was involved in the murders, but as of the date of this interview April 18, 1984, she felt differently. (Ref. Exh. 3A at pp. 40, 48-49.)

When asked what had occurred to change her mind about whether or not Angarita was involved in the murders, Kesselman embarked on a discussion of the trip she took to San Francisco with Jose Angarita the night before the murders. Kesselman stated she went to San Francisco with Jose Angarita to meet a gentleman. She believed the trip occurred on December 28th, the night prior to the murders. She had seen a photo of the man who was arrested for the murders and now believed it could be the same man she met in San Francisco. (Ref. Exh. 3A at p. 50.)

She recalled that Angarita called her at her friends' house, the Martinicos, at around nine or ten in the evening asking her to take a ride to San Francisco. Kesselman did not want to go, but Angarita pressed her, calling her again an hour later, and finally she agreed. (Ref. Exh. 3A at pp. 51-53) Angarita said he was going to meet with a man who had just flown in to San Francisco from New York. The man was staying at a hotel in San Francisco. (Ref. Exh. pp. 53-54.) On the way to San Francisco, they would be picking up Angarita's cousin, Augustine, whose plane had just arrived

from Florida. (Ref. Exh. 3A at p. 54.)[13] Angarita told Kesselman the man they were meeting in San Francisco was one of the biggest cocaine dealers from one of the big Columbian families. (Ref. Exh. 3A at pp. 54-55.)

Kesselman stated they stopped at the airport along the way and picked up Jose's cousin, Augustine. (Ref. Exh. 3A at pp. 56-57.) Then they stopped at a gas station near the airport and called the hotel for directions and for the man's room number. Kesselman thought the room number might be something like "1011." (Ref. Exh. 3A at p. 58.)

When they arrived at the hotel, Angarita got out of the car to find the dealer. Angarita returned to the car with a man. Augustine got in the front seat and Angarita and the man got in the rear seat. At that point Angarita introduced the man to Kesselman, and she was "almost positive" his name was Miguel. Angarita did not state a last name. (Ref. Exh. 3A at pp. 57, 59-61.)

When asked to describe the man she met, Kesselman estimated his age as mid- to late-thirties. He had bushy eyebrows and acne scars. He had either a beard or a growth of stubble, but she couldn't remember the bottom part of his face very well because his coat collar was turned up. (Ref. Exh. 3A at p. 61.)

They drove around the block while Jose, the dealer, and Augustine spoke in Spanish. They dropped the man off and went home. Kesselman recalled that she didn't get home until about 2:00 a.m. (Ref. Exh. 3A at p.

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[13] Augustine also went by the name Ismael Ortiz or Ortez. He was supposedly a trusted worker in Angarita's drug business, responsible for deliveries of drugs and money. His home on Kiely Blvd. in Santa Clara was supposedly a safe house where drug money was kept and was the house Ron Nance attempted to rip-off, resulting in Nance's arrest. Ismael Ortiz was a named victim in the initial felony complaint filed against Nance. Ortiz is the "Ortez" Nance referred to in his statement. (21 RRT 1710; 32 RRT 3166.)

64.) She recounted that, during the drive home, Angarita said, "'Looks good. We're supposed to meet, the guy's supposed to come down, be in town tomorrow at two o'clock.'" (Ref. Exh. 3A at p. 62.)

When asked what made her say the man's name was "Miguel," Kesselman explained that when Sandra Williams came and saw her on a Saturday in Boulder Creek/Ben Lomond, Williams asked Kesselman if she knew a guy named Miguel. At first Kesselman could not remember anybody she had met named Miguel, but she thought about it all weekend and the more she thought about it, the more she believed the guy she met in San Francisco was named Miguel. (Ref. Exh. 3A at pp. 65-66.)

Later, in the second half of the interview, Kesselman related that she had recently talked to "Pepe," who she explained was Luis Laureano. After talking to Laureano, her "gut feeling" was that Angarita was involved in the murder. (Ref. Exh. 3A at p. 10.) When questioned why Angarita would have ordered the murders, Kesselman replied:

> I don't know. He told me, "I don't have no idea." Okay? Except for, the only thing, the only, he's only mentioned a couple times. Once in fact, I know one person that he really wanted to take care of and get even with and that was Dan Burke, okay? And he told me that was over, a few years ago, during the de-valuation of the peso, they ran money order schemes in Mexico. . . .
>
> And when he stepped, exited with Dan Burke's business, he said that was basically over that, that he beat him out of around a hundred thousand dollars or so, all out of that money order scheme. But, you know, maybe there was more involved. I know that, that guy was working for them at that time. Maybe that has something to do with it, I don't know. But he gave, I got the impression talking to him, he didn't tell me why, I asked him why, he told me it was because of something that happened a few years ago.

(Ref. Exh. 3A at p. 11 [interviewer interjection omitted].)

Kesselman had the "impression" it was payback over an old debt from Colombia, but didn't know if that was true or not, it was just her impression. (Ref. Exh. 3A at p. 12.) Kesselman described a recent conversation she had with Luis Laureano, in which Laureano told her he did not think Angarita was involved in the murder. (Ref. Exh. 3A at 16.) When asked about her conversation with Laureano,[14] Kesselman (after providing some background information) recounted:

> Pepe's Puerto Rican, he goes, "The Guerrero's had followed Jose in his car," and they were saying that Jose had been [*sic*: them] killed. And he indicated to me that, that he felt, you know, Pepe felt that this had happened because of the robbery. And I said, "Well what do you think, Pepe?" You know, I said, "Do you think Jose had anything to do with it?" He goes, "I don't think so." But you know, it's like, you know, it made me feel like that, that he, that he, that, that was my gut feeling was that, that, I think Pepe said he probably (inaudible), you know, that's, that's the impression he gave me, and I asked him, so I asked him, I said, "Were you doing anything?" He goes, "No, things are just too hot." And he says, "Jose's not doing anything," that Jose is hiding. And (inaudible) And he told me Augustine. I said, "Well what happened to Augustine?" He goes, "Oh, they snuck him out of town." He goes, "But he's still in California."

(Ref. Exh. 3A at p. 16-17.)[15]

Based on Kesselman's report that the New York drug kingpin had a room at the hotel where they were meeting, Williams contacted the possible

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[14] The transcript notes that Williams asked, "What was your conversation with Lee, Dan and (inaudible)?" (Ref. Exh. 3A at p. 12.) However, a careful examination of the actual recording indicates that Williams asked, "What was your conversation with Luis Laureano?" (Ref. Exh. 43.) The notation to "Lee, Dan and (inaudible)" appears to be a transcription error.

[15] A careful examination of the tape indicates that Kesselman said "Jose had them killed," not "Jose had been killed." (Compare Ref. Exh. 3A with Ref. Exh. 43.)

hotels that were mentioned by Kesselman, including the Hyatt and Hilton hotels, and checked their guest lists for anyone with the name Miguel Padilla, or even anyone with an Hispanic surname staying as a guest on the night before the murders, with negative results. (18 RRT 1364-1367; 19 RRT 1431-1434; 21 RRT 1770-1773, 1787-1788; Ref. Exh. 22 at pp. 3-4.)

Williams continued to investigate Kesselman's claims, but found nothing to corroborate Kesselman's assertions. Kesselman's description of the person she and Angarita met in San Francisco did not match petitioner. (21 RRT 1773-1779.) Also, Kesselman's account of a meeting at a hotel in San Francisco with a high powered drug dealer flying in from New York was inconsistent with what was known about petitioner, namely that he was too poor to afford a hotel room and had no means of transportation to San Francisco. (21 RRT 1779-1782, 1786-1792.)

Williams testified that Kesselman did not give her any information linking Angarita to the murders or to petitioner other than what was reflected in the taped interview. (21 RRT 1792.) Kesselman never reported to Williams that the Guerreros lost a large amount of cocaine and owed Angarita money, nor that the killing was arranged by Angarita to avenge that loss of cocaine or financial debt. (21 RRT 1726-1728.) She never reported that the Guerreros were storing drugs or cash for Angarita. (21 RRT 1745.) She never gave any details more specific than the speculation she offered in the taped interview. (21 RRT 1792.)

Kesselman did not recount any statements by Angarita other than what she said on the tape. (21 RRT 1833-1834.) She never reported to Williams that Angarita said the crime was a contract murder. Kesselman never reported that Angarita told her the murder was based on a vendetta by someone in South America, and that he was carrying out orders in arranging the hit. (21 RRT 1833-1834.) She did not tell Williams that Angarita said he was under orders to meet with petitioner and arrange for

the killings, or that he was sorry to have to be an instrument in carrying out the murders. (21 RRT 1838, 1840.)[16]

Williams also received information that an attorney named Joseph DiLeonardo, had called Sergeant Hensley seeking the return of property of his client, Luis Laureano, that was seized during Nance's arrest, including papers and the vehicle. During the course of the conversation with Sergeant Hensley, DiLeonardo had indicated to Hensley that the murders may have been a hired hit. (20 RRT 1623; Ref. Exh. 25, at Bates stamp pages 1728-1729, 1733.) Williams got DiLeonardo's contact information, and on April 18th, asked Kracht to follow up with DiLeonardo. (20 RRT 1623-1626; Ref. Exh. 25, at Bates stamp pages 1728-1729, 1733.)[17] As will be detailed below, DiLeonardo explained to Kracht that his information of a possible hired hit came from Sergeant Hensley's recounting of Nance's statements (Ref. Exh. 50), and Nance's information, in turn, came from Kesselman (Ref. Exh. 46). Consequently, as Williams explained at the hearing, all the statements regarding the possibility of a hired hit circled back to Kesselman as the only source. (21 RRT 1794-1795.)

After thoroughly following up on Kesselman's statements, Williams concluded two things: (1) Kesselman's information about the possibility

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[16] Williams also denied showing Kesselman any photograph of petitioner. She pointed out that her records showed that she picked up a mug shot of petitioner from the Sheriff's Department on May 3, 1984, at the request of Deputy District Attorney Joyce Allegro. Williams explained that she would not have needed to obtain a photograph on May 3rd, if she already had one in early-April that she allegedly showed to Kesselman. (21 RRT 1799-1800; 23 RRT 1893, 1896, 1913; Ref. Exh. 22 at p. 5.) Similarly, the only photo line-up of petitioner was first created by John Kracht on May 15, 2003. (32 RRT 3105-3106.)

[17] Kracht's taped interview of DiLeonardo (Ref. Exh. 50) is discussed in detail below.

the Guerrero murders were a drug hit, were, by Kesselman's own admissions in the taped conversation, nothing more than her own speculation and musings about what might have occurred, and (2) there was nothing that corroborated her speculation. (21 RRT 1772-1793, 1803; 23 RRT 1892-1911.) To the contrary, the investigation by Williams and Kracht contradicted Kesselman's speculation, indicating her speculation was simply wrong. (21 RRT 1772-1793, 1803; 23 RRT 1892-1911.) Williams explained that she thoroughly investigated Kesselman's allegations because, if she and the District Attorney's Office concluded someone else was involved in the murders, they would certainly want to arrest and prosecute that individual as well. (21 RRT 1842.) Kesselman's allegations, however, did not pan out. (21 RRT 1772-1793, 1803.)

Williams did believe that Kesselman had credible information about the drug operation she described, which is why she turned Kesselman over to the DEA. (18 RRT 1355-1356; 19 RRT 1515; 23 RRT 1927-1928.) However, Williams was never completely sure if Kesselman's account of Angarita's drug Cartel was accurate, but she concluded it was for the DEA to determine her credibility regarding the drug operations. (19 RRT 1519-1520.) Williams did not follow the specifics of the federal investigation into Angarita's drug operations. (25 RRT 2199-2205.) She had no knowledge of whether the DEA had concluded that Angarita had a drug operation, although she did occasionally check in with the DEA to see if their investigation developed any information regarding the murder case. (18 RRT 1342, 1354; 19 RRT 1466-1468, 1493; 25 RRT 2200-2205.) She suspected Angarita could be involved in cocaine in some fashion but had no

knowledge of how or to what extent. (18 RRT 1321-1323, 1335; 19 RRT 1494-1495; 20 RRT 1573.)[18]

Sandra Williams investigation of petitioner's case was largely completed by June 1984. (Ref. Exh. 22 at pp. 5-6.) After that point, her activity in the case was focused on maintaining contact with witnesses and making sure the case was ready for trial. (Ref. Exh. 22 at pp. 6-9.)

In 1985, the defense filed a motion seeking disclosure of the confidential informant's (i.e., Kesselman's) identity as well as any interviews of the confidential informant. (1 CT 240-246.) That motion resulted in Judge Reed Ambler holding an in camera hearing in September 1985 regarding whether the confidential informant was material to the defense. (1 CT 249-251; 19 RRT 1478.)

Williams explained that Kesselman was designated and maintained as a confidential informant by the prosecution because she was helping the DEA in their ongoing drug investigation, and she could be in jeopardy if her participation with the federal investigation was revealed. (19 RRT 1479-1480.) Williams noted that it was up to Judge Ambler to determine if Kesselman had any information about petitioner's case that had to be turned over to the defense. (19 RRT 1480.) Williams met with Kesselman

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[18] Williams explained to the court how she differentiated between "beliefs" and "suspicions." (21 RRT 1800-1804.) She explained that she may have "suspicions" about someone based on hearsay or rumor. But without direct proof, she cannot say she "believes" or "knows" something to be true. In the context of Jose Angarita's drug Cartel, she had suspicions based on Kesselman's statements, but Williams could not substantiate Kesselman's assertions with regard to Angarita running a drug Cartel, and Williams had no proof or direct knowledge of Angarita's activities, which she explained would require her conducting a controlled buy traced to Angarita. (21 RRT 1800-1804.) Absent direct knowledge or proof, Williams would be unable to say she "believed" that Angarita ran a major drug operation. (21 RRT 1800-1804.)

prior to the hearing to explain the mechanics of the hearing. Williams did not suggest what to say. She merely told Kesselman to be truthful. (19 RRT 1482-1492.) Williams never directed Kesselman to withhold information from the court or to lie about any information she knew. (21 RRT 1834-1835.)

Williams explained that she was truthful in her own testimony at the in camera hearing.[19] (21 RRT 1811-1812.) She explained that she told the court Kesselman did not have any knowledge that the murders were a drug hit by Angarita because Kesselman's reference to that possibility was pure speculation without any actual knowledge, as reflected in her taped interview. (19 RRT 1485; 21 RRT 1811-1813.) Williams did not feel obligated to describe for the court all of Kesselman's changing accounts or speculation, given that Williams's investigation could not verify her stories, and the court would be reviewing the tape of Kesselman's interview. (19 RRT 1509, 1537-1538; 21 RRT 1810-1811.)

Williams also discussed being interviewed by defense investigator Alayne Bolster on February 20, 1986. (20 RRT 1556-1557; Ref. Exh. 17.) Williams agreed to be interviewed after learning that District Attorney Investigator Rod McCurdy gave Bolster an interview that contained inaccurate information. (20 RRT 1556-1557, 1594-1607; Ref. Exh. 17.)

Williams testified at the hearing about McCurdy's involvement in the investigation. Williams explained that, by the time of her interview with Ron Nance, there were so many names, addresses, and locations, that had been mentioned in connection with the case that Williams requested the assistance of Investigator Ron McCurdy to work on a "via chart." (18 RRT 1263, 1333, 1338-1340, 1378-1379; 23 RRT 1936.) She explained that a

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[19] The transcript of the in camera testimony of Williams and Kesselman is set out in Reference Exhibit 2.

"via chart" is a method of diagramming the possible connections between numerous individuals, dates, and locations in a flow chart format. McCurdy recently had training on how to prepare a via chart, so Williams asked him to assist her in that aspect of the investigation. (18 RRT 1333, 1339-1340, 1378-1379; 23 RRT 1936-1939.) He did not conduct any of his own investigation on the case. (18 RRT 1263, 1339; 23 RRT 1940.)

Williams testified that, notwithstanding his via chart training, McCurdy had difficulty keeping the information she provided straight and often got the facts wrong. She was disappointed by his efforts and ultimately abandoned McCurdy's attempts to chart the facts of the case. (18 RRT 1378-1379; 19 RRT 1414-1416; 23 RRT 1933-1943.)

On February 20, 1986, when Bolster contacted Williams to discuss an interview, she related what she had learned from an interview with McCurdy two weeks earlier on February 2nd. (20 RRT 1556-1557; Ref. Exh. 17; Ref Exh. 19.) When Bolster related what McCurdy had reported, Williams responded that McCurdy's statements were wrong in numerous respects. (20 RRT 1574-1610; 23 RRT 1975.) Williams informed Bolster that, contrary to what McCurdy had suggested, they had investigated Karlos Tijiboy and found no evidence of drug dealing or narcotics connections. They found nothing to contradict Tijiboy's innocuous account of his own life as a waiter who befriended petitioner solely as a favor for petitioner's mother who was a frequent customer at his restaurant. (20 RRT 1574-1583, 1594-1597.) Williams also informed Bolster that they found nothing to show that Orestes Guerrero handled drugs or stolen property for Angarita. (20 RRT 1597-1598.)

Williams also explained to Bolster that she was not able to obtain any verifiable information that Angarita was involved in the drug business. (25 RRT 2200, 2228-2229.) Williams was careful in her discussions not to

identify Kesselman as the confidential informant, given the court's order that her identity not be revealed. (25 RRT 2230.)

B. Gale Kesselman (a.k.a. Barbara Gale Divine)

Kesselman testified at length about Jose Angarita's drug operation. She was initially introduced to Angarita in the Summer of 1983 by her friend Frank Martinico, who she claimed was connected to the Italian mafia. (10 RRT 285, 304-305, 342.)[20] According to Kesselman, on the first night she met Angarita, he drove her around and showed her his entire drug operation, including his secret cocaine storage locations and cash collection sites. (10 RRT 346.) Kesselman became Angarita's girlfriend, and he brought her into his drug business. (10 RRT 267-268, 305-306, 342.) She and Angarita's ex-wife worked on the books for the drug trafficking business. (10 RRT 267-272, 322-323; 11 RRT 444.) Kesselman testified about scope and extent of his drug trafficking business, and her involvement in his operation during the second half of 1983. (10 RRT 289-290, 267-272, 321-323, 333-373.)

Kesselman testified about the incidents that led her to believe that Angarita was responsible for having the Guerreros killed. She first described the car trip to San Francisco with Angarita. She testified that, on December 28, 1983, the day before the murders, she went to San Francisco with Angarita and Laureano to meet a major cocaine supplier from New York. (10 RRT 283-284; 11 RRT 469.) Kesselman explained that she received a call from Angarita in the late afternoon when she was at her home on Glen Avenue, asking her to drive him to San Francisco. (10 RRT 393; 11 RRT 436, 440, 444-447.) Angarita told her he was meeting an associate in San Francisco who was flying in from New York and they

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[20] Kesselman had been working at a car dealership at the time. (10 RRT 365.)

would meet the man at the hotel where he was staying. Angarita was not comfortable driving and wanted Kesselman to drive. (11 RRT 444-445, 453.)[21] About an hour later, Luis Laureano ("Pepe") called to confirm the trip. (11 RRT 447.) Angarita and Laureano picked her up at her house around dark. They left right at dusk, around 5:30-6:00 p.m., when it was still a bit light out. (11 RRT 429, 452.) Kesselman did the driving, Laureano sat in the front passenger seat and Angarita sat in the back. (11 RRT 452.) During the drive, Angarita told her the man he was meeting was a Columbian who was one of the biggest cocaine dealers in New York, and who could supply Angarita with an additional ten kilos a week. (11 RRT 453, 460; 12 RRT 611.)

They made one stop along the way, at a gas station off of the San Francisco airport exit, where they made a phone call for directions to the hotel. Angarita had the phone number of the hotel where the man was staying, which he gave to Kesselman. She called the hotel and received directions. (10 RRT 285; 11 RRT 453-455, 461.) She testified she was certain they did not pick up anybody at the airport. (11 RRT 454.)

When they arrived at the hotel in San Francisco, they had trouble locating the man, so they drove around the hotel. Angarita then spotted the man standing in an alcove and told Kesselman to pull over. Either Laureano or Angarita waved the man over to the car. The man got into the back seat with Angarita. (10 RRT 285-286; 11 RRT 456-459, 462-463.) When the man entered the car he was not introduced to her. (11 RRT 458.) The man was wearing a pea coat and a knit watch cap pulled down on the sides and to his eyebrows in the front. She could recall no facial hair on the

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[21] Kesselman testified that she readily agreed to make the trip, explaining that her daughter and adopted daughter were staying at the adopted daughter's grandmother's house that day. (11 RRT 446-447.)

man. (10 RRT 285-286; 11 RRT 459-460.) As the man entered the rear seat she turned to watch him enter glancing at him over her shoulder. They did not greet each other and they were not introduced. The man was positioned behind Kesselman and to her right. Angarita was directly behind her. She had no other face-to-face contact with the man during this encounter except for an occasional glance in the rear view mirror as she drove. (11 RRT 461-463.) She drove around for no more than five minutes and most of that time she had her attention on the driving. (10 RRT 287-288; 11 RRT 463-464.) During the five minute drive Angarita and the man conversed in Spanish. Neither she nor Laureano participated in that conversation. At the end of five minutes they dropped the man off at the hotel. (10 RRT 287-288; 11 RRT 465-467.) Kesselman did not speak to the man as he departed and they were never introduced. She thinks she heard the name Miguel in conversation with Jose en route to San Francisco. (11 RRT 465-466.) By this time she estimates it was maybe 7:30 or 8:00 p.m. (11 RRT 463-464.)

They returned directly to San Jose and arrived approximately 9:00 or 10:00 p.m. (11 RRT 467-468.) Kesselman claimed that, on the trip back to San Jose, Angarita told her that the dealer would be coming to San Jose the following day for another meeting with Angarita at around 2:00 p.m. (10 RRT 288; 11 RRT 469.)

Kesselman also asserted that, after the murders, Angarita made incriminating statements about his involvement in the murders. (10 RRT 301; 11 RRT 507.) When pressed on cross-examination for specific details about Angarita's statements, Kesselman recounted a specific conversation she claimed she had with Angarita after the murders. She described the conversation as taking place on the day of the funeral for the victims, when

Angarita was staring into the fire in the fireplace. (12 RRT 659-660.)[22] Kesselman claimed that Angarita told her that he knew the murder was over an old drug debt between some Peruvians and another Cartel, probably Venezuelan. Angarita said he was contacted by someone to assist "with a meeting of the gentleman that took care of the Guerrero brothers." (12 RRT 659, 689-691.) He did not say who contacted him, only that he was directed to arrange the killing. (12 RRT 660.) Angarita told her that the man they met in San Francisco was the person who had done the killing. (12 RRT 660, 691.) Angarita related this information to Kesselman in the same conversation by the fireplace in which he also said he could see the victims' faces in the fire and hear their children crying out. (12 RRT 660.)[23] Angarita was very emotional that evening and it was the only time that Angarita described himself as instrumental in assisting whoever had ordered the murders. (12 RRT 676-681, 689-691.)

Kesselman was contacted by Williams on March 31, 1984, at her home in Ben Lomand in Santa Cruz County. (10 RRT 278; 11 RRT 474, 476-478; 18 RRT 1353.) Kesselman was insistent at the hearing that this was not her first meeting with Williams. Kesselman testified that she knew Williams from a previous criminal case involving her ex-husband stalking her, in which Kesselman believed she worked with Williams. (10 RRT

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[22] Kesselman noted that she had an earlier conversation with Angarita about the killings the day after the murders, which she described in her taped statement, but Angarita did not make any incriminating statements in that conversation, and after the conversation she did not suspect Angarita was involved in the murders. (12 RRT 681-683.)

[23] After recounting this information, however, Kesselman promptly backtracked and said that Angarita never told her he hired anyone to do the killing, nor that he arranged for the man he met in San Francisco to murder the Guerreros. (12 RRT 666.) She was not sure if he ever identified that the man from San Francisco was the killer. (12 RRT 666.)

279-280, 331.)[24] Kesselman claimed that she told Williams all about Angarita's admission during her first meeting in Ben Lomand and at each meeting thereafter, including the taped interview of April 18, 1984. (10 RRT 389.) She averred that she gave the same account at each meeting, and never changed her story. She testified that her statement in the taped interview was the same account that she gave Williams on March 31st. (10 RRT 389.) She testified that she provided the information about Angarita because it was the right thing to do, and she did not leave anything out of her statements, including her taped conversation. (11 RRT 478-479.) She was entirely truthful in her April 18th taped interview and did not leave anything out. (12 RRT 598.)

Because of her information about Angarita's drug business, Williams connected Kesselman with the Drug Enforcement Agency, for whom she became a confidential informant. (10 RRT 273-276, 303; 11 RRT 482-484.) However, she did not recall discussing the murders with the federal agents in the federal drug case. (11 RRT 482-484.)

Kesselman claimed that Williams was aggressively investigating the case as a drug-related hit until Angarita disappeared. At that point, suddenly Williams began talking about the case as nothing more than a double murder during a robbery, instead of a contract hit. (10 RRT 308.)

In September 1985, Williams contacted Kesselman about testifying at the in camera hearing to maintain her status as a confidential informant. (10 RRT 309-311.) Kesselman claimed that Williams convinced her that

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[24] Kesselman's recollection of a prior relationship with Williams is incorrect. The prosecution produced the files from the criminal case involving Kesselman's ex-husband, Steven Cannistraci. Williams was not involved in that case. Kesselman had been referring to Deputy District Attorney Jean High, whose appearance was somewhat similar to Williams. (20 RRT 1651-1656; Ref. Exh. 28.)

she had no personal knowledge that Angarita hired petitioner to kill the Guerreros. (10 RRT 308-312.) Kesselman did not disclose to the court during the in camera hearing any of the information she described at the reference hearing. (10 RRT 313.) She claims she did not understand the legal ramifications of her actions at the hearing. She asserted that Williams convinced her that she had no direct knowledge of any information relating to the murders, and was just following Williams's instructions. (10 RRT 313; 11 RRT 505-506; 12 RRT 658.)

On cross-examination, Kesselman was asked about her testimony at the in camera hearing. (12 RRT 652; see also Ref. Exh. 2 [transcript of in camera hearing].) Kesselman acknowledged recounting for the court the incident with Angarita sitting in front of the fireplace and speculating about the possibility that the murders were a drug hit. (12 RRT 653-655; Ref. Exh. 2 at p. 20-21.) Kesselman also acknowledged that this account to the court was truthful at the time. (12 RRT 655.)

Kesselman provided some insight into the difference between her testimony at the in camera hearing and at the reference hearing in the following exchange.

> A. What I said here [at the in camera hearing] is true.
>
> Q. That [Angarita] was speculating how this might have occurred?
>
> A. Right. And what I'm telling you is now, after really thinking about it and after reviewing it, you know, over the years, or thinking about that, it makes a lot more sense. He was just running things in his mind.
>
> Q. So you're thinking now that whatever it was he was saying, which you related accurately to the Court --
>
> A. I knew then --
>
> Q. Let me finish my question.

A. I'm sorry. I apologize.

Q. You were saying that whatever it was he was saying to you, which you related accurately to the Court --

A. Um-hum.

Q. -- you really think he meant something else?

A. Correct.

Q. All right. And that's based upon you having run this over in your mind over and over through the years between then and now?

A. Not through the years. I probably knew it within a few weeks.

Q. Well, you never said that to Sandy Williams, did you?

A. Yeah.

Q. What did you tell her?

A. What did I tell her?

Q. About that?

A. From the first time she came to Boulder Creek or Felton, I told her that I thought that Jose was definitely involved in it, and that his strange behavior from the time that we went to San Francisco till then right after the murders is what -- obviously, his behavior changed dramatically, so I knew he had to be involved somehow. Or I was speculating that he was.

Q. Ah.

A. You know, it's just semantics.

Q. All right. You were speculating and Jose was speculating?

A. And Sandy and everyone else.

Q. A lot of speculating going on?

A. Right.

Q. About this murder?

A. Right.

Q. So that's why we're trying to get at exactly what he said. And you were asked at this hearing what it was he said, and that's what he told you, what you just agreed to in this transcript?

A. That part is true, yes.

(12 RRT 655-657.)

Kesselman testified that, after providing truthful information about the fireplace incident, she then lied to the court in denying that Angarita gave her any information that he knew the murders were a contract killing. (12 RRT 657.) She claimed she lied because Williams convinced her that "legally, or by the letter of the law, that all I knew was speculation, that I had no real knowledge that it was a contract killing." (12 RRT 658.) Kesselman testified that she further lied to the court about denying that Angarita was involved, and claimed she was lying even when she volunteered information to the court without prompting. (12 RRT 660-663, 670-671.) Kesselman also claimed that she lied to the court when she said that Angarita never met petitioner. (12 RRT 665.)

Kesselman testified she was truthful during other portions of the in camera hearing, however. She told the truth when she described Angarita speculating about the killings.

Q. Going over to page 24, line 17, you were asked the following, were you not:

"Specifically, at some point in time, did you tell Sandra Williams anything with respect to Jose Angarita indicating that revenge was possibly a motive for the killing?

"Answer: Well, while he was speculating, yes. While he was speculating, he just -- that was one of the things he speculated about. He goes, 'Well, maybe it could have been a problem from the other brother that was murdered. He's just

come from Peru. Perhaps it had something to do with some Peruvian problems.'"

Now, is that what Mr. Angarita speculated to you?

A. He speculated a portion of that, but that had nothing to do with the main gist of which I described a few minutes ago.

Q. Well, so -- well, I guess, first of all, that was your testimony; is that true?

A. Yes.

Q. Were you lying --

A. No.

Q. -- in part of that answer?

A. No.

Q. So Mr. Angarita did, in fact, speculate to you that maybe it could have been a problem with the – something that happened back in Peru with the brother that had just recently come to the United States?

A. Yes.

Q. Then you were asked at line 27, page 24: "Did he say why he was thinking these things?"

And you answered: "No, just kind of seemed he was just turning it over in his mind why, why his friends were murdered, and he couldn't understand why anyone would murder two people for a small amount of jewelry."

Is that what you testified to?

A. Yes.

Q. Was that a lie?

A. He probably said that at one point.

Q. That seems inconsistent with him telling you this was a contract killing, and I was an intermediary who arranged to have the killer go to the jewelry store and execute this killing?

A. Yes, he became extremely inconsistent right after the killings.

(12 RRT 663-664.)

Kesselman similarly described being truthful at another part of the hearing regarding Angarita's speculations.

Q. [On page 25, line 13] -- you were asked, "What did he tell you about a homicide scene," referring to Mr. Angarita.

And you answered: "He told me that -- well, let me see -- that one body was like in this -- on this. Well, let's say right here. And that the other body was in another room around the corner somewhere. So he was wondering how, you know, if it was just some robber, how did that robber manage to kill both people within such short amount of time, you know, without being heard and escaping. So that's why he was just speculating, Well, maybe it could have been. Maybe it was -- maybe it was a revenge killing. Maybe it was a contract killing, you know. He was only speculating. He was wondering why someone, you know, if only the robber could be that fast, or maybe there were two people. That was another speculation he used. Maybe there were two people involved."

Did you give that answer?

A. Yes.

Q. Was that the truth?

A. That I was observing his speculations?

Q. That he was speculating about these matters?

A. Well, that's what I observed, him speculating.

Q. Well, were you accurately quoting him in this passage of your testimony?

A. Yes, that small passage, I would say so.

(12 RRT 667-668; see also 12 RRT 669-670.)

After the 1985 in camera hearing, Kesselman's next involvement in petitioner's case arose in August 1997, when she was contacted by petitioner's habeas counsel, Karen Schryver, in Columbia, Mississippi, where Kesselman was then residing. (11 RRT 485-494.) After their meeting, Schryver prepared a declaration for Kesselman's signature. (11 RRT 490-494; Ref. Exh. 1; Pet. Exh. A-86.)

In her declaration, Kesselman described her involvement in Angarita's drug operation. (Ref. Exh. 1 at pp. 1-2.) She averred that the person she, Angarita, and Laureano met on the trip to San Francisco was petitioner. (Ref. Exh. 1 at p. 2.) She averred that Angarita became nervous and acted strangely after the murders. (Ref. Exh. 1 at p. 2.) Based on this observation, she averred, "I began to suspect that Jose had been ordered to kill the Guerrero brothers." (Ref. Exh. 1 at p. 3.) She described Nance's attempt to steal drugs from Angarita. (Ref. Exh. 1 at pp. 3-4.)[25] She averred that she informed Williams of everything in her declaration, including her belief that "it was very likely that he was following orders to have the Guerrero brothers killed, and that Bacigalupo met Jose and could have carried out those orders." (Ref. Exh. 1 at p. 4.) She also averred that, for the in camera hearing in petitioner's case, "Sandy Williams told me not to mention the possibility that the Guerrero brothers' murders were contract hits ordered by Jose." (Ref. Exh. 1 at p. 5.)

On May 15, 2001, Kesselman was contacted at her home in Sunnyvale, California, by Sergeant John Kracht regarding her 1997 declaration. (11 RRT 503-504.) Kracht recorded the interview. (Ref. Exh.

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[25] Kesselman did not include any mention of her own involvement in that failed enterprise to steal Angarita's drugs and cash. (Ref. Exh. 1 at pp. 3-4.)

5A.) During the interview, Kracht asked Kesselman to read through her 1997 declaration and note anything that may be incorrect. (Ref. Exh. 5A at p. 1.)[26] Kesselman read through her declaration, noting minor inconsistencies, until she came to the discussion about her belief that Angarita was involved in the killings. (Ref. Exh. 5A at pp. 1-7.) At that point, Kesselman interjected that the 1997 declaration was incorrect. She explained:

> [Kesselman]: This . . . this is not exactly what was said. I told . . . if you want me to say this now . . . and backtrack to this other paragraph?
>
> Kracht: Go ahead.
>
> [Kesselman]: I told . . . I told this woman that . . . that at one time . . . that I . . . wondered if that was the case. But I never told her . . . I never told Sandy Williams specifically that I had knowledge, for sure, that it was a contract killing. That . . . that my suspicions from what they were talking about, that maybe it was a possibility. But I never had . . . I've never had any knowledge that it was a contract killing, period.
>
> Kracht: O.K. So . . .
>
> [Kesselman]: . . . And I never told Sandy that.
>
> Kracht: And Sandy . . . O.K. Well . . . part . . . where it says, Sandy said . . . Sandy told me . . .
>
> [Kesselman]: He told . . . let's see. Oh, O.K. This is about what Nance told to . . . But maybe Nance may have said that. But I never said . . . I never said . . . I may have said that I wondered that but I was never told by anyone that it was a contract murder.

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[26] At that time, Kesselman was using her married name, Divine.

(Ref. Exh. 5A at p. 8.)[27]

Kesselman then resumed reading through her declaration until she came to the averment that Williams told her not to mention to the judge the possibilities that the murders were contract hits ordered by Angarita, at which point Kesselman spontaneously interjected, "No. I did not say . . . that." (Ref. Exh. 5A at pp. 8-9.)

> Kracht: Sandy never told you that?
>
> [Kesselman]: Sandy never told me that. Sandy never told me that.
>
> Kracht: Why did that woman put it in?
>
> [Kesselman]: That I don't know. Now what . . . maybe she supplicated into this, with . . . I told her . . . I told her that I wondered all of those things. And Sandy had asked me about those things. But I told Sandy I had no knowledge of that as being true. But Sandy never ever . . . never told me not to mention that possibility. Never. She never said that. . .

(Ref. Exh. 5A at p. 9; see also Ref. Exh. 5A at p. 10 ["It's not accurate. It's . . . it's what . . . that was not accurate."]; Ref. Exh. 5A at p. 11 ["I discussed those things with Sandy – but Sandy never told me what to say or not to say. Ever."].)

Kracht returned to Kesselman's home on May 17th, with a copy of the April 18, 1984, interview tape. After listening to the interview tape, Kesselman reported that there was no significant parts of the conversation left out and that and that the tape was a complete record of everything she knew at the time. (Ref. Exh. 11 at pp. 1-3.)

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[27] All ellipses in the transcript were inserted by the transcriptionist to indicate pauses or sentence fragments, and do not indicate omissions or deletions. (See Ref. Exh. 4 [tape of interview].)

> Kracht: O.K. And . . . anything else that . . . that you left out that . . . that would be important? Did you leave anything out when you came to the police department?
>
> [Kesselman]: No. Not that . . . no, I didn't.
>
> Kracht: O.K. This is a complete . . .
>
> [Kesselman]: Right. That's everything that I remember at that . . . at that time, which was fresh in my mind.

(Ref. Exh. 11 at pp. 1-2; see also Ref. Exh. 11 at p. 3 ["Kracht: And during that interview you told us everything . . . [Kesselman]: Everything that I was aware of. Kracht: . . . that would lead you to believe that, right? [Kesselman]: That's correct."].)

Kracht also showed Kesselman two photo lineups and asked her if she recognized anyone. (Ref. Exh. 11 at p. 2; 12 RRT 639-640.) She circled photograph number 5 from one of the lineups as most closing resembling the man she met with Angarita the night before the murders. (Ref. Exh. 11 at p. 2; Ref. Exh. 12 & 12A; 12 RRT 639-640.)[28]

Kracht met with Kesselman again the following day on May 18th, and showed her the transcript of her in camera testimony. (Ref. Exh. 13A.) After reading the transcript, Kesselman told Kracht that her testimony was complete and accurate, and that she did not leave anything out. (Ref. Exh. 13A at p. 1.) She also recounted that Williams did not tell her how to testify at the hearing nor direct her to modify her testimony. (Ref. Exh. 13A at p. 1.) She also read through the declaration of Luis Laureano that petitioner's counsel had submitted with petitioner's habeas petition. She disputed that Angarita stored drugs in jewelry shops, or that anyone had stolen drugs from him. (Ref. Exh. 13A at p. 2.)

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[28] The photograph Kesselman selected was of a filler, not petitioner. (Ref. Exh. 12 & 12A; 32 RRT 3118-3120.)

At the reference hearing, Kesselman claimed she lied to Kracht throughout the 2001 interviews. (11 RRT 505.) She claimed that, before recording her answers, Kracht told her she was never supposed to say anything about having personal knowledge of the murders. (11 RRT 505 ["He just informed me or reiterated to me that -- on the same point that I was explaining to you about the original in camera testimony, that I wasn't supposed to ever say anything about it being -- having any knowledge of a contract murder. And Sandy had made that really clear to me."].) She asserted that Kracht intimidated her. (12 RRT 575.) She claimed he told her she would get into trouble if she changed her statement from what she said back in 1984. (12 RRT 579 ["Well, he – he had told me that I could get in trouble by changing what I stated originally and then stating something different to Karen Schryver."]; 12 RRT 580.) She asserted he made this threat at some point during one of the interviews, after having stopped his recording device. He then restarted it and resumed the interview. (12 RRT 581.)[29]

The prosecutor asked her about the transcript of her 2001 interview. When questioned about the point during her May 15, 2001, interview when she interjected, "No, I did not say that," after reading the statement in her 1997 declaration about Williams purportedly directing her to withhold information at the in camera hearing, Kesselman claimed that she never said, "No, I did not say that." (12 RRT 586.) She claimed that the tape or the transcript must have been doctored to move her statement from another portion of the interview. (12 RRT 588 ["Well, maybe I said that at some other point in here, and it's just put in there incorrectly."].) She also denied

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[29] Kesselman claimed that Kracht frequently stopped his recorder, had discussions with Kesselman off tape, and then restarted the recorder. (12 RRT 581.)

ever saying to Kracht that, "Sandy never told me that," and claimed that if she did say it, it was a lie. (12 RRT 588.) When asked about the portion of the interview where she indicated that Karen Schryver "supplicated" the comment about Williams into the declaration, Kesselman denied making the statement in the interview, claiming "I've never used the word 'supplicated' in my life before." (12 RRT 589.)

Kesselman was asked about the third interview with Kracht on May 18, 2001, and she acknowledged that he provided her with a copy of her in camera testimony. (12 RRT 673.) Kesselman claimed that she lied to Kracht when she said her testimony was accurate because she wanted to get rid of him. (12 RRT 673.) She claimed that she did not actually read that transcript "[b]ecause it really didn't interest [her]." (12 RRT 674.) She claimed she lied about everything she said to him because she was sick, and she was "tired of being caught in the middle," and "didn't want to be bothered by it any more." (12 RRT 675.)

When Kesselman was examined at the reference hearing about her 1984 taped statement, she repeatedly agreed that she was truthful in that interview, and never changed her statement from her earlier discussions with Williams. (10 RRT 389; 11 RRT 479-480, 507-508; 12 RRT 588-589, 640-641.) She did not omit anything she thought was relevant or important from that interview. (11 RRT 480; 12 RRT 588-589; 12 RRT 640-641.) She acknowledged that the 1984 interview was the culmination of Williams's investigation into the information Kesselman provided. (12 RRT 601.) She was not threatened or pressured during that interview, and did not withhold information or lie. (12 RRT 601-602.) She told the authorities "everything that [she was] aware of at that time." (12 RRT 640, 641.)

On cross-examination, Kesselman acknowledged that there were discrepancies between her testimony at the hearing about the trip she made

to San Francisco with Angarita and the account she gave in the 1984 interview, and volunteered that her memory of the events would have been "a lot clearer [in 1984] than today." (12 RRT 604.) She admitted that she does not "remember half the things I said in here." (12 RRT 607.) When questioned about the contradictions between the 1984 interview and her 2006 testimony, she pointed to the passage of time, noting that 22 years had passed and that "there are certain things that stand out in your mind and certain things that fade away." (12 RRT 610.) She conceded that her recollection of these events "back in 1984, when [she] gave this tape-recorded interview to the investigators, was much better than it is today," and better than when she signed the declaration for petitioner's counsel in 1997. (12 RRT 611.)

When asked about the details she gave in her 1984 interview, Kesselman repeatedly reported that she could not recall the specific events described. (12 RRT 603-618.) She also acknowledged that the transcript of the interview is "probably a better recollection" of those events. (12 RRT 618-619.)[30] She conceded that she had no "reason to doubt any of the things that [she] said in 1984." (12 RRT 622; see also 12 RRT 627.)

When Kesselman was pressed about Angarita's statements that he was an "instrument" in making arrangements for the killings, she explained that the conversation happened on the night when Angarita was looking into the fireplace. (12 RRT 679-680.) However, when she was confronted with her account of that conversation in front of the fireplace in the 1984 taped

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[30] After reading the transcript of the 1984 interview, in which she stated that she and Angarita picked up Augustine from the airport, and noting that Augustine was the third person in the car, not Laureano, Kesselman testified that that she was no longer sure whether it was Laureano or Augustine in the car, notwithstanding her earlier testimony about Laureano. (12 RRT 621 ["Q. And is that true [that Augustine was in the back seat of the car], or do you know? A. I don't know."].)

interview, she acknowledged that her statements in 1984—in which she did not mention any reference to being an "instrument" and in which she indicated that she did not suspect Angarita was involved in the shooting even after this conversation—appeared to contradict her current testimony. However, she claimed that what she said in 1984 as it appeared in the transcript, was "not what [she] really meant." (12 RRT 687.) When asked about the fact that, in the 1984 interview, Kesselman indicated that she did not believe that Angarita was really involved until Williams showed her a photograph of the person arrested for the killings, she agreed it conflicted with her current testimony. (12 RRT 688.) When asked to explain this contradiction, Kesselman conceded, "At these lines, no, I can't explain that discrepancy." (12 RRT 688.)

Kesselman also gave conflicting testimony at the reference hearing itself. When asked about Angarita's specific statements to her regarding petitioner, Kesselman first testified that she did not recall whether Angarita said the man they met was the person who committed the murders. (12 RRT 665-666.) A short time later in the hearing, when asked again what Angarita said, Kesselman gave a very detailed answer, asserting:

> He told me that they had -- well, when they of course his -- Miguel's picture was all over TV, so right away he asked me, "Did you see the T -- did you see what happened? Did you see the television? Did you see the guy they caught?"
>
> And I said, "No."
>
> And he said, "Well, you need to, because it's the guy we met in San Francisco last night."

(12 RRT 691.)

Kesselman claimed she told Williams this statement, essentially word for word, in 1984. (12 RRT 691.)

C. John Kracht

On April 16, 1984, Sergeant John Kracht was assigned to investigate whether Jose Angarita was involved in ordering the murder of the Guerreros. This assignment came at the request of Sandy Williams based on Kesselman's statements raising this possibility. (25 RRT 2294-2300.) On April 16th, Kracht attended a meeting with Williams and McCurdy about the allegations raised by Kesselman of Angarita's involvement. (25 RRT 2294-2299.) Kracht's investigations were memorialized in a supplemental report. (Ref. Exhs. 33, 34, 38.) On April 18th, Kracht took part in the taped interview of Kesselman. (25 RRT 2299; 26 RRT 2383-2396; Ref. Exh. 3A; Ref. Exh. 34.) Later that day, Kracht conducted a taped interviewed of attorney Joseph DiLeonardo. (Ref. Exh. 34; see Ref. Exh. 50 [transcript of DiLeonardo interview].) In that interview, Joseph DiLeonardo explained he was Angarita's attorney. He recounted that Nance had told Sergeant Hensley that the murders were a drug hit ordered by his client Angarita. (Ref. Exh. 50 at p. 1.) DiLeonardo related that Angarita had denied to him any involvement in the murders. (Ref. Exh. 50 at pp. 2, 6.) DiLeonardo also represented Orestes Guerrero on an unrelated matter and recounted that Orestes did not have much money and was not reputed to be involved in drugs. (Ref. Exh. 50 at pp. 2-3; Ref. Exh. 34.) Based on his dealings with Orestes Guerrero, DiLeonardo did not believe that Orestes was involved in the drug trade. (Ref. Exh. 50 at pp. 2-3, 6-7.)

On April 19th, Kracht contacted Sergeant Hensley who reported that all his information came from Nance. (Ref. Exh. 34.) Kracht and Williams then interviewed Nance. Nance explained that everything he said about the murders came from Kesselman. (Ref. Exh. 34; 26 RRT 2352; 32 RRT 3167-3168.) Kracht contacted the DEA regarding the ledgers that had been turned over. DEA agent Alvarez reviewed the ledgers and reported to Kracht he found no references to Orestes or Jose Luis Guerrero. (26 RRT

2331, 2342, 2352; Ref. Exh. 34.) Kracht next interviewed Maria Guerrero and Timoteo Guerrero to learn if they knew of any possible motive to kill Orestes Guerrero other than robbery, to no avail. (26 RRT 2352; Ref. Exh. 34.)[31] Kracht also interviewed Angarita's ex-wife Julie Hovgaard, who did not know of any possible dispute between the Guerreros and Angarita or motive for murder. (26 RRT 2352; Ref. Exh. 34.) She reported that Angarita used cocaine but did not traffic in it. (Ref. Exh. 25.)[32]

Kracht's investigation turned up no information supporting Kesselman's speculation that Angarita was involved in the murders. (25 RRT 2323; 32 RRT 3056; 32 RRT 3134.) At that point, Kracht's role in the investigation came to an end. (25 RRT 2323.) Kracht testified about all the factors that led him to conclude that there was no connection between Angarita and petitioner's case. (32 RRT 3133-3151.) Kracht knew nothing about the DEA's investigation into Kesselman's information other than that there was an investigation ongoing. He did not see any of the pleadings in the federal case and did not know what occurred in that case. (26 RRT 2342-2347.)

Kracht testified that Kesselman never told him that Angarita made any admissions to the killing. She never said that Angarita claimed to have

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[31] A detailed account of Kracht's interview of Maria Guerrero is in Kracht's complete supplemental report, which is attached as an exhibit to his deposition as part of Reference Hearing Exhibit 33 and separately included as Reference Hearing Exhibit 38. In that interview, Maria Guerrero reported that her husband Orestes was not involved in any illegal activities with Angarita, although she knew that Angarita was involved in dealing cocaine. (Ref. Exh. 33, Kracht Supplement at Bates stamp pages 1011-1012; Ref. Exh. 38.)

[32] Kracht also created two photo lineups on May 15, 1984, one containing petitioner's photo, and another containing Karlos Tijiboy's photo, to show two witnesses. (Ref. Exh. 33, Kracht Supplement at Bates stamp pages 1020-1021.)

been responsible for the murders or an instrument in arranging the killings. (32 RRT 3054-3080.) She never said that Angarita identified petitioner as the guy they picked up in the car or as the killer. (32 RRT 3078-3081.) Kesselman's statements never varied from those contained in her taped interview from April 18th. (32 RRT 3054-3081.) Williams similarly never related that Kesselman made any statements recounting Angarita admitting responsibility for the murders. (32 RRT 3054-3081.)

Kracht became involved in the case again in 2001 when he was asked to interview Kesselman about the declarations she provided to the defense in support of the instant petition. (32 RRT 3083-3084.) Kracht interviewed Kesselman at her home in Willow Glen on May 15, 2001. She was on medical leave at that time, waiting for a liver transplant. (32 RRT 3083-3086, 3094.) Kracht explained that Kesselman was relaxed, friendly, cooperative, and very hospitable. (32 RRT 3093-3096, 3098.) Kracht never suggested or intimated that she could get into trouble for her answers to him, her statements to the defense, or her prior in camera testimony. (32 RRT 3096-3097.) Kesselman never inquired about possible negative repercussions and Kracht never suggested any. (32 RRT 3096-3098.) The entire conversation was taped. (32 RRT 3088-3091; Ref. Exh. 5A [transcript of taped interview]; Ref. Exh. 4 [tape].) Kracht asked Kesselman to read her 1997 declaration prepared by petitioner's counsel, and at several points while reading the declaration, she spontaneously pointed out statements that were incorrect. She specifically noted that her declaration was incorrect where it related that Sandy Williams told her not to mention to the in camera judge the possibility that the murders were a contract hit ordered by Jose Angarita. (Ref. Exh. 5A at 7-8.) She explained that she never told Williams that she had knowledge the murders were a hit, she only had "suspicions . . . that maybe that was a possibility." But she made clear "I've never had any knowledge that it was a contract killing,

period." (Ref. Exh. 5A at 7-9.) She also made clear that Williams never told her to withhold information from the judge at the in camera hearing. (Ref. Exh. 5A at 9-10.) The interview took roughly 15 minutes, and at the end Kracht explained that he wanted to show her some photographs, but forgot to bring them, so they arranged for another meeting. (Ref. Exh. 5A at 11; 32 RRT 3103-3104.)

Kracht met with Kesselman again on May 17th. Once again Kesselman was very hospitable, friendly, relaxed, and cooperative, and there was no discussion of any negative repercussions for any statements. (32 RRT 3106-3109, 3112.) On this occasion, Kracht brought the tape of Kesselman's interview from April 18, 1984. She listened to the interview and followed along with a transcript. (32 RRT 3106-3112.) After listening to the tape, Kracht conducted a recorded interview of Kesselman. (Ref. Exh. 6A [tape]; Ref. Exh. 5A [transcript].) In that interview, Kesselman reports that the taped interview was complete and accurate, "That's everything that I remembered at that ... at that time, which was fresh in my mind." (Ref. Exh. 5A at p. 2.) She explained she left nothing out during that interview, she recounted "[e]verything I was aware of" regarding Angarita's possible involvement in causing the murders of the Guerreros. (Ref. Exh. 5A at pp. 1, 3; 32 RRT 3113.) Kracht had Kesselman look at two photo lineups that were originally prepared in May 1984, one containing petitioner's photo with five fillers, and the other containing Karlos Tijiboy's photo with five fillers. (32 RRT 3116-3118; Ref. Exh. 12 & 12A.) Kracht asked Kesselman to select the individual who most closely resembled the person she picked up in San Francisco with Angarita, and she selected a filler instead of petitioner. (32 RRT 3118-3120.)

Kracht met with Kesselman again the following day on May 18th to review her in camera testimony and Laureano's declaration. (32 RRT 3122.) Once again, Kesselman was pleasant, relaxed, friendly, and

welcoming. (32 RRT 3125-3126.) Kesselman read the transcript from the in camera hearing and Laureano's declaration attentively. (32 RRT 3127-3128.) Kesselman told Kracht that her in camera testimony was accurate and complete, and she denied that Williams told her to modify her testimony in any way. (Ref Exh. 7A [tape]; Ref. Exh. 13A at p. 1 [transcript].)

Kracht also examined the San Jose Police file for petitioner's case. Kracht explained that the file contained 13 tapes of interviews, 11 of which were numbered sequentially. (32 RRT 3151-3156.) Tapes #1 and #2 were 60-minute tapes labeled as separate interviews of Maria Guerrero from December 29, 1983. (32 RRT 3152.) Tape #3 was a 90-minute tape of another interview of Maria Guerrero from that same day. (32 RRT 3153.) Tape #4 was a 60-minute tape labeled as an interview with Encarcion Guerrero also from that same day. (32 RRT 3153.) Tape #5 was a 90-minute tape labeled as the police interview of petitioner from December 29, 1983. (32 RRT 3153.) Tape #6 was a 60-minute tape labeled as Carlos Valdviezo's interview from that same day. (32 RRT 3153.) Tape #7 is a 40-minute microcassette tape labeled as another interview of petitioner from December 29, 1983. (32 RRT 3153.) Tape #8 was not kept in the file with the other tapes. That tape was a 60-minute microcassette tape containing the April 18, 1984 interview of Gale Kesselman. (32 RRT 3154.) This microcassette tape was placed in a standard size cassette box marked "Conf. Inft.," which was then placed in an envelope and segregated from the other tapes. (32 RRT 3154.) Tape #9 from the file was a 60-minute tape labeled as an interview with Timothy Guerrero from April 20, 1984. (32 RRT 3155.) Tape #10 was a 90-minute tape labeled as an interview of Maria Guerrero from April 20, 1984. (32 RRT 3155.) Tape #11 was a 60-minute tape labeled as an interview of DiLeonardo from April 18, 1984. (32 RRT 3155.) The file contained two other tapes that were not

numbered. Both were 60-minute tapes labeled as interviews of Jose Angarita from March 19, 1984. (32 RRT 3156.) When asked specifically about the DiLeonardo tapes, Kracht explained it was available to the defense if the prosecutor gave authorization. (32 RRT 3159.)

D. Steve Price

Steve Price testified that in February 1984 he was approached by Sandra Williams outside the county jail, just after he had visited with Ron Nance, who was in custody. (14 RRT 794-797.) Price did not give Williams any information about the murders of the Guerrero brothers because he did not have any information about the killings. (14 RRT 799, 818, 860.) He had only just learned of the killings from his conversation with Nance in the jail. (14 RRT 852-855.) Price agreed to provide Williams with a map and directions on how to locate Kesselman's house in Santa Cruz County, but was otherwise uncooperative. (14 RRT 860-862.) Price denied hearing any conversations between Kesselman and Nance about the double murder prior to being questioned by Williams. (14 RRT 852-853.) Price also noted he would not have testified back in 1984 had he been questioned by the defense, but he would have told them how to locate Kesselman. (14 RRT 819, 872, 875.)

E. John Aaron

John Aaron was a public defender and petitioner's third and final trial attorney. (15 RRT 885.) Petitioner's case was initially assigned to Jim Thompson. It was reassigned to Michelle Forbes after Thompson left the public defender's office. (15 RRT 886.) Forbes worked on petitioner's case until late 1986 or early 1987, when the case was transferred to Aaron. (15 RRT 886-887.) Aaron knew that a confidential informant had spoken to the prosecution, and that the court had denied Forbes's motion to unseal the informant's interview. (15 RRT 885-886.) However, he did not know

what information the informant had given. Aaron acknowledged that the defense had Sergeant John Kracht's supplemental police report, which noted that Joseph DiLeonardo had made statements to the police that the murder was a contract killing. He also knew from the report that DiLeonardo attributed that information to the sergeant handling the investigation into the case against Nance and that Nance was the likely source of this information. (15 RRT 952-953; Ref. Exh. 34.) Kracht's report indicated that the DiLeonardo interview was recorded. (28 RRT 2619-2620; Ref. Exh. 34.) That report also recounted that the informant indicated that Jose Angarita thought the motive for the murder was revenge rather than robbery. (15 RRT 952; 28 RRT 2617.)

Aaron could not recall if he ever obtained a copy of the taped interview of DiLeonardo. (28 RRT 2619, 2662.) Aaron testified that he did not listen to any taped interviews of Nance, DiLeonardo, or Angarita.

Aaron explained that he did not maintain any record in his files of what discovery was provided by the prosecution in petitioner's case. (28 RRT 2619, 2667; see also 27 RRT 2477 [testimony of Bolster confirming no inventory procedure].) Aaron confirmed that during the time period of petitioner's case, discovery of tapes was provided by obtaining authorization from the prosecutor for the release of tapes and then getting the tapes directly from the police department. (28 RRT 2666.) The practice was to provide blank tapes to the police in exchange for copies of the interviews. (28 RRT 2679.) Aaron conceded that "little or no[]" record was kept by him or his office of any discovery obtained from the prosecution. (28 RRT 2667; see also 27 RRT 2477.) He also observed that he would not ordinarily keep tapes in the case file because of their bulky shape. Instead, any tapes would probably be kept "on a lawyer's shelf somewhere." (28 RRT 2667.) Aaron did not know if there were any tapes in the defense case file when it was turned over to appellate counsel

because he was not involved in that process. (28 RRT 2668.)

Aaron acknowledged that an entry in the activity log of Defense Investigator Russell Keubel dated January 11, 1984, indicated that Keubel was directed to pick up "tapes" from the police department. (28 RRT 2678-2679.) The log suggests that Keubel was to bring five 60-minute tapes, and two 90-minute tapes to exchange for the tapes in the police files. (28 RRT 2679.)

F. Judge Joyce Allegro

Judge Joyce Allegro was, in 1984, the Deputy District Attorney assigned to petitioner's capital trial. She took over the case from another prosecutor in early 1984, shortly after the preliminary hearing, most likely on April 27, 1984. (24 RRT 1998-2000, 2043.) Judge Allegro testified that Williams was the primary investigator when she took over the case. Judge Allegro saw references to Ron McCurdy as previously assisting, but he never worked with Judge Allegro on the case. (24 RRT 2030.) Judge Allegro was familiar with the police reports from the files and had listened to Kesselman's taped interview. (24 RRT 2033-2034, 2039.)

Judge Allegro explained the standard discovery practice during that time period. Interview tapes were maintained by the police in the defendant's police file. The prosecutor would authorize the release of the tapes and the defense could then obtain a copy simply by bringing blank tapes of equal length to the police station to exchange for copies of the interview tapes. (24 RRT 2031.)

Judge Allegro maintained notes and records of discovery requests and the discovery authorized and provided to the defense. (24 RRT 2031.) She typically did not keep specific records for tapes provided to the defense because those were maintained by the police department. Instead, she would provide her authorization to the police department to release the tapes to the defense. (24 RRT 2047.) Judge Allegro explained that the

practice in a capital case was that the defense could pick up tapes of interviews at any time unless they were confidential. (24 RRT 2051.) She explained that there was nothing to preclude the defense from picking up the tapes at any time. (24 RRT 2051.)

Judge Allegro's files contained a copy of a discovery request by petitioner's second trial counsel, Michelle Forbes. (Ref. Exh. 23 at pp. 23-26.)[33] Forbes's discovery request was a standard discovery motion requesting "[a]ll statements made by witnesses including, but not limited to, law enforcement agents, notes of such statements or reports based thereon, and tape recordings of such statements, whether in the possession of the People or available to them." (Ref. Exh. 32 at p. 24.) Forbes attached to the discovery request a copy of page 74 of Kracht's supplemental report and made specific requests for the taped interview of attorney DiLeonardo, the business ledgers seized, and the informant's recorded interview.[34] (Ref. Exh. 32 at pp. 23, 26; 24 RRT 2139-2140.)

Judge Allegro's copy of the discovery request contained Judge Allegro's handwritten authorization for discovery of all tapes except for the tape of confidential informant Kesselman's interview. (Ref. Exh. 32 at p.

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[33] The discovery request in Judge Allegro's files corresponded to the earlier discovery motion filed in court by Forbes on March 8, 1985. (1 CT 233-235; see also 1 CT 228-232 [points and authorities in support of discovery].)

[34] The business ledgers requested by Forbes were the ledgers seized from the car of Nance's drug-dealing victim after Nance's failed robbery attempt. The ledgers had already been turned over to the Federal Drug Enforcement Agency and were no longer available to the prosecution. (20 RRT 1616.) However, Kracht inquired of the DEA and learned that there were no references to the victims in the ledgers. (26 RRT 2331, 2342, 2352; Ref. Exh. 34.)

23 [noting "Granted as modified 8-12-85"]; 24 RRT 2052.)[35] She wrote down on the motion that Forbes already has possession of or access to all of the information except for the informant's interview, and noted that Forbes planned to bring a separate motion in court to obtain the informant's identity and taped interview. (Ref. Exh. 32 at p. 23.)

Judge Allegro testified that she agreed to and authorized all of Forbes's discovery requests except for release of the tape of the confidential informant, and that all the defense had to do was to pick up the tapes from the police department. (24 RRT 2052, 2141.)

Judge Allegro's files also contained a memorandum from "Joe T." to "Pat" regarding Forbes's discovery request, dated August 2, 1985. (Ref. Exh. 32 at p. 41.) That memo was to Deputy District Attorney Pat Sanford of the law and motions team from her supervisor Deputy District Attorney Joe Thibideaux, regarding Forbes's discovery motion. (24 RRT 2029; Ref. Exh. 32 at p. 41.) The memo reflected that Judge Allegro had no objection to the discovery request except for information about the confidential informant. The memo indicated that Forbes would bring a new discovery motion to reveal the informant's identity. (Ref. Exh. 32 at p. 41.)

Judge Allegro's account is confirmed by the fact that, on August 13th—the day after the dated notation "granted as modified" on the discovery request—Forbes filed a new discovery motion focused exclusively on revealing the confidential informant's identity and taped statement. (1 CT 240-241.)[36] The narrow focus of this new motion

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[35] Reference Hearing Exhibit 32 is a collection of notes Judge Allegro provided to the defense from her files in conjunction with her deposition. (24 RRT 2001-2029.)

[36] The trial record reflects that Forbes's new discovery motion seeking disclosure of the confidential informant, included as an attachment the marked copy of page 74 of Kracht's supplemental police report as

(continued...)

demonstrates that Forbes had already received the authorization from Judge Allegro to obtain copies of all other interviews contained in the police files, which necessarily included the Nance, DiLeonardo, and Angarita interviews, with the sole exception being the Kesselman interview. The court's order following the in camera hearing, likewise reflects that the only remaining discovery controversy presented to the court by the defense was access to the Kesselman taped interview. (1 CT 250-251.)

Judge Allegro testified that the prosecution investigated Kesselman's statements about Angarita being involved in the killing, but that investigation did not turn up anything to support Kesselman's assertion. (24 RRT 2089, 2101, 2114.) Judge Allegro testified she had no knowledge about what information was known to the federal authorities about Kesselman or Angarita. (24 RRT 2054, 2061, 2120-2121.)

G. Julie Hovgaard

Julie Hovgaard married Jose Angarita in the early 1980s and divorced him after two years. (16 RRT 1037-1038.) Hovgaard gave extensive testimony about the drug operation of Jose Angarita and his family. (16 RRT 1041-1060.) However, she never provided any of that information to the prosecution. (16 RRT 1063-1064.) She explained that she knew nothing about the murders of the Guerreros. (16 RRT 1110, 1135.) She also did not trust the San Jose Police Department and would not have given them any information. (16 RRT 1134-1135.) She did not recall being interviewed by San Jose Police Sergeant John Kracht, but she acknowledged she would not have given him any information due to her distrust of the San Jose Police. (16 RRT 1135-1136.)

(...continued)
identifying the confidential informant who was the target of the motion. (1 CT 240-246.)

In describing Angarita's operation, Hovgaard testified that Angarita brought in a professional hit man named Enrique. Enrique had worked for Angarita's family in Columbia, and came to San Jose while she and Angarita were still married. He was still working for Angarita in the period after she and Angarita divorced. (16 RRT 1058-1059, 1093-1096.)

H. Alayne Bolster

Alayne Bolster was a public defender investigator who worked on petitioner's case for trial. She took over investigation duties from Russell Keubel who retired in 1985. (16 RRT 1145; 27 RRT 2409-2411, 2426.) She reviewed the time logs and investigation logs prepared by Keubel, some of which were introduced into evidence as Exhibits 44 and 45. (27 RRT 2419-2420.) She testified that interview tapes were turned over to the attorney and not kept in the investigator's files. (27 RRT 2475.) She acknowledged that, during the time of petitioner's prosecution, the public defender's office maintained no record keeping system regarding discovery from the prosecution. She conceded they kept no inventory log, nor any method for looking back to determine what materials had been provided. (27 RRT 2471, 2477.)

Bolster confirmed that a standard method for providing discovery between 1983 and 1987 was for the defense to bring blank tapes directly to the police department and exchange them for the taped interviews in the police files after having obtained authorization from the prosecutor. (27 RRT 2543.)

Bolster acknowledged that the defense had the May 4, 1984, supplemental report by Sergeant Kracht indicating that the prosecution was investigating whether petitioner murdered the Guerreros as an agent of Angarita. (27 RRT 2492-2493; Ref. Exhs 33, 34, 38.) The defense also knew from the report that Kracht had conducted a taped interview of DiLeonardo, in which he referred to the murders as a hired hit, and that

Nance was the source of that information. (27 RRT 2506-2507.) Bolster acknowledged that the standard practice would have been to obtain the tape of DiLeonardo's interview in light of his statements. However, it was not her role to listen to the tapes, she would merely provide them to the attorney for his or her review. (27 RRT 2471, 2507.) She would not interview any witnesses without being directed to do so by the attorney. She did not interview or investigate DiLeonardo or Nance because she was never asked to do so by counsel. (27 RRT 2508-2513.)

On February 12, 1986, Bolster interviewed Investigator Ron McCurdy, who had played a supporting role on petitioner's prosecution team. (16 RRT 1147.) Bolster prepared a report of her interview. (Ref. Exh. 19.)[37]

In the report, Bolster wrote that McCurdy offered his speculation on the case. Bolster asserted McCurdy had suggested that Karlos Tijiboy was connected to Angarita. He suggested the victims may have been asked to handle stolen jewelry and drugs for Angarita. (Ref. Exh. 19.) He indicated that Angarita was on the run, and identified Luis Laureano as one of his lieutenants. McCurdy thought that Angarita's uncle was a police chief in Columbia who helped him bring drugs into the country. McCurdy then referred Bolster to Williams, explaining that it was her case. (Ref. Exh. 19.)

Bolster interviewed Sandy Williams on February 20, 1984, and prepared a report of that interview. (Ref. Exh. 17.) In that interview, Williams indicated that McCurdy was mistaken about several of his assertions. The prosecution found no connection between Karlos Tijiboy

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[37] Petitioner did not call Ron McCurdy as a witness at the hearing and, as explained below, the purported content of this report is inadmissible hearsay.

and Angarita, and no evidence that Tijiboy ever sold drugs. (Ref. Exh. 17.) She found no evidence that Orestes Guerrero had any connection to Angarita's illegal activities. Williams indicated she did not find out anything about Angarita running a drug business although she suspected it. (Ref. Exh. 17.)

I. Cliff Gardner

Cliff Gardner represented petitioner on direct appeal and in his first state habeas petition. (29 RRT 2831-2814.) Upon being appointed, Gardner met with John Aaron and received the defense files. (29 RRT 2820.) Gardner had no recollection of whether he received any tapes in the Bacigalupo file, but his practice is to ask for everything in the file. (29 RRT 2820, 2823.) When he completed his representation of petitioner in 1994, he turned over all the files he had to Karen Schryver. (29 RRT 2820-2821.)

J. Karen Schryver

Karen Schryver was appointed as petitioner's federal habeas counsel by the federal district court in 1995. (11 RRT 519.) Upon reviewing the investigative reports, Schryver was able to locate Kesselman by following the same trail that Williams followed in 1984. First, Schryver focused on Ron Nance, based on the statements he made as noted in the police reports. She located Nance, who recounted his earlier statements that the murders may have been a drug hit and told her that the information came from Gale. (11 RRT 522-523; 29 RRT 2872.) Nance directed her to speak to Steve Price, who in turn gave her Gale Kesselman's name. (11 RRT 523; 29 RRT 2872.) Schryver located Kesselman and learned that Kesselman was the confidential informant. (11 RRT 526.) Schryver noted that petitioner's trial counsel could have taken the same steps to locate Kesselman prior to trial. (29 RRT 2750.)

After interviewing Kesselman, Schryver drafted a declaration which Kesselman signed on August 7, 1997. (11 RRT 530; Ref. Exh. 1.)

Schryver also tracked down Luis Laureano based on the references to him in the reports. Schryver learned of Laureano's federal case through her investigations into Angarita. (11 RRT 544-546.) She located Laureano's brother, and he put her in touch with Laureano who was living in Venezuela. (29 RRT 2755-2756; 2848-2849; 30 RRT 2924-2925.) She contacted Laureano and prepared a declaration for him to sign, which he signed on February 26, 1999. (29 RRT 2756, 2848-2852; Pet. Exh. 85.)

Schryver testified that she received petitioner's defense file from his appellate and state habeas counsel Cliff Gardner. (29 RRT 2739-2740.) The only tapes in petitioner's defense file were the tapes containing petitioner's interviews by the police. (29 RRT 2740, 2798-2800, 2802-2803.) Schryver acknowledged that the defense had Kracht's supplemental reports (Ref. Exhs. 33 [Bates stamp pages 1006-1021], 34, 38), which referenced taped statements by Maria Guerrero and Joseph DiLeonardo, but she could not locate any other tapes in the Public Defender's files. (29 RRT 2404-2407.)

K. Luis Laureano (a.k.a. Luis Albarran-Arnal)

Luis Laureano flew in from Caracas, Venezuela, to testify at the hearing. He had been living in Venezuela since being deported in 1988 following his federal conviction for drug trafficking. (34 RRT 3337, 3372, 3377-3381; Ref. Exh. 41.) Laureano testified that he first came to San Jose in 1982 and got a job selling used cars at East Side Auto Sales. (34 RRT 3354.) While working there, he met Jose Angarita who, at the time, owned a jewelry store across the street from the auto dealership. (34 RRT 3354.) Angarita came over from his jewelry store one day, introduced himself to Laureano, and asked if there was anything he could do for Laureano. (34 RRT 3459.) Angarita visited frequently, and the two men became friends.

(34 RRT 3459.) When the auto dealership closed in early- or mid-1983, Laureano began working for Angarita. (34 RRT 3460.)

Laureano testified that he would transport large quantities of cocaine for Angarita. (34 RRT 3357.) Laureano recounted Angarita's extensive, multi-million dollar drug trafficking business, most of which he heard about from Angarita, rather than observed first hand. (34 RRT 3357-3363, 3375-3384, 3438, 3469.) Laureano testified that he was already working for Angarita when Kesselman became Angarita's girlfriend. (34 RRT 3464.) He recounted that Kesselman soon became involved in Angarita's drug operation. She often transported cocaine for Angarita. (34 RRT 3403-3405.)

Laureano also described how Angarita had several "sicarios," or professional assassins, whom he employed to kill drug dealers who crossed him. (34 RRT 3398-3399, 3511.) Laureano recalled that Augustine was one of the hired killers whom Angarita brought to San Jose. (34 RRT 3479-3480, 3511.) Laureano drove Augustine around on occasion, but had no personal knowledge of any sicario jobs Augustine performed. (34 RRT 3479-3480.) Laureano testified that Angarita was a dangerous and violent man who often threatened retribution against his perceived enemies. (34 RRT 3398-3401.)

Laureano testified that he met Orestes and Jose Luis Guerrero on several occasions. (34 RRT 3390, 3506.) He recalled meeting both Orestes and Jose Luis shortly after he started working for Angarita in mid-1983. (34 RRT 3507.) He went over to their store many times with Angarita. (34 RRT 3390.) Laureano claimed that the two brothers were involved in cocaine trafficking for Angarita, and helped move cocaine and count money for Angarita. (34 RRT 3391.) Angarita used their jewelry shop to store cocaine and packages of cash. (34 RRT 3394.) On one occasion, Angarita angrily told Laureano that the Guerrero brothers stole two kilos of cocaine

from him. He said that no one would make a fool of him and said he was going to have them killed. (34 RRT 3394-3395, 3511.) This exchange occurred quite some time before the Guerrero brothers were murdered. (34 RRT 3505.)

Laureano claimed that, while still working at the auto dealership in early- or mid-1983, Angarita introduced him to petitioner. (34 RRT 3385-3386, 3491-3492.) Angarita came by with petitioner and another individual. Angarita introduced petitioner to Laureano as "Miguel." (34 RRT 3386, 3388-3390, 3491-3494.)

Laureano claimed that petitioner returned several more times to visit Laureano at the dealership without Angarita. (34 RRT 3494, 3508.) One time petitioner looked at a car, but did not buy it. (34 RRT 3495.) Laureano described a memorable occasion when petitioner visited Laureano while he was working at East Side Auto. (34 RRT 3545, 3554, 3558.) Laureano asserted that petitioner talked with him about having visited with the Guerrero brothers. (34 RRT 3544-3545.) Laureano claimed that petitioner appeared nervous and distracted. (34 RRT 3554.) When Laureano asked what was the matter, petitioner confided that Angarita told him he had to do a job for Angarita. Petitioner began crying and said that if he did not do the job, Angarita would kill his family, starting with his mother. (34 RRT 3554.)[38] That was the last time Laureano saw petitioner until the reference hearing. (34 RRT 3555.)

Laureano also claimed to know Karlos Tijiboy, although he insisted Tijiboy's first name was spelled "Carlos." (34 RRT 3500.) Laureano asserted that he delivered drugs to Tijiboy on behalf of Angarita. (34 RRT 3498.) Laureano testified that Tijiboy lived in a house on King Road in

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[38] Petitioner did not testify at the hearing, and his purported statements to Laureano were hearsay.

East San Jose. (34 RRT 3498-3501.) He claimed that Tijiboy was a distributor for Angarita, who had "credit" with Angarita for the drug distribution. (34 RRT 3501.) Laureano testified that he made several personal deliveries of cocaine to Tijiboy from Angarita, with each delivery consisting of roughly a quarter to half of a kilo of cocaine. (34 RRT 3501-3502.) Laureano testified that Tijiboy also had a car at his house. (34 RRT 3503.)

Laureano testified about taking a car ride to San Francisco in late 1983 with Kesselman and Angarita. (34 RRT 3428-3429.) Kesselman was driving, Laureano sat in the front seat, and Angarita sat in the back. (34 RRT 3429, 3520.) Kesselman drove them to a hotel near San Francisco International Airport. (34 RRT 3429-3430, 3521-3522.) Angarita got out of the car and located someone just outside the hotel doorway. It was very late at night and Laureano could not see the person's face. (34 RRT 3430-3432.) Angarita and the other person returned to the car and they got in the back seat. Although Laureano had to lift his own seat to allow access to the back, Laureano did not look at the other man. (34 RRT 3430-3432, 3522-3525.) Kesselman drove around for a brief period of time while the two men conversed quietly in the back. Laureano did not pay attention to what they said. (34 RRT 3432, 3522.) Laureano did not believe that the man in the back of the car was someone he had ever met before. (34 RRT 3527.) Then Kesselman dropped the man off, and they returned to San Jose. (34 RRT 3432, 3525-3527.)

L. Iraida Golden

Petitioner's mother, Iraida Golden recounted how petitioner had been deported to Peru after serving prison time in New York. (34 RRT 3565.) After petitioner was deported, Ms. Golden moved to California. Petitioner reentered the United States via Mexico and arrived in California at the end of 1983. (34 RRT 3566.) She explained that petitioner met Karlos Tijiboy

through her. Karlos Tijiboy was a waiter at a restaurant in Palo Alto where she and her husband regularly dined. (34 RRT 3567.) She and Tijiboy conversed frequently in Spanish. Karlos was a very nice and pleasant boy, and they became friends. (34 RRT 3567.) When petitioner came to California, Ms. Golden asked Karlos Tijiboy to help her son get a job working in a restaurant, and Tijiboy agreed. (34 RRT 3568.)

Ms. Golden also testified that petitioner met Orestes Guerrero through her. She explained that a friend of hers was Orestes Guerrero's brother-in-law. (34 RRT 3568.) Her friend introduced her to Orestes. (34 RRT 3568.) At some point after petitioner had been living in California, Ms. Golden asked her friend to prevail upon Orestes Guerrero to give her son a job in his jewelry business and Orestes agreed. A few days later, petitioner murdered Orestes and Jose Luis Guerrero. (34 RRT 3568-3569.)

EXCEPTIONS TO REFEREE'S RULINGS

I. GENERAL EXCEPTION TO THE REFEREE'S FACTFINDING PROCESS DUE TO PERVASIVE LEGAL ERROR THROUGHOUT THE REFERENCE HEARING

A. Standard of Review

The standard of review for evaluating a referee's findings following a reference hearing is well established.

> "The referee's conclusions of law are subject to independent review, as is his resolution of mixed questions of law and fact. [Citations.] . . . The referee's findings of fact, though not binding on the court, are given great weight when supported by substantial evidence. The deference accorded factual findings derives from the fact that the referee had the opportunity to observe the demeanor of witnesses and their manner of testifying." [Citations.]
>
> It is important to reiterate that the deference to which a referee's factual findings are entitled is appropriate only if substantial and credible evidence supports the findings. As we explained in *People v. Ledesma* (1987) 43 Cal.3d 171, a referee's factual findings are "'not binding on this court, and we may reach a different conclusion on an independent examination of the evidence produced at the hearing he conducts even where the evidence is conflicting. [Citation.] However, where the findings are supported by "ample, credible evidence" [citation] or "substantial evidence" [citation] they are entitled to great weight. . . .'" [Citations.]

(*In re Hitchings* (1993) 6 Cal.4th 97, 109-110.)

When the referee's factual findings are based on documentary evidence "this deference is arguably inappropriate." (*In re Lucas* (2004) 33 Cal.4th 682, 694.) Likewise, this Court independently reviews expert testimony "[b]ecause observing the demeanor of an expert is generally of little or no benefit in evaluating the persuasive value of the expert's opinion

testimony, deference to the referee's factual findings may not be appropriate." (*In re Cudjo* (1999) 20 Cal.4th 673, 688.)

Any extraneous findings by a referee are irrelevant to the court's resolution of claims. (*In re Visciotti* (1996) 14 Cal.4th 325, 349.) Moreover, when a factual issue requires knowledge of the evidence presented at trial in addition to that presented at the reference hearing, the failure to review the trial evidence renders any determination on that issue unpersuasive. (*In re Ross* (1995) 10 Cal.4th 184, 205.)

B. The Referee's Factfinding Was Legally Flawed

In the present case, the referee's findings are suspect and not meriting of deference by this Court because the referee was operating under a misunderstanding of the role of the Rules of Evidence at a reference hearing. Specifically, the referee believed that the traditional hearsay rules, as set out in the Evidence Code, did not apply to a reference hearing in a habeas case. The referee made this point repeatedly during the extended hearing.

This issue first came up when the prosecution made a hearsay objection to Steve Price's testimony allegedly recounting statements made by Gale Kesselman and Jose Angarita. (13 RRT 775-776.) Only after ascertaining that the witness had no personal knowledge of the information other than through hearsay (13 RRT 777-778), did the referee reveal his view of application of the Evidence Code to a reference hearing. The referee overruled the hearsay objection, observing: "The rules of evidence are not quite the same in habeas corpus proceedings as they are. [*sic.*] They're more – more broad in habeas than they are otherwise here." (13 RRT 779.)

The referee repeated this view when the prosecution raised a hearsay objection to testimony by witness Julie Hovgaard allegedly recounting statements made by Jose Angarita. (16 RRT 1043-1044.) The prosecution

noted: "I know the Court has been very lax with both sides in admitting hearsay in this case, but going back over the transcripts we've heard a lot of hearsay from a lot of people and very little personal knowledge." (16 RRT 1044.) The referee overruled the objection, explaining:

> Well, you're pushing the envelope, but, as you know, if you read these habeas cases we're getting along, both state and federal, more particularly federal, there's more and more hearsay coming in.
>
> I'll let it come in at this time subject to a motion to strike. It seems to me it probably has some degree of credibility, however, and she may answer the question.

(16 RRT 1044-1045.)

The prosecution made another hearsay objection as the defense examination of Julie Hovgaard continued to elicit hearsay statements by Jose Angarita. (16 RRT 1049.) The referee again overruled the objection, this time with an extended disquisition on his distorted view of the applicability of the rules of hearsay to a reference hearing, as shown in this exchange with the prosecutor and the witness.

> MR. FARRIS: Same objection. Hearsay.
>
> THE COURT: Yeah, it's obviously -- this is a field of hearsay that I suppose the late Professor Bickell's prophecy in the 21st century is going to come true when he said that -- I didn't know him at all, never was a student at Yale, but he was a well-known professor at Yale. And he wrote some cyclicals, as they were called, and I think there were four of them. I only read one. One was "The Law in the Courts in the 21st Century." And he prophesied that hearsay would be the common vehicle in American courts.
>
> And, you know, ever since Justice Lucas, when he was -- when he was -- that's before he became Chief Justice, he brought forth the credible hearsay doctrine. Remember that case, from Los Angeles? Credible hearsay?

And -- and now we're getting a little bit more pure type of hearsay.

But it seems to me, though, Mr. Farris, that in the field of -- of habeas corpus -- first of all, they still classify them as civil proceedings. Civil proceedings have always had much more latitude than the criminal areas for hearsay. And, quite frankly, I -- there was a time -- I have a couple of books, if you can find them in my office, about 40, 50 years old or more about hearsay. And I thought I knew hearsay. I really don't know hearsay any more. I really don't know, if it has any boundaries, where it's going to go.

But all of these things, is it fair for me to draw the inference, at least, that these are conversations that you had with your husband?

THE WITNESS: Yes.

THE COURT: And did you at any time have occasion -- and I'm not asking you any questions that you don't want to answer or the lawyers want to ask you, but did you at any time have opportunity to observe any of these activity [*sic*] directly or indirectly by yourself?

THE WITNESS: No.

THE COURT: Okay. So that goes to the weight but -- go ahead.

MR. FARRIS: Your Honor, if I can just state, I don't want to keep interrupting and making these objections, if it can be understood that I have objections to these hearsay statements coming in. I'll confess ignorance as far as there being different rules of evidence in terms of testimony in habeas proceedings. I'll defer to the Court. But I just wanted my objection on the record.

THE COURT: Well, they started -- yeah, they're noted, and they're scholarly and proper in the abstract here, but they started -- you know where they started? In probation hearings.

MR. BRYAN: Really? Oh, right.

THE COURT: You know, I lecture on all this business in the criminal law, but I haven't done much of it in the latter years. But it's kind of interesting. But the credible hearsay doctrine arose in Los Angeles County when a person who was under a probationary order not to leave the state of California without the consent and approval of either the Court or the Probation Department. Lo and behold, the probation officer got some information that this person had left the state of California. And the only proof they had was what?

MR. BRYAN: Hearsay.

THE COURT: A Hertz rental receipt from O'Hare.

MR. BRYAN: Ah.

THE COURT: And from that time on we've been riding this wave and so forth. And particularly in habeas corpus proceedings it's becoming almost the vehicle. But the record will strongly suggest that I'm well acquainted with the limitations of hearsay as to factual matters, but you don't have to object to each one. It will be deemed to have been objected to each and every time.

(16 RRT 1049-1051.)

Later in the hearing the referee overruled the prosecutor's hearsay objection and reiterated his view of hearsay in habeas evidentiary hearings:

MR. FARRIS: Previously in this hearing many times I've made hearsay objections. The Court has overruled those objections.

THE COURT: Well, in habeas corpus it's a little bit different, they're fact-finding issues. And I realize that, technically speaking, on some occasions questions should be -- the objection should be sustained here. But the nub of what this gentleman is talking about took place in a period of time -- he's indicated that -- 1983. And he also told us about being arrested in 1984. So it's a relatively short period of time that we're dealing with here, as far as this witness is concerned.

MR. FARRIS: I just want to clarify, in the past that the Court has indicated that my objections to this type of hearsay would be noted, has made similar explanations as to the different

nature of a habeas proceeding than a criminal trial, and that perhaps there are other reasons pertaining to the issues of this hearing, basically discovery matters, that might provide an exception in the sense that it's not offered for the truth of the matter asserted, but as it bears on the questions before this Court regarding failure to provide adequate discovery. I just want it noted that I continue to object to the hearsay, but I'm appreciative and aware that the Court has overruled these objections pretty much uniformly, and my objection just be noted to be a continuing one.

THE COURT: It's noted. And certainly I'm not denigrating you in any way, shape or form --

MR. FARRIS: I didn't take it that way.

THE COURT: -- your objections. But to a great extent, habeas corpus proceedings are pretty much based upon past recollections. And when we get a case like this here, we try to resurrect what was happening at a particular time and what a person knew. And that person -- that's why I asked you whether you were asking for his opinion at one time, because opinion evidence is a little bit different, as you know. And as you also know, the Supreme Court had an interesting opinion case, a civil case, last year I think, Aielle (phonetic) or something like that, and it was amazing how technical they dealt with that particular case, which was a civil case. And it had nothing to do with a criminal process. So it's not to get us into the area of. . . well, of course from Apprendi on from 2000, to the area of Cunningham, Crawford and the other cases.

And I don't know whether we'll ever get to the point where the late Professor Bickle, who prophesied that in the 21st century, criminal proceedings would be substantially based upon hearsay because we're getting more and more -- nothing to do with this hearing -- but more and more documents presumed to be proper -- with nobody ever seeing the original and so forth. But that's just my philosophy. It has no bearing on this case.

(34 RRT 3391-3392.)

The referee's erroneous view of the applicability of the rules of hearsay came to a head when the defense began questioning Luis Laureano

about statements allegedly made to him by the defendant, who declined to take the stand at the reference hearing. This line of questioning led to a vigorous objection by the prosecutor which the referee ultimately overruled after a long, rambling, and occasionally incomprehensible disquisition on areas of the law wholly irrelevant to the hearsay objection raised by the prosecution.

> MR. FARRIS: Secondly, what counsel's attempting to elicit is hearsay statements of the accused. There's no exception to the hearsay rule, that I've heard, that would enable them to put forth statements of the defendant under those circumstances. It's not an admission of a party, it's not a statement against interest, it's self-serving.
>
> THE COURT: Well, this is an interesting byplay here. As both of you gentlemen know, there has -- not talking about this case in any way, shape or form -- it was carved out whether Crawford is going to be emasculated, I'll leave that to somebody else, but you may recall the Shepard [*sic*: Chambers] case from Mississippi at an earlier time. And the only source that's available to the defendant in that case, it's about 63, '64, '65, '66, ballpark figure, was hearsay -- statements made by people who did not testify and would not testify. And that has grafted on a little bit of moss just as effective it is.
>
> And I'm not going to lecture on this because it's too lengthy, but you both will recall that an earlier time when Justice Lucas was early appointed on the Court, he proposed or propounded what's known as credible hearsay. Credible hearsay in that case was a document issued by an automobile agency, or it may have been a rental car agency in Chicago. Then of course in '83 you've got the Roberts case, which was thought to have been overturned entirely by the Crawford case in' 04 -- 2004. Then you had Booker in 2005 that seemed to say -- had a little -- all I'm pointing out, and I told lawyers and judges, I have long since indicated that I know what hearsay is. And the Shepard case is still a fundamental concept for defendants to utilize something that -- that ordinarily isn't available to them. It also was the progenitor to some extent to Justice Traynor's case, probably in the mid '60s, maybe a little bit earlier, when the doctrine of diminished responsibility was introduced. And the

Supreme Court said, No, we didn't mean that and they changed the name a little bit.

But I'm just telling you, you fellas will have the opportunity of seeing whether these things develop, but hearsay is becoming much more prevalent. That's why I asked you gentlemen if you had given any thought to that Supreme Court case that came out in June -- late May or June -- on -- which is a civil case, which Crawford does not apply to, at least to my knowledge doesn't apply to.

You can tell how painstakingly the Court was to not express any real ruling as to what is or is not hearsay. Now, we have the Hammonds case and the Davis case in '06, one from the state of Washington and one from the state of Indiana. Washington hadn't done very well because they lost both Blakely and Crawford at the same time, but they did survive handy on the 911 calls. The Indiana case held that what was -- that was hearsay, subject to the Crawford rights of confrontation. And as you know, our Supreme Court, in a period of time between those particular -- between those cases, concluded contrary-wise. And they were summarily reversed and then justice -- chief justice -- our chief justice wrote an opinion what is hearsay as far as 911 calls are concerned. So younger scholars than me are going to have an interesting time on that concept. But it's still a fundamental concept of habeas corpus proceedings that defendants are entitled to project matters that do not meet the crescendo of cross-examination.

And also, as you know in California, habeas corpus proceedings are what? They are civil in nature.

So, if I have to err I'd as soon err on allowing hearsay to come in in a limited degree on this particular aspect relying on the Shepard case.

MR. FARRIS: So the -- I'm not sure I understand, but I'd like the record to be clear that the witness was asked a question which would call for him to respond, if he knows, with out-of-court statements made by the defendant in 1983.

THE COURT: Well, the Shepard case was kind of interesting. These three people stated that the defendant, in Shepard, they confessed to the crime and they wouldn't come to

court and they wouldn't testify and they weren't granted immunity. That resulted in a reversal on sort of a doctrine of necessity. But it's a little while since I've read the Shepard case.

MR. FARRIS: I just want to clarify the record, your Honor.

THE COURT: Sure.

MR. FARRIS: So if allowed to testify about this, if he has this knowledge, he would be testifying about something the defendant told him in 1983. The People have lodged a hearsay objection. My understanding of the Blakely and Crawford and et al., those are cases which limit the use of hearsay as opposed to expand the use of hearsay. I'm unaware [*sic*: aware] of no rule which expands the use of hearsay to include statements by the defendant in the circumstances . . . and I certainly could be wrong. I've been wrong many times before.

So to be clear, the Court is permitting this because this is a habeas proceeding, civil in nature, and that in such hearings the rules of evidence, particularly hearsay, either don't apply or are much less stringent than criminal cases.

THE COURT: At least the latter portion of your comment I would agree with.

MR. FARRIS: Thank you. And the People would ask there be a continuing objection to any hearsay statements made by the defendant; would move to strike any such statements if they come into the record.

THE COURT: There's unanswered question, about statements of the defendant too, and the scholar on the Appellate Court is lecturing on it and I haven't attended any lectures, but the definition -- if I recall it correctly, his thesis is What is hearsay? Because most of us aren't smart enough to know what hearsay is. Now, in the one case that the supreme -- US Supreme Court had in '06, it was -- or was it the California case, it could be. You may remember there was -- most of these cases all arise from things said on the telephone, statements made to a dispatcher, questions asked by a dispatcher, boom, boom, boom, they've all pretty much agreed that per se 911 calls are

admissible hearsay. Until that point -- or the line is crossed and the interrogation by the dispatch person is testimonial in nature.

Now, in that one case, it was interesting, I forget which one it was, but there was -- a domestic violence call, 911 in the early afternoon. The person was -- I'm just going by my memory -- crying, young child could be heard, and she said bad things about her husband. And the dispatcher sent two patrol cars to the residence. Before the patrol cars arrived the lady arrived at the station house. I use station house because that's what all the eastern courts call it, they don't call it police department, they call it station house. And she walked into the police station carrying a baby, she was crying, she was bruised, she was obviously upset and distraught, and all the other things, so the dispatcher was ordered to call the patrol people back and they came back to the police station, interviewed the defendant -- the victim, the lady. And they held that everything there was clearly testimonial. On the earlier case -- Hammond was an Indiana case; Davis, if I recall correctly, was a Washington case. The holding in that is kind of like a spontaneous declaration. I've been injured. The dispatcher asked, What happened? Are you hurt? Should we send an ambulance? All that sort of thing, and that was held admissible, not hearsay. It was still hearsay but not but admissible hearsay.

I understand where you're going, Mr. Farris, and it's one of the reasons why the law -- criminal law is more interesting to all of us than the civil law is. But you may want to leisure some time, I can't people that, guys or guys. [*sic.*]

MR. BRYAN: I'm sorry, what case?

THE COURT: The civil case on opinion testimony. You may recall after the great expansion on opinion testimony after the -- I can't remember the name of the case now, the child abuse case involving many, many children in a school if I recall, Southern California.

MR. BRYAN: Yes.

THE COURT: But let's not digress too long here. Try to get -- but it seems to me here that for the purpose of -- the basis of this witness' thoughts that he has expressed, the fears he has expressed, that this has some relevance. And while I maybe

> haven't got all the notes, I'm looking at my notes here from both of you fellas, and I know there was some question asked by Mr. Farris about when he first talked to Mr. Bacigalupo. That would obviously have to be some time after -- some time in '83, and when Bacigalupo had -- when this witness, who was quite close to Jose, I just call him Jose because it's similar, talked to him, expressed some of the things that this witness has mentioned and why he was afraid, why he left the State of California, the United States.
>
> Okay, go ahead . . . .

(34 RRT 3546-3552.)[39]

The referee's belief that the rules of hearsay are somehow relaxed or do not apply in full force at a reference hearing is profoundly wrong. This Court has repeatedly held: "'A reference hearing following issuance of an order to show cause is subject to the rules of evidence as codified in the Evidence Code. (See Evid. Code, § 300.) Under those rules, an out-of-court declaration is hearsay, and unless subject to some exception permitting it to be admitted, should be excluded upon timely and proper objection.'" (*In re Miranda* (2008) 43 Cal.4th 541, 574, quoting *In re Scott* (2003) 29 Cal.4th 783, 822-823; see also *In re Fields* (1990) 51 Cal.3d 1063, 1070 & fn. 3 [same, and observing: "We today reject any implication derived from *Hochberg* that a court has discretion to base its decision on

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[39] Later, at the close of Laureano's testimony, the court offered an alternative theory for the admissibility of petitioner's statement to Laureano by invoking the coconspirator exception set out in Evidence Code section 1223. (34 RRT 3561-3562.) This ruling was bizarre and also patently erroneous. There has never been any suggestion that Laureano was involved in any conspiracy to kill the Guerrero brothers, which was the sole content of the defendant's statement, nor was the statement in furtherance of any conspiracy. More importantly, because the coconspirator exception is a form of a "party admission," that exception is expressly limited to "[e]vidence of a statement offered *against* a party." (Evid. Code § 1223, emphasis added.) This exception does not apply to a defendant's own self-serving hearsay statements offered in support of his defense.

disputed issues of fact in a habeas corpus proceeding upon inadmissible hearsay."].)[40]

Unfortunately, the referee's failure to apply the rules of hearsay and his professed willingness to base his decision-making on inadmissible hearsay due to his erroneous belief that different evidentiary rules applied to reference hearings, thoroughly infected his findings of fact, rendering them unreliable and unusable. Notably, much of the background material regarding the nature of Jose Angarita's drug organization was derived from hearsay.

The court also accepted hearsay testimony about what materials were obtained by petitioner's trial counsel from the prosecution. Petitioner was represented by three trial attorneys in succession, first by Jim Thompson, second by Michelle Forbes, and finally by John Aaron, who took over petitioner's case in late 1986 or early 1987, roughly six months before trial. (15 RRT 885-886.) The defense called only the final attorney, Mr. Aaron, to testify at the hearing. Yet, the court permitted petitioner's state habeas counsel, Karen Schryver, to testify about her conversations with petitioner's first two trial attorneys recounting what materials they had in

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[40] The referee's attempt to justify his approach by reference to *Crawford v. Washington* (2004) 541 U.S. 36, *Davis v. Washington* (2006) 547 U.S. 813, *Hammon v. Indiana* (2006) 547 U.S. 813, and *Ohio v. Roberts* (1980) 448 U.S. 56, was erroneous as those cases are wholly inapposite. Those cases involve Confrontation Clause claims, not application of evidentiary hearsay rules. Moreover, they pertain to the admission of testimonial evidence by the prosecution, over defense objection, and are not applicable to efforts by the defense to introduce hearsay over the prosecution's objection. The referee's references to *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Blakely v. Washington* (2004) 542 U.S. 296 are baffling and monumentally erroneous, as those cases pertain to a defendant's jury trial right in the sentencing context and have no applicability to the admission of evidence or the rules of hearsay.

their files and what was turned over. (30 RRT 2937-2939.)[41] Of course, this hearsay went to the heart of the issues raised by this Court in the reference order, and the referee cited this testimony in support of his findings as to Question One. (Ref. Rpt. p. 19.) The referee then compounded the error by repeating his finding of a failure to disclose the materials in his rulings on the subsequent questions.

The referee also permitted petitioner to introduce into evidence the content of a report of an interview by a defense investigator from 1986 purporting to the be the hearsay statements of District Attorney Investigator Ron McCurdy. (Ref. Exh. 19; see also 15 RRT 1005-1008; 16 RRT 1146-1149, 1170-1175; 28 RRT 2595.) The referee accepted these hearsay statements of Ron McCurdy, not merely as information available to the defense for purposes of investigation in 1986, but for the truth of the matter contained therein, notwithstanding the fact that Ron McCurdy did not testify at the hearing, and was not shown to be unavailable. Indeed, the referee specifically quotes from the content of the defense investigator's report for the truth of the matters asserted therein in his findings on

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[41] The referee overruled the prosecutor's hearsay objection to this line of questioning, ruling: "Well, it may be hearsay, but it might have some relevance as to what information she had available. She's expressed a lot of opinions and comments. And for that limited purpose, you may answer." (30 RRT 2937.) Once again, the court's ruling reflects its erroneous view of hearsay. This witness was free to discuss what materials she found in the files, but could not introduce hearsay statements by the prior attorneys about those materials. Indeed, although the court purported to limit the admissibility of those hearsay statements as being the basis for petitioner's attorney's "opinion" or "comments," the record reflects that opinion she was offering was her personal views on the factual question whether the material at issue had been provided and whether a *Brady* violation occurred, none of which is a proper subject for her opinion. (30 RRT 2937-2040.) Indeed, this is the precise factual question that was for the referee to determine, based on properly admitted evidence, not inadmissible hearsay.

Question Three as if Ron McCurdy testified at the hearing. (Ref. Rpt. at 23, quoting Ref. Exh. 19; see also Ref. Rpt. at 14.) The referee relied on this report as evidence that the prosecution had established a link between Karlos Tijiboy and Jose Angarita (Ref. Rpt. 14, 23), notwithstanding the fact that Ron McCurdy provided no testimony to support this claim and Sandy Williams, the only person with any actual knowledge on the prosecution's investigation of Karlos Tijiboy who did testify at the hearing, flatly denied that claim (18 RRT 1268, 1342; 20 RRT 1574-1575, 1594-1595), as did Karlos Tijiboy at trial (10 RT 3352-3360 [original trial]). This hearsay was used to bolster the credibility of Luis Laureano, whose testimony, in turn was used to bolster the credibility of Gale Kesselman. (See Ref. Rpt. at 3 [finding that Laureano's testimony corroborated Kesselman's].)

The referee's erroneous view of how the rules of evidence apply to a reference hearing on state habeas infected every aspect of the referee's fact finding. Indeed, the court's lax approach to enforcing the rules of evidence and controlling the nature and scope of the evidentiary hearing are reflected in the fact that the testimony at the hearing exceeds 3500 pages of reporter's transcripts, in sharp contrast to the original trial transcript, in which the testimony for the guilt and penalty phases consisted of less than 600 pages of reporter's transcripts.

This Court observed, in a different context in *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104, "Chaos could ensue if courts were generally able to pick and choose which provisions of the Code of Civil Procedure to follow and which to disregard as infringing on their inherent powers. The same concern applies to the Evidence Code, which, after all, generally limits a court's ability to consider evidence." In this case, those concerns were realized. The referee's failure to abide by and enforce the rules and limitations of the Evidence Code undermine the referee's finding of fact

and render those findings and conclusions unpersuasive and unusable. This Court must reject those findings and make its own determinations based on a reevaluation of the record with proper application of the rules of evidence.

C. The Referee's Credibility Determinations Are Unsupported

The referee begins his findings with credibility determinations as to the key witnesses at the reference hearing. As explained below, several of the referee's credibility determinations are legally suspect and factually unsupported by substantial and credible evidence. We address each of the referee's credibility determinations.

1. Gale Kesselman

Respondent objects to the referee's credibility determinations which are set out at the start of his report. Respondent begins with the referee's finding that Kesselman was credible. The referee's finding suffers from several substantial flaws. First, the referee failed to acknowledge, let alone take into account, the central legal principle undercutting the credibility of any recanting witness. As this Court explained in *In re Roberts*:

> It has long been recognized that "the offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion." (*In re Weber* (1974) 11 Cal.3d 703, 722; see also *People v. Minnick* (1989) 214 Cal.App.3d 1478, 1481; *People v. McGaughran* (1961) 197 Cal.App.2d 6, 17 ["It has been repeatedly held that where a witness who has testified at a trial makes an affidavit that such testimony is false, little credence ordinarily can be placed in the affidavit . . . ."].)

(*In re Roberts* (2003) 29 Cal.4th 726, 742; see also *In re Cox* (2003) 30 Cal.4th 974, 998, 1004 [same].)

Kesselman's 1997 declaration provided to petitioner's counsel and her testimony at the reference hearing constituted a clear retraction of her sworn testimony at the 1985 in camera hearing on her status as a confidential informant. Moreover, in her 2001 interview with Investigator

John Kracht, Kesselman retracted key portions of her 1997 sworn declaration (Ref. Exh. 5A at pp. 8-9), which retractions she then retracted at the reference hearing (12 RRT 586-589). Given the twists and turns in her testimonial history and her repeated recantations, her testimony at the reference hearing must be viewed as suspect and should have been given little credence. (*In re Roberts*, *supra*, 29 Cal.4th at p. 742; *In re Cox, supra*, 30 Cal.4th at pp. 998, 1004.)

The referee, however, ignored Kesselman's repeated recantations, eliding over them in his assessment of her credibility. The referee observed superficially that "the general outlines of her account remained consistent throughout her contact with the defense team from 1997 through her testimony in this proceeding. That account, furthermore was consistent with the account she gave in 1984." (Ref. Rpt. at 3.) This assessment notably omits Kesselman's recantation to the prosecution investigator in 2001, and her contrary sworn testimony at the in camera hearing in 1985. Accordingly, the referee failed to conduct an accurate assessment as to whether Kesselman's testimony on the critical issues in this case merited credence.

Second, the referee's credibility findings are undermined by his failure to test the witnesses' testimony at the reference hearing against the content of the original taped statements and contemporaneously created materials. The testimony at the 2006 reference hearing was based on memories of events that occurred over 20 years earlier. Such testimony, even if sincerely given, fundamentally is far less reliable than taped statements made contemporaneously with the events in question owing to the vagaries of human memory. As the Colorado Supreme Court sagely observed in explaining the historical basis for the hearsay exception for admitting a past recollection recorded:

> As has been pointed out in many cases, human memory dims with the passage of time. The extent of the dimming process varies with individuals. But a written record is constant for all time. Such a record, accurately made by a witness or under his direction at the time of the event or shortly thereafter, would be more reliable than the memory of the witness. In achieving justice, that which is more reliable is more desirable. Such record, of course, would be open to attack, and when disputed by other evidence, would give rise to a question for the jury as to the facts recorded.

(*Jordan v. People* (Colo. 1962) 376 P.2d 699, 703.)

"A faithful memorandum should be acceptable, not conditionally on the total or partial absence of a present remnant of actual recollection in the particular witness, but *unconditionally*; because, for every moment of time which elapses between the act of recording and the occasion of testifying, the actual recollection must be inferior in vividness to the recollection perpetuated in the record." (3 Wigmore on Evidence (Chadbourne Rev. ed. 1970) § 738, p. 91; accord *People v. Gardner* (1961) 195 Cal.App.2d 829, 833 ["Obviously, a recording is more reliable and satisfactory evidence than testimony from memory; it is more trustworthy; it reproduces the very words used by the person or persons who make the statements, in their own voices, and with all the added significance that comes from inflection, emphasis, and the various attributes of speech."].)

Here, the referee failed to accurately test Kesselman's credibility against the best source of information available as to what she told the prosecution investigators in 1984, namely the tape of her 1984 interview. The referee blithely concluded that her trial testimony "was consistent with the account she gave in 1984." (Ref. Rpt. 3.) This finding is unsupported by the evidence.

A review of Kesselman's taped interview shows that her 2006 testimony in the reference hearing was glaringly inconsistent with her taped interview in 1984 as to the key issues this Court identified as needing

resolution. Indeed, even Kesselman was forced to acknowledge on cross-examination that her 2006 testimony was inconsistent with 1984 taped interview regarding the key aspect of her story of Angarita's admissions, and conceded, "I can't explain that discrepancy." (12 RRT 688.)

Kesselman testified at the hearing she told Williams that Angarita made detailed admissions about the murders, which she claims she conveyed to Williams. (10 RRT 299-301.) Kesselman was explicit about the circumstances under which she claimed that Angarita admitted to being an instrument in arranging for the murder of the Guerreros. She testified that Angarita made his admissions while looking into the fireplace at Kesselman's brother's house on the day of the victims' funerals. (12 RRT 659-660, 676-681, 689-691.)

Critically, Kesselman also discussed that same incident during her taped interview in 1984. She recounted in great detail Angarita's behavior and statements made while looking into the fireplace at her brother's house. (Ref. Exh. 3A at pp. 40-50.) In fact, she discussed two conversations she had with Angarita following the murders, with the first conversation occurring the day before the fireplace incident. (Ref. Exh. 3A at pp. 30-42.)

In the first conversation, which lasted for about 10 minutes, Angarita intimated his belief that the murders were payback for some incident that occurred several years earlier. (Ref. Exh. 3A at p. 37-40.) However, he did not provide any specifics and did not make any incriminating statements implicating himself in the killings. In fact, Kesselman reported to the investigators that, after the conversation, she did not believe Angarita "had anything to do with it, at that time." (Ref. Exh. 3A at p. 40.)

Kesselman then recounted the second conversation in great detail. She described how Angarita became emotional when thinking about the deaths of his friends. (Ref. Exh. 3A at pp. 44-45.) Then he told her that it

was a professional murder and there had to be a second person involved. (Ref. Exh. 3A at pp. 46-47.) When she pressed him why he thought so, Angarita explained it had to be a professional job based on the positioning of the bodies and the fact that there were two victims in different rooms. (Ref. Exh. 3A at pp. 46-48.) At no point in the taped interview does she suggest that Angarita admitted to her that he was involved in the shooting, that he facilitated the murders or played a role as an instrument in arranging the murders. (Ref. Exh. 3A at pp. 47-49.) To the contrary, Kesselman once again made clear in that interview that, even after this conversation, she did not suspect that Angarita was at all involved in the murders. When she was asked if his statements made her think he was involved, she explained:

> I didn't, that really didn't cross my mind except the only thing that made me think about it for just a, you know, more than a moment, was the fact that I, that he showed so much emotion about it, and he'd talked about other people dying in like Columbia . . . . And I didn't really feel that he was that close . . . to [Orestes Guerrero], because I had been around Jose day and night for probably, for thirty days, you know, prior to that, you know, I was with him almost all the time. And had been around his family, all his family. And not, you know, no one had ever mentioned those people or, you know, I'd never heard any, you know, heard them talk about them before, and, this a man of such, kind of a calculating nature, it surprised me that he showed so much emotion.

(Ref. Exh. 3A at pp. 48-49.)

Kracht then asked her, "Anything since then uh, uh, make you feel differently about whether he was involved or not?" (Ref. Exh. 3A at p. 49.) Kesselman then explained that she first began to suspect Angarita was involved when she was interviewed by Williams. (Ref. Exh. 3A at p. 49; see also Ref. Exh. 3A at p. 40.) Kesselman recounted that she began to suspect him "when I saw, while I was talking to Sandy, and seeing the picture of the guy that, that was arrested for the murders, I think it's the

same man that, I had driven Jose to San Francisco to meet with . . . ." (Ref. Exh. 3A at p. 50.)

Later in the interview, Kesselman confirmed that, even after she was first interviewed by Williams, she was still struggling in her own mind over the question whether Angarita may have been involved in the murders, making clear that her musings were driven by her speculation rather than any admissions by Angarita. She explained that when asked a few days before this April 18th interview what her "gut feeling" was about Angarita's involvement, she said:

> the more I think about all this and put it all together, you know, my mind tells me, you know, you know, god, it looks like, you know (inaudible) it all makes sense that, that he had done that. But you know, it's hard to rationalize to yourself that you were . . . you know, that close to that person or something.

(Ref. Exh. 3A at p. 10 [interviewer interjection omitted].)

When asked, why Angarita would have been involved in the murders, she responded, "I don't know," and said that Angarita also said to her, "I don't have no idea" what the reasons for the murders were. (Ref. Exh. 3A at p. 11.) She offered the possibility that it was over a prior dispute between Angarita and Dan Burke, but she was just guessing. (Ref. Exh. 3A at pp. 11-12.) She even recounted how she was still speculating back and forth over Angarita's possible involvement when she called Laureano while acting as an informant for the DEA agents (to whom Williams had introduced her). During that call, she asked Laureano's opinion, and he responded that he did not think so, but she believed that Laureano had doubts, which also caused her to have doubts about Angarita's innocence. (Ref. Exh. 3A at pp. 16-17.)

In sum, the taped interview not only does not support Kesselman's assertion at trial that she told the authorities in 1984 that Angarita admitted his involvement in the murders to her, it patently refutes it.

The same is true for her claim at the reference hearing that Angarita identified the man they met in San Francisco as the murderer. (12 RRT 690-691.) Kesselman testified at the hearing that, on the evening of the murders, Angarita pointed to the television during a news story of petitioner after his arrest for the double murders, and asked, "Did you see the guy they caught?" When Kesselman said, "No," Angarita supposedly replied, "Well, you need to, because it's the guy we met in San Francisco last night." (12 RRT 691.) Kesselman then claimed at the hearing that she related this statement to Williams almost word for word. (12 RRT 691.)

By contrast, a review of Kesselman's taped statement from 1984, reflects that Angarita never suggested to her that the man they met in San Francisco was petitioner, let alone pointed to his picture on television during a news story about the double murders and identified him as the man they met. To the contrary, Kesselman explained that she first started to suspect that the man they met may have been the murderer a few days after she met Sandy Williams and saw petitioner's picture, which occurred in early April 1984. (Ref. Exh. 3A at pp. 50, 65-66.) Moreover, when Kesselman recounted her conversation with Angarita from the night of the murders, she makes no mention of any identification of petitioner as the man they met in San Francisco. (Ref. Exh. 3A at pp. 37-40.)

Notably, everyone involved in the interview and investigation who testified, including Kesselman, agreed that the taped statement was a complete accounting of the information Kesselman provided to the authorities in their investigation into Angarita's possible involvement in the double murder. (See 10 RRT 389; 11 RRT 479-480, 507-508; 12 RRT 588-589, 601-602, 621-622, 640, 683-685, 688. [Kesselman testimony]; and 12 RRT 640-641 [Kesselman explaining that at the interview, she told the authorities "everything that [she was] aware of at that time"]; see also 21 RRT 1726-1728, 1745, 1792, 1833-1834, 1836, 1838, 1840 [Williams's

testimony]; 32 RRT 3054-3081 [Kracht's testimony]; accord Ref. Exh. 11 at pp. 1-3; 32 RRT 3113 [2001 taped interview of Kesselman].)

Accordingly, a comparison between her 2006 testimony as to what she *claimed* she told the authorities during the April 1984 investigation and her *actual* recorded statements on April 18, 1984, at the conclusion of that investigation, reflect that Kesselman's testimony at the hearing was not credible. As explained above, when there are fundamental contradictions between a recorded statement made contemporaneously with the relevant events, and testimony given 22 years after that recorded statement, the recorded statement is certainly the more trustworthy source of information. (*Jordan v. People*, *supra*, 376 P.2d at p. 703; *People v. Gardner*, *supra*, 195 Cal.App.2d at p. 833; 3 Wigmore on Evidence § 738, p. 91.)[42]

Next, the referee's finding that Gale Kesselman was credible cannot be squared with his finding that John Kracht was credible. (Ref. Rpt. at 4 ["The court finds that Kracht was a credible witness."].) In assessing Kesselman's credibility, the referee observed cryptically, that he "appreciates the fact that she had issues with Kracht in 2001 during three interviews in her home." (Ref. Rpt. at 3.) However, what the referee characterizes obliquely as "*issues* with Kracht," were in fact accusations leveled against Kracht of witness intimidation and evidence tampering, which were refuted by Kracht and by the evidence itself.

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[42] The referee also found Kesselman credible because the DEA found her account of Angarita's drug operation credible and used her as a confidential informant. (Ref. rpt at 3.) The flaw in this analysis is that she provided the DEA with information based on her actual knowledge of Angarita's drug operation and her relationship with Laureano, who was an agent in Angarita's operation. By contrast, as her 1984 taped interview shows, the information she provided regarding the murders was based on her speculation, rather than her direct observations, and thus is not entitled to the same mantle of credibility as her assistance to the DEA.

Kesselman testified that, when Kracht came to interview her in 2001, he repeatedly threatened that she could get into trouble if she did not recant her declaration to defense counsel and reaffirm her in camera testimony. (12 RRT 579-580.) She claimed that Kracht stopped his recording device several times during the interview, and reiterated his threat that she would get into legal trouble if she did not reaffirm her earlier testimony. (12 RRT 581.) Kracht, of course, denied ever making any such threats, and the taped interviews reflect that their conversations were amicable and nonthreatening. (32 RRT 3096-3097, 3106-3109, 3112; Ref. Exhs. 5A, 11, 13A.) Kracht explained that he recorded the interviews without interruption and never shut off the tape. (32 RRT 3088-3089.) Listening to the tapes themselves reflects that they were not stopped and restarted during the interview. (Ref. Exhs. 4, 4A, 6, 6A, 7, 7A.)[43]

Kesselman, in her 2006 testimony, also denied making the statements in the 2001 interviews in which she spontaneously stated that she never told petitioner's counsel that Williams told her to withhold information. (12 RRT 586-588.) When confronted with her own words from that interview in the transcript, Kesselman asserted that Kracht must have doctored the transcript by moving a quote from another portion of the interview to that point to make it appear she was contradicting her 1997 declaration. (12 RRT 588.) When asked about another portion of her interview in which

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[43] Notably, petitioner's counsel made arrangements to have the original mini-disc recordings of these interviews analyzed by a professional sound engineering company to find evidence of tampering and stopping and starting. (11 RRT 424; 12 RRT 697-699; 13 RRT 703-712; 15 RRT 960-961; 26 RRT 2396-2397.) Yet, the defense never reported any results from this analysis that contradicted what was plain to the ear in listening to the tapes (namely, the absence of any auditory indications of stopping and restarting or editing), nor refuted Kracht's testimony, or supported Kesselman's wild accusations.

Kesselman offered that petitioner's counsel must have added in the claim that Williams told her to withhold information, Kesselman denied making that statement. (Compare Ref. Exh. 5A at p. 9 ["I don't know. Now what . . . maybe [petitioner's counsel] supplicated into this, with . . . I told . . . I told her that I wondered all of those things . . . . But Sandy never ever . . . never told me not to mention that possibility. Never." (Fourth ellipses denote alteration)], with 12 RRT 589 [claiming that she had never used the term "supplicated" in her life].) Of course, a review of the interview tape reflects that Kesselman did, in fact, make the statements she now claims she never made, and debunks her allegations that Kracht doctored the transcript by relocating portions of her statement to create a false retraction. (Ref. Exhs. 4, 5A.)

In sum, the record reflects that Kesselman did not merely have "issues" with Kracht, she accused him of making threats, lying, and fabricating evidence, and denied making critical statements that are reflected in her taped 2001 interview. Given her testimony, either she was lying or Kracht was lying. The recordings plainly demonstrate that Kracht was truthful and Kesselman was lying. The referee's finding that Kracht was a credible witness amply supports this conclusion. (Ref. rpt. at 4.) However, it also undermines the referee's finding that Kesselman was credible in her testimony.

Finally, the referee found Kesselman credible because "her testimony was corroborated in relevant part by the testimony of Luis Laureano in these proceedings." (Ref. rpt. at 3.) As explained below, Laureano was not a credible witness, so his "corroboration" does not render her testimony credible.

2. Luis Laureano

Respondent objects to the referee's finding that Laureano was a credible witness. (See Ref. Rpt. at 5.) The sum total of the referee's

credibility analysis of this witness is the referee's crediting Laureano's decision to fly in from Venezuela and testify despite obstacles. (Ref. Rpt. at 5.) Noticeably absent from the referee's analysis is any effort to test the credibility of the *content* of Laureano's testimony against known facts. The earnestness with which a witness testifies matters little if his testimony cannot be squared with known truths. Irrespective of the efforts Laureano undertook to testify in 2006, his actual testimony suffers from the fatal flaw of being demonstrably false.

Laureano testified at length about being introduced to petitioner by Angarita, and then having several meetings with petitioner. (34 RRT 3385-3386, 3388-3492.) Laureano described one meeting in which petitioner recounted meeting the Guerreros, well before they were murdered. (34 RRT 3544-3545.) Laureano then recounted his final meeting with petitioner. Petitioner was very upset, and confessed to Laureano that he had been ordered by Angarita to do a job, and his family would be killed if he refused. (34 RRT 3554-3555.)

Central to all of Laureano's accounts was the fact that these meetings all took place when Laureano was working at the used car dealership before being hired on by Angarita. (34 RRT 3385, 3388-3390, 3492-3494, 3555.) Indeed, Laureano described the meetings taking place on the used car lot or in the dealership office. (34 RRT 3385, 3388-3390, 3492-3494, 3555.) Laureano also testified that he worked at the used car dealership until it closed down in early- to mid-1983, at which point he went to work for Angarita. (34 RRT 3460.)[44]

The patent flaw in Laureano's account is that petitioner was not in the country at the time these alleged meetings occurred. Petitioner did not

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[44] Laureano also testified that he started working for Angarita before Angarita began dating Kesselman. (34 RRT 3464.)

illegally re-enter the United States and join his mother in Palo Alto until the end of October 1983, well after the auto dealership closed and Laureano was working for Angarita. (9 RT 3080 [testimony of petitioner's mother at original trial]; 9 RT 3116 [testimony of petitioner's stepfather at original trial]; 34 RRT 3566.)[45] Similarly, petitioner did not work for the Guerreros until one to two weeks before the murders in late December 1983 (9 RT 3089, 3101, 3129 [trial testimony]; 10 RT 3455 [same]; 34 RRT 3568-3569), and thus could not have described meeting the Guerreros in mid-1983, as claimed by Laureano.

Laureano also testified about meeting both of the Guerrero brothers when he first started working for Angarita in mid-1983. He specifically described Jose Luis Guerrero being at this meeting. (34 RRT 3506-3507.) Laureano also described an incident in the fall of 1983, in which Angarita complained about both Orestes and Jose Luis Guerrero cheating him. (34 RRT 3390-3391, 3505-3507; see also 27 RRT 2461[discussing content of Laureano's declaration].)

However, as was the case with petitioner, Jose Luis Guerrero was not in the country at the time of these claimed meetings and could not have been the subject of any discussions. Jose Luis Guerrero arrived in this country for the first time on December 1, 1983, entering illegally from Peru with Carlos Valdiviezo. (9 RT 3133, 3167.)

In another part of his sworn testimony, Laureano accused Karlos Tijiboy of being a drug runner for Angarita. (34 RRT 3386-3387.) Laureano specifically recalled delivering drugs to Tijiboy's house. He recounted the frequency with which he delivered large quantities of cocaine to that location, typically packages of a quarter to a half kilo of cocaine.

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[45] Petitioner had been deported to Peru after serving a prison sentence in New York for a robbery conviction. (34 RRT 3565.)

(34 RRT 3498-3504.) With remarkable clarity, Laureano recounted that Tijiboy lived in a house on the left-hand side of Kings Road, in East San Jose, near a mall, and even described Tijiboy's car in the driveway. (34 RRT 3498-3503.) Laureano's testimony was not only startling in its clarity 23 years later, it was startlingly in its falsity. Tijiboy lived in Sunnyvale, not San Jose, and worked in Palo Alto. (10 RT 3341, 3346.) He did not own a car; he rode bicycle or the bus to work every day. (10 RT 3346.)

Indeed, Laureano was so certain of his familiarity with Tijiboy, that he corrected the spelling of Tijiboy's first name from "Karlos" to "Carlos." (34 RRT 3449.) Laureano knew that Tijiboy spelled his first name, "Carlos," with a "C," because he had written the name down many times in his cocaine delivery instructions. (34 RRT 3449, 3500.) Contrary to Laureano's testimony, Tijiboy's first name is spelled, "Karlos," with a "K." (10 RT 3331.)

Laureano's accounts of key aspects of what occurred in 1983 are not merely improbable, they are impossible. Accordingly, respondent submits that Laureano is not a credible witness.

3. Judge Joyce Allegro

Respondent agrees with the referee's finding that Judge Joyce Allegro was "generally credible." (Ref. Rpt. at 5.) However, respondent objects to the referee's identification of there being "some issues regarding her credibility." (Ref. Rpt. at 5.)

First, the referee identified what he considered to be an instance in which Judge Allegro "misspoke," in asserting that Kesselman had no personal knowledge anything and would not have been allowed to testify because everything she knew was speculative. (Ref. Rpt. at 5, citing 24 RRT 2057, 2059-2060.) The referee pointed out that Kesselman had accompanied Angarita on the San Francisco trip, and thus had direct knowledge of that trip. (Ref. Rpt. at 5.) However, Judge Allegro expressly

acknowledged that aspect of Kesselman's knowledge and explained that Kesselman's suggestion that it might have been petitioner whom she and Angarita met was speculative, and thus of doubtful admissibility. (24 RRT 2144-2146; see Ref. Exh. 3A.)

Second, the referee suggests that Judge Allegro gave "contradictory testimony" about the San Francisco meeting evidence, "stat[ing] the information about the meeting was turned over in discovery but later testified that the information did not have to be turned over as it was inadmissible." (Ref. Rpt. at 5) The referee does not supply a record citation for the assertion that Judge Allegro stated that the information about the San Francisco meeting was turned over in discovery, and respondent is not certain to what the referee is referring with this allegation. A review of the record reflects that Judge Allegro was consistent in testifying that she provided everything to the defense in discovery *except* for the taped interview with Kesselman, which was maintained as confidential pursuant to Judge Ambler's ruling. (24 RRT 2022, 2044-2045, 2049, 2051, 2053.) In fact, Judge Allegro specifically testified that Kesselman's statements about the car ride were not turned over to the defense. (24 RRT 2053, 2146.) To the extent the referee believed there was "contradictory testimony," respondent submits it came as a result of the referee's confusion, and not from Judge Allegro's testimony, which was consistent and clear on this point.[46]

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[46] It appears from a subsequent finding in the referee's report that the referee relied on Judge Allegro's handwritten notes, written in response to this Court's questions to the referee, which were attached as Tab 1 to Reference Exhibit 32 as the source of this finding. (See Ref. Rpt. at 36 [citing Ref. Exh. 32 at p. 3, for this same allegation].) However, the notation upon which the referee relies does not support his finding. Judge Allegro hand-wrote on her copy of this Court's question regarding what was turned over, "Stmts from Angarita & Nance to PD – Ø Devine." (Ref.

(continued...)

Judge Allegro did offer her opinion that the information provided by Kesselman would not have been admissible because it was speculative. (24 RRT 2057-2059, 2144-2146.) However, she made clear that the reason Kesselman's interview was not turned over was to protect her identity because she was a confidential informant in the federal case, and not because of Judge Allegro's evaluation of its admissibility. (24 RRT 2120.) Judge Allegro took the legally appropriate step of turning the information over to Judge Ambler to evaluate in camera. Judge Ambler determined that Kesselman did not have any relevant information after listening to her testimony and her 1984 taped statements, a determination which this Court upheld on direct appeal. (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 123.)

The third point made by the referee is that Judge Allegro's "testimony at this hearing that Nance's statement, Jose Angarita's statement, and the information about the San Francisco meeting were turned over in discovery is not supported by the record." (Ref. Rpt. at 5.) This finding by the referee is wrong.

First, as noted above, Judge Allegro did not testify that "the information about the San Francisco meeting w[as] turned over in discovery." She testified to just the opposite, stating clearly that it was not. (24 RRT 2053, 2146.) Second, the referee's finding that the record does not support that Nance's statement and Angarita's statement were turned over in discovery is premised on the referee's fundamental misunderstanding of the requirements of *Brady*. Judge Allegro testified

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(...continued)
Exh. 32 at p. 3; RRT 2044-2045.) This notation clearly indicates that Judge Allegro correctly recalled that Nance's and Angarita's statements were turned over *but not* Kesselman's ("Ø Divine"). Judge Allegro explained at the hearing that the "Ø" symbol represents "not." (24 RRT 2044-2045.) The referee was apparently unaware that "Ø" is the mathematic symbol for "empty set" or "null set."

that she followed the standard discovery practice applicable at the time by authorizing the release of the tapes in the police files to the defense at any time they wished to review and copy them. (24 RRT 2031, 2047, 2051.)[47] Judge Allegro's files contained a copy of her authorization to the defense discovery request to release all tapes and interviews except for that of the confidential informant (Kesselman), as well as an internal office memo confirming the authorization. (Ref. Exh. 32 at pp. 23, 41; 24 RRT 2029, 2052.)[48] Judge Allegro explained that, as a result of her authorization, the tapes of the Nance interview and the Angarita interview were available to the defense at the police station if they chose to bring in blank tapes. (24 RRT 2052; Ref. Exh. 32 at p. 23.) John Kracht confirmed that the Nance interview tape and the Angarita interview tapes were available in the police file for petitioner, along with all other tapes, save for Kesselman's interview, which had been segregated and marked as confidential, and noted that they were available to the defense. (32 RRT 3151-3156, 3159.) As will be explained in detail below, making the tapes available for copying not only complied with the standard discovery process, it also satisfied Judge Allegro's obligations under *Brady v. Maryland* (1963) 373 U.S. 83. Judge Allegro was not required to "turn over" the materials by physically handing them to the defense. It was sufficient to make them available pursuant to standard practice. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1134, overruled on other grounds by *People v. Doolin* (2009)

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[47] All agreed that this was the standard discovery practice at the time of petitioner's trial. (28 RRT 2666, 2679 [testimony of defense counsel John Aaron]; 27 RRT 2543 [testimony of defense investigator Alayne Bolster]; 29 RRT 2801 [analysis of defense investigator Keubel's log reflects example of turning in blank tapes for copies of interview tapes].)

[48] John Aaron testified that he did not make or keep any record of discovery requests or authorizations (28 RRT 2619, 2667), and thus could not dispute Judge Allegro testimony regarding authorizing discovery.

45 Cal.4th 390, 420.) Accordingly, the referee's finding that Judge Allegro's statements regarding discovery were not supported by the record, is itself contrary to the record and relies on a misconception of the legal obligations imposed by *Brady*.

4. Sandra Williams

Respondent objects to the referee's findings that Williams's testimony was not credible. The referee found Williams gave evasive, misleading, and exaggerated answers and concluded that she was untruthful in parts of her answers. The referee points to two factors as contributing to his conclusion. First, he contrasts Williams's testimony with that of Kesselman. (Ref. Rpt. at 4.) Because the referee found Kesselman credible, he concluded that Williams was not. As explained above, the referee's findings that Kesselman was credible is not supported by the record. For the same reason, the referee's decision crediting Kesselman over Williams and therefore finding Williams not credible is unsupported and unwarranted.

Second the referee observes that "one would never know from Sandra Williams's testimony in this case that at one point in the early investigation of the case Sandra Williams herself believed the murders were drug-related murders for hire cases," and "Kracht's notes and report support this view that Jose Angarita was the direct focus of Sandra Williams's investigation for some period of time." (Ref. Rpt. at 4.) The conclusion the referee draws from the testimony, however, is unwarranted. Specifically, the referee conflates process with result by isolating a small instance in time during the investigation and using that to challenge Williams's testimony as to her opinions following the conclusion of that investigation.

Specifically, when Williams learned from Nance about the possibility of a drug hit, she testified that she took Nance's allegations seriously enough to pursue that as part of her investigation and attempted to track

down Price and "Gale." (18 RRT 1274-1303.) She testified that, based on Nance's statement and other information she learned, she suspected that Angarita was involved in the drug trade. (18 RRT 1314-1323.) When Williams located and interviewed Kesselman, she concluded that Kesselman had information that was potentially useful to the DEA and connected her with the DEA, but Williams explained that she was not sure she could trust everything Kesselman said. (18 RRT 1354.)

Williams explained that, given the nature of the suggestions Kesselman offered regarding petitioner's case, it was important to investigate the claims. (18 RRT 1373; 19 RRT 1412-1413.) However, Williams also detailed the inconsistencies in Kesselman's initial accounts during her first interviews, such as Kesselman's initial denials of any involvement in the rip-off scheme involving Nance and Price. (20 RRT 1669-1672; 21 RRT 1724.) Kesselman also initially told Williams that there was no way Angarita was involved in the shootings—which account is confirmed by Kesselman's 1984 taped statement. (20 RRT 1669; Ref. Exh. 3A at pp. 40, 50, 65-67.)

Williams began checking up on Kesselman's accounts by contacting the hotels where she thought the man from New York may have stayed. (21 RRT 1770-1773.) On April 16, 1984, Williams put in a request to the San Jose Police Department to assign a detective to the case to assist with this aspect of the investigation. Sergeant Kracht was assigned to investigate, and Williams conducted a meeting or presentation of what she had learned to that point to get Kracht up to speed. (18 RRT 1377; 19 RRT 1427; 21 RRT 1796-1797; accord 25 RRT 2294-2298; 32 RRT 3057.)

Williams and Kracht investigated Kesselman's allegations and found nothing to corroborate her account. To the contrary, her description of the New York drug dealer did not match petitioner's and the story did not square with either the evidence of the murders or with petitioner's

statement given to the police after the murders. (19 RRT 1538-1540; 21 RRT 1769-1793.) Accordingly, after investigating the matter, they concluded Kesselman had no direct or accurate information regarding the murders. (21 RRT 1772-1793, 1803; 23 RRT 1892-1911; accord 25 RRT 2323; 32 RRT 3056; 32 RRT 3134.) Williams explained that she thoroughly investigated Kesselman's allegations because, if she and the District Attorney's Office concluded someone else was involved in the murders, they would certainly want to arrest and prosecute that individual as well. (21 RRT 1842.) The investigation into Kesselman's allegations, however, refuted Kesselman's claims rather than bolstered them. (21 RRT 1772-1793, 1803.)

Contrary to the referee's suggestions, Williams was quite clear and detailed about the scope and nature of their investigation into Kesselman's story of a possible drug hit, which she and Sergeant Kracht took very seriously because of the nature of the claim. However, Kesselman's account was couched in speculation from the start and further investigation showed the speculation to be unsupported. Accordingly, there is no contradiction in the fact that Williams fully investigated Kesselman's story, but ultimately concluded it was unsupported speculation.

Respondent notes that the record reflects that Williams often became frustrated and hostile with the defense questioning. However, the record reflects that she did so as a result of the unreasonably long period time she spent on the stand (her testimony spanned six days), and various unfounded allegations leveled against her, such as allegations of drug use and having been placed on leave without pay and put on probationary status by her employer. (20 RRT 1641, 1648.)

Respondent also acknowledges that Williams often did not have an answer to the questions, noting frequently that she could not recall facts and details from 1984. Williams acknowledged that if there were any

discrepancy between her testimony and her activity log, the log was correct and should be relied upon. (See, e.g., 19 RRT 1399-1401.) To the extent that there were inaccuracies in her testimony, such inaccuracies are properly viewed as a product of the extreme passage of time and fading memory, rather than any deception by Williams. (See *In re Ross*, *supra*, 10 Cal.4th at p. 204 [noting that the passage of 9 years between trial and reference hearing made it difficult to assess trial counsel's actions because "memories had dimmed" and events had become "obscured by the fog of time"].)

Indeed, the principle that fading memories may lead to inaccurate testimony is so well established in California law that it is a part of the standard jury instructions. CALJIC No. 2.21.1 provides:

> Discrepancies in a witness's testimony or between a witness's testimony and that of other witnesses, if there were any, do not necessarily mean that [a] witness should be discredited. Failure of recollection is common. Innocent misrecollection is not uncommon.

Similarly, CALCRIM No. 226 provides:

> Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember.

(See generally *Dodds v. Stellar* (1946) 77 Cal.App.2d 411, 426 ["While 'failure of recollection is a common experience and innocent misrecollection is not uncommon' might be regarded as a gratuitous observation, it is nevertheless a truism . . . ."]; see also *People v. Woodard* (1979) 23 Cal.3d 329, 341 fn. 8 ["The fact that Johnson's testimony contradicted Spencer's does not inevitably mean that one of the two committed perjury, for it is widely recognized that 'innocent misrecollection is not [an] uncommon [experience]' . . . ."]; *People v.*

Ibarra (2007) 156 Cal.App.4th 1174, 1187-1188 [affirming correctness of CALCRIM No. 226].)

What is significant for purposes of assessing Williams's credibility is that her account of the investigation into Kesselman's allegations, as reflected in her testimony and her entries in her investigation log, was fully consistent with the account given by Kracht.

The referee also criticizes Williams for denigrating Kesselman's account. However, Williams's assessments that Kesselman was very talkative and "all over the map," (19 RRT 1431), corresponds quite closely with Kesselman's contradictory statements made throughout the course of these proceedings, from 1984 and 1985 to 1997, and from 2001 to 2006. Moreover, Williams's assessment of Kesselman's lack of credibility in her story was echoed by Kracht. (See 32 RRT 3133-3134 [characterizing the account as, "It's a fantasy. It's something that no reasonable actor would ever take a part in if it were a movie."].)

Finally, the referee indicated that additional findings of Williams's lack of credibility are set out in his findings with respect to Question One. Respondent's objections to the referee's findings on that question are set out below. It is sufficient to note here that the referee's findings of lack of credibility of Williams are a product of his finding that Kesselman was credible at the reference hearing. As explained above and below, that finding is unsupported.

D. The Referee's Factfinding Is Undermined by His Failure To Consider the Original Trial Record

The referee's faulty credibility determinations regarding Laureano also expose another flaw in the referee's factfinding. The referee failed to consider the original trial record in making his determinations of fact. The referee's report consists of a 37-page, single-spaced document detailing his findings and the evidentiary bases for those findings. The referee also

prepared a 157-page appendix to the report, which details all the facts considered by the referee in creating his report. The report and the appendix contain citations and references to the testimony and exhibits presented at the reference hearing, but contain not a single citation or reference to the original trial record. Notably, roughly two-thirds of the way through the hearing, the referee acknowledged he had not read the original trial record, and the prosecution requested the referee do so before ruling. (28 RRT 2582.) At another point in the hearing, when the parties were questioning petitioner's trial counsel about the motions filed in the original trial, the prosecution again asked the referee to read the original trial transcripts. (28 RRT 2685.) However, the appendix to the referee's report reflects that the referee never consulted the original trial record. (Ref. Appx. at pp. 1-157.)

The referee's failure to consider the trial record is remarkable given that there was extensive hearsay testimony at the reference hearing about what Judge Allegro presented in her opening statement and argued in her closing arguments in the guilt and penalty phase of petitioner's trial, and what John Aaron argued for the defense during the guilt and penalty phases. (15 RRT 911-912, 917, 929, 994-995, 947-949, 1022; 24 RRT 2133.) Notably, when the referee's report and appendix refer to these arguments, they cite exclusively to the testimony at the reference hearing, rather than reviewing the actual arguments presented at the original trial. (Ref. Appx. at 22-23, 26, 74, 76, 85.)

Moreover, as detailed above, the referee credited Laureano's accounts of his interactions with petitioner, Karlos Tijiboy, and Jose Luis Guerrero, without ever having considered the original trial testimony. (Ref. Rpt. at 5; Ref. Appx. at pp. 128-141.) As a result, the referee failed to consider the sworn trial testimony of Karlos Tijiboy that directly contradicted every aspect of Laureano's allegations of Tijiboy's supposed drug dealing. (10

RT 3331-3373.) The referee also failed to consider the sworn testimony of petitioner's mother Iraida Golden explaining how she met and befriended Tijiboy and was responsible for introducing Tijiboy to petitioner, rather than some drug lord. (9 RT 3081-3082.)

The referee also failed to consider the sworn trial testimony of petitioner's mother (9 RT 3078-3114), his stepfather Donald Golden (9 RT 3115-3131), and the victim's brother Francisco Guerrero (10 RT 3453-3459), regarding the timing of petitioner's entry into the United States and his meeting and employment with Orestes Guerrero, all of which contradicted Laureano's testimony regarding his alleged meetings with petitioner. The referee failed to consider the testimony of Carlos Valdiviezo regarding the timing of Jose Luis Guerrero's entry into the United States (9 RT 3132-3179), which contradicted Laureano's testimony about meeting Jose Luis Guerrero, and about Angarita's alleged tirade that Jose Luis Guerrero had stolen Angarita's drugs or money that was stored at the jewelry store.

Finally, as will be discussed in more detail in relation to the referee's findings in relation to Question Four (Ref. Rpt. at 27), the referee failed to consider the mitigating evidence actually put on in petitioner's trial. In assessing what information the defense could have presented had it received additional discovery, the referee's report goes on for several paragraphs about how the defense could have put on psychological evaluations at the penalty phase regarding petitioner's IQ and mental state. (Ref. Rpt. at 27-28.) The referee's report, however, ignores the fact that during the penalty phase, the defense did put on the testimony of a clinical psychologist, Dr. John Brady, who did discuss petitioner's mental functioning and mitigating evidence based on his assessment. (12 RT 3866-3938; *People v. Bacigalupo*, *supra*, 1 Cal.4th at pp. 120, 150.)

Indeed, having failed to review the trial testimony of Dr. Brady, the referee's dismissal of Dr. Brady's analysis is not only without factual basis, but constitutes a patent abuse of discretion. Specifically, at the reference hearing petitioner called Dr. Fred Rosenthal as a psychiatric expert to describe evaluations performed on petitioner well after his conviction, beginning in 1990. (30 RRT 2980-3033.) Dr. Rosenthal testified about other expert evaluations conducted on petitioner which he took into account in reaching his conclusions. (30 RRT 2985-2995.) However, Dr. Rosenthal explained that, in reaching his conclusions he refused to consider the evaluation performed by Dr. Brady, which was undertaken at the request of petitioner's counsel John Aaron for trial. (30 RRT 3027-3031.) Petitioner's counsel alleged in his questioning of Dr. Rosenthal at the reference hearing that Dr. Brady was not a licensed psychologist, but had misrepresented himself as one, and was, in truth, only a "criminalist." (30 RRT 3027 ["By Mr. Bryan: Q. One of the issues on the state habeas was that he, in fact, misrepresented himself, that he's not even a psychologist. He's a criminalist. He studied criminology. Are you aware of that?"].) Dr. Rosenthal accepted as true counsel's unsupported and unfounded misrepresentation of Dr. Brady's qualifications. Dr. Rosenthal explained that he refused to consider Dr. Brady's conclusions because

> I felt [it] was completely improper for this person who was not trained in mental health to make a diagnosis and pretend to be something and essentially reach a conclusion that three or four well-trained, qualified experts disagreed with and that this -- this report should have been ignored entirely in my opinion.

(30 RRT 3030.)

Amazingly, rather than test this scurrilous accusation against the actual trial record of Dr. Brady's testimony, the referee merely accepted it and repeated it at face value in his appendix. (Ref. Appx. at 120 ["In fact, Brady was not a psychologist, but a criminalist."].) Even a cursory

examination of Dr. Brady's trial testimony puts the lie to petitioner's counsel's claim. (12 RT 3866-3871 [Dr. Brady testifying about his Ph.D. in Criminal Psychology, his expertise in forensic psychology, his published articles, his extensive background and history evaluating and treating patients, his having qualified as psychological expert 75 in criminal cases in Santa Clara County alone, and his tenure on the Santa Clara County forensic panel]; see also *People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 120.)[49] This information, in turn, would have required the referee to take into account the fact that Dr. Rosenthal refused to consider Dr. Brady's report in making his findings based on the erroneous assumption that Dr. Brady was unqualified, and reevaluate Dr. Rosenthal's conclusions in light of the contrary findings by Dr. Brady. The referee, however, failed to do so because he failed to review the trial record.

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[49] Petitioner's counsel apparently bases his claim that Dr. Brady is a "criminalist" who has merely studied criminology, rather than a licensed psychologist, on the meager fact that when Dr. Brady signed his psychological evaluation report for defense counsel, he listed his title under his name as "Forensic Examiner, Santa Clara County." (Resp. Exh. 1 at p. 11.) Petitioner's counsel facilely assumed that this must have meant that Dr. Brady was a criminalist, not a psychologist—as opposed to merely reflecting the fact that Dr. Brady was an examiner on the Santa Clara *Forensic Panel* (12 RT 3867-3868), and notwithstanding that the report letterhead clearly identifies Dr. John C. Brady II as a "licensed clinical psychologist" (Resp. Exh. 1 at p. 1). Petitioner's counsel's scurrilous accusation is plainly refuted by Dr. Brady's trial testimony, which apparently was never provided to Dr. Rosenthal.

Moreover, petitioner's counsel could easily have confirmed Dr. Brady's licensure status had he bothered to check readily available public records, such as the on-line records of the California Department of Consumer Affairs, Board of Psychology, which confirms that Dr. John Charles Brady II (Lic. # 4551) has been a licensed psychologist in California since 1976. (See <http://www2.dca.ca.gov/pls/wllpub/WLLQRYNA$LCEV2.QueryView?P_LICENSE_NUMBER=4551&P_LTE_ID=725> [as of Nov. 9, 2009].)

As this Court has made clear, when factual issues require knowledge of the evidence presented at trial in addition to that presented at the reference hearing, the failure to review the trial evidence renders any determination on that issue unpersuasive. (*In re Ross*, *supra*, 10 Cal.4th at p. 205; see also *In re Marquez* (1992) 1 Cal.4th 584, 604 ["This [factual determination] requires knowledge of all of the evidence that was presented at trial, not just the evidence that was presented at the habeas corpus hearing. Since the referee had not made a full review of the evidence that was presented at trial, we do not find his recommendation persuasive."].) The referee's failure to review the trial evidence is yet another reason why his findings of fact must be rejected.

II. OBJECTIONS TO REFEREE'S FINDINGS FOR QUESTION ONE

The first question posed to the referee by this Court is:

> What information did the prosecution obtain before or during petitioner's capital trial regarding a possible connection between one Jose Luis Angarita and the murders of Orestes and Jose Luis Guerrero? What, if any, of this information was given to the defense?

A. Information in Possession of the Prosecution

Respondent agrees with the referee's general assessment that "[t]he information about a connection between Jose Angarita and the murders of Orestes and Jose Luis Guerrero came from three primary sources: CI-2 (Gale Kesselman . . .), Ronnie Nance and the attorney Joseph DiLeonardo. The information came through three law enforcement conduits, Sandra Williams, Ron McCurdy and John Kracht. Information from the attorney Joseph DiLeonardo came from Ronnie Nance and ultimately [Kesselman]." (Ref. Rpt. at 6.)

Respondent objects to the referee's crediting Kesselman's testimony at the reference hearing regarding what information she conveyed to the

prosecution in 1984. Respondent has already detailed numerous inconsistencies, recantations, and falsehoods in her testimony. Given these profuse inconsistencies, as well as her 1997 recantation of her in camera hearing testimony, her 2001 recantation of her 1997 recantation, and her 2006 recantation of the 2001 recantation of her 1997 recantation, in conjunction with the dimming effect of the extreme passage of time since the relevant events in this case, the only trustworthy record of what Kesselman actually told the authorities in 1984 is her taped interview from April 18, 1984. (Ref. Exh. 3A.) Even Kesselman acknowledged at the reference hearing that her taped interview from April 18, 1984, was a full, complete, and accurate account of her knowledge or speculation about Angarita's possible involvement in the murder of the Guerrero Brothers. (10 RRT 389; 12 RRT 622, 640, 683-685, 688.)[50] Accordingly, that interview contains the sum and substance of what Kesselman told to the prosecution in 1984.

A review of the taped interview reflects that her entire account of Angarita's possible involvement was speculation based on Angarita's behavior on two evenings following the murders. (Ref. Exh. 3A.) At no point in the taped interview did Kesselman offer that Angarita made any admissions of involvement or of being an instrument in the murders. To the contrary, her statements reflect that he made no such admissions, given her statements that she did not seriously suspect he had any involvement in the murders until after her first meeting with Williams. (Ref. Exh. A at pp. 10-12, 16-17, 40, 47-50.) Such statements would have been jarringly inconsistent with any claim that Angarita admitted to her his involvement

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[50] We agree with the referee's finding that "[Kesselman] gave the same information to law enforcement at both the March and April contacts . . . ," except for the name "Miguel." (Ref. Rpt. at 7.)

in the murder, or that he pointed to a news story about petitioner following the murders and said that was the person we picked up in San Francisco. Kesselman's taped interview reveals nothing but speculation about Angarita's involvement based on his actions after the murders.

Respondent generally agrees with the referee's recitation of facts under the "Sources and Contacts" heading, regarding information obtained by the prosecution relating to Angarita and the double murder. (Ref. Rpt. at 6-8.) However, respondent objects to the referee's conclusion:

> Thus, [Kesselman] simultaneously was involved in this homicide case and a federal drug trafficking case.
>
> [Kesselman's] involvement in both cases is significant for this case because it helps to establish a link between the homicides and Angarita's drug trafficking organization. [Kesselman] testified that the theme of the meetings with Sandra Williams and the DEA were all in "one basket" and interrelated.

(Ref. Rpt. at 8.)

The referee's assessment errs in conflating contemporaneity with interrelation. First, Kesselman's connection to petitioner's case was relatively brief (lasting only from March 31, 1984, to early May 1984) and concluded long before her involvement in the DEA's drug case, which apparently lasted several years. The mere fact of some temporal overlap in her involvement with two sovereign investigative agencies does not create a connection or "link" between the cases. Second, the only "link" between the two cases was the simple fact that Kesselman was the source of information for both matters. Nothing in the DEA case (which involved a large undercover drug purchase and sting operation, conducted months after the murders) ever related to petitioner's double murders in any way.

Moreover, the fact of contemporaneity is hardly significant, given the manner in which Kesselman was introduced to the DEA. Specifically, Kesselman came to Williams's attention because of statements made by

Nance, who had been arrested in connection with a failed drug rip-off. Nance explained that Kesselman was involved in the drug rip-off, and that while they were planning the job, Kesselman had bragged that Angarita may have been involved in the murders and had the Guerreros killed. (Ref. Exh. 29 at pp. 11-13, 36-38.) Of course, the Nance/Price/Kesselman drug rip-off attempt had nothing to do with the murders, it merely provided the backdrop for how Nance learned of the pertinent information. After the meeting with Nance, Williams decided to involve the drug task force because of Nance's report of the drug operation. (18 RRT 1277.) Consequently, after the first interview, Williams reinterviewed Nance accompanied by San Jose Police Officer Mike Miceli, who served on an interjurisdictional drug task force that worked closely with the DEA, which is how the DEA became connected to the individuals in the case. (18 RRT 1278; 20 RRT 1664.) However, the DEA's interest in the case differed from that of Williams; Williams was interested in the double murder, and the DEA was interested in any ongoing drug operation.

On March 19, 1984, Angarita came into the police station because he was upset about Guerrero family members following him and accusing him of being involved in the murder. (18 RRT 1305-1311.) During that interview, Angarita referred to his sister Maria. (18 RRT 1323; 21 RRT 1710; Ref. Exh. 23A at p. 18.)

On March 22, 1984, Williams learned from the DEA that Maria Angarita was arrested for possession of two kilos of cocaine at the San Francisco International Airport. (18 RRT 1323, 1336; 20 RRT 1634; 21 RRT 1707, 1710.)[51] The next day Williams attempted to interview Maria

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[51] Respondent objects to the referee's finding that it was Williams who told the DEA about the arrest of Maria Angarita (Ref. Rpt. at 17), as opposed to Williams's testimony that she learned of the arrest from the (continued...)

in her jail cell, but Maria refused. (18 RRT 1336.) Williams also met with the DEA and had the San Jose Police Department transfer the ledgers found in Ortiz's car following the Nance shootout to the DEA. (18 RRT 1336-1337; 20 RRT 1616; 21 RRT 1707-1708.) She did so because the ledgers were potentially relevant to the DEA's drug investigation, but not Williams's homicide investigation.

When Williams located and interviewed Kesselman, Kesselman provided information about Angarita's drug operation, as well as her speculation about the murders. Williams took the obvious step of bringing her to the DEA because she had information about a drug operation, which was best investigated by the DEA. (18 RRT 1354-1356; 19 RRT 1409, 1516, 1519; 21 RRT 1803.)

Following the conclusion of Williams's investigation into Kesselman's information, she checked occasionally with the DEA to see if Kesselman provided any additional information regarding the murders, but the results were negative. (19 RRT 1466-1467; see also Ref. Exh. 22 [log entry for July 31, 1984, showing contact with DEA].) Williams maintained occasional contact with the DEA and learned that the drug case generated from the contacts with Kesselman was progressing, but she did not know the details of the case. (19 RRT 1466-1469; 20 RRT 1569, 1573; 20 RRT

(...continued)
DEA (18 RRT 1323, 20 RRT 1634; 21 RRT 1707, 1710). Indeed, it defies belief that the DEA could possibly be unaware of a drug bust involving two kilos of cocaine at San Francisco International Airport, and yet Sandra Williams would somehow learn of that arrest first, notwithstanding that the airport was not even in her jurisdiction and she was in no way involved in the arrest. The referee plainly misinterpreted the rough notes in Williams's log, which indicate: "DEA notified that Maria Angarita/David Soto arrested at SF airport, called DEA Agent Mike Fiorentino re arrest" (Ref. Exh. 22 at 3), as suggesting that Williams notified the DEA, rather than that the DEA notified Williams.

1631; 21 RRT 1816-1817.) Williams maintained Kesselman's confidentiality because of the ongoing DEA operation. (25 RRT 2158-2159, 2199.)

In sum, while there may have been overlap between cases owing to Kesselman, there was no *link* between the cases, and Williams was not conducting a drug investigation, just a murder investigation.

Respondent objects to the referee's findings made under the heading "South American Drug Cartel and Jose Angarita: CI-2's Information." As noted above, most of this information came from Kesselman's 2006 testimony, rather than the taped interview of April 1984. Accordingly, regardless of whether or not this information, as related in 2006, is an accurate history, there is no evidence this information was provided to the prosecution in 1984. Only the material found in the April 18th taped interview was known to have been provided to the prosecution.

Respondent specifically objects to the referee's findings that Angarita made incriminating admissions to Kesselman about being involved, or "an instrument in the murders," or that the man from San Francisco committed the killings. (Ref. Rpt. at 9.) As detailed above, the taped interview directly refutes these allegations.

Respondent also objects to the referee's finding that Laureano was in the car with Kesselman and Angarita for the drive to San Francisco, instead of Augustine. (Ref. Rpt. at 10.) Kesselman provided explicit details in her taped interview about that trip to San Francisco, including the fact that she and Angarita stopped at the airport to pick up Augustine. (Ref. Exh. 3A at pp. 53-54, 56-57, 64.) Although she also mentions Laureano in her taped interview, she did not suggest he was involved in that trip. (Ref. Exh. 3A at pp. 10-11.) Her taped statements were provided just a few months after the event. As detailed above, her 2006 testimony differed dramatically, not only in replacing Augustine with Laureano, but changing numerous details

about the trip and events surrounding the trip. (12 RRT 604-629.) For the reasons discussed above, the contemporaneously made statements should be deemed the more accurate account. (*Jordan v. People*, *supra*, 376 P.2d at p. 703; *People v. Gardner*, *supra*, 195 Cal.App.2d at p. 833; 3 Wigmore on Evidence § 738, p. 91.)

Respondent objects to the referee's findings under the heading, "Kracht's Notes Regarding the Contract/Revenge Hit." (Ref. Rpt. at 10.) The referee claims the notes show that "Jose Angarita indicated to CI-2 that the murders were revenge killings." (Ref. Rpt. at 10.) However, the notes say clearly: "The informant, relaying statements Jose Angarita made after the murders, *suggested* that revenge and not robbery was the motive . . . ." (Ref. Rpt. at 10 [emphasis added]; Exhibit 25 at Bates stamp page 1728.) Moreover, this April 18th entry of Kracht's notes is nothing more than his summary of the taped interview. Thus, it cannot constitute any additional evidence beyond that contained in the interview itself. Indeed, all of the quoted passages from Kracht's notes referring to information the murders were a hired hit come directly from two of the three sources identified at the beginning of this section, namely statements made by DiLeonardo and statements made by Kesselman. (See Ref. Rpt. at 10-12; Ref. Exh. 25 at Bates pages 1726, 1728, 1733.) DiLeonardo's information came indirectly from Kesselman via Nance, and he made that clear in his interview, and the information from Kesselman is contained in the April 18th interview. Thus, Kracht's notes do not identify any new evidence beyond the interviews of Kesselman, Nance, and DiLeonardo.

With respect to the findings made under the heading "Ronnie Nance" (Ref. Rpt. at 12-13), respondent agrees the prosecution had the evidence contained in the Nance interview tape.

Under the next heading, Respondent objects to the referee's heading characterizing the murders as drug related. (Ref. Rpt. at 13 ["Homicides

Drug Related."].) Respondent agrees the prosecution had the information related by Nance, and the information related in the taped interview with DiLeonardo, as memorialized in Kracht's notes. (Ref. Rpt. at 13-14.)

Respondent objects to the referee's finding asserting that: "Ron McCurdy investigated Karlos Tigiboy and determined he was not a high class drug dealer. However, his investigation discovered a link between Tigiboy and Jose Angarita 'who was thought to be a dope dealer.' (Exhibit 19, PD Report of Investigation, p. 1.)" (Ref. Rpt. at 14.) As noted above, this finding is premised entirely on inadmissible hearsay. The only source of this assertion is a defense memorandum purportedly memorializing an interview of McCurdy. (Ref. Exh. 19.) McCurdy did not testify at the hearing and thus was never questioned about the content of that memorandum. This material is inadmissible hearsay and cannot serve as the basis for any finding by the referee.[52] Indeed, it should never have been considered by the referee for the truth, and would not have if the referee properly understood the applicability of the rules of evidence to reference hearings. The referee recognized the prosecution's standing objection to the admission of hearsay, preserving this issue. (16 RRT 1049-1051.)

Indeed, contrary to the referee's finding, the evidence overwhelmingly established the contrary is true. First, McCurdy did not conduct any independent investigation. McCurdy's role was strictly to assist Williams. (18 RRT 1263, 1333, 1338-1340, 1378-1379; 23 RRT 1936, 1940.) Judge Allegro confirmed that McCurdy was not a significant investigator on the case. (24 RRT 2030, 2120.)

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[52] Notably, even petitioner's trial counsel John Aaron recognized that the memorandum of the McCurdy interview was inadmissible hearsay. (15 RRT 1002.)

Williams also explained that McCurdy had difficulty keeping the facts straight in trying to organize the information she obtained. (18 RRT 1378-1379; 19 RRT 1414-1416; 23 RRT 1933-1943.) Williams made clear that the prosecution never uncovered any information that Karlos Tijiboy was a drug dealer or worked for Angarita, and any suggestion to the contrary was erroneous. (19 RRT 1341-1342; 20 RRT 1594-1597, 1665-1668; 21 RRT 1818-1820; 25 RRT 2188-2191, 2226.) Indeed, Williams prepared a contemporaneous report on her investigation into Tijiboy which reflects the prosecution did not find any information of the kind. (21 RRT 1818-1820; 25 RRT 2188; Ref. Exh. 26.)[53] Tijiboy's trial testimony was consistent with his earlier interview and showed no drug dealing or connection to Angarita. (10 RT 3352-3360.) Accordingly, the only admissible evidence at trial reflects that the prosecution did not have any information that Tijiboy was involved in drug dealing or connected to Angarita.

For the reasons stated above, respondent objects to the referee's findings of fact under the section headed, "Sandra Williams" (Ref. Rpt. at 14-16), to the extent they are inconsistent with her testimony or her activity log. Respondent objects to the referee's finding that, although Williams testified she first learned of Angarita's name from Scott Burke on March 6, 1984, "in her Investigation Checklist (Exhibit 22), Sandra Williams indicated she had already 'run' Jose Angarita's name by March 6, 1984." (Ref. Rpt. at 14-15.) The entry in Williams activity log for March 6th shows that she learned of Jose Angarita's name from Burke and then "ran" that name for criminal contacts. (Ref. Exh. 22; 21 RRT 1697, 1703.) The referee's contrary reading of Williams's log is unreasonable and unsupported by the evidence.

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[53] John Aaron similarly reported that the defense investigation into Karlos Tijiboy found nothing. (15 RRT 978, 1018-1019.)

Respondent objects to the referee's finding that: "Thus, contrary to her testimony at this hearing, Sandra Williams knew Jose Angarita's name before her March 31, 1984 meeting with CI-2." (Ref. Rpt. at 15.) This finding unfairly takes a snippet of testimony out of context. Although Williams initially thought she learned of Angarita's identity from Kesselman, her recollection was refreshed by her activity log. She clarified that she first learned of Angarita's *name* from Scott Burke on March 6th. However, it was when she spoke to Kesselman, that she finally confirmed that Angarita (and not Laureano) was the drug dealer "Jose" referenced by Nance. (21 RRT 1691-1699.) Accordingly, there was no contradiction.

Respondent objects to the referee's characterization of the possibility that Angarita had ordered a hit on the Guerreros, as being Williams's "theory" (Ref. Rpt. at 15) when in fact it was Kesselman's theory, which Williams and Kracht were understandably pursuing in light of Kesselman's interview. Respondent also objects the referee's finding that "[t]his theory was based on the statement by Jose Angarita to CI-2 that he was an instrument in the murders." (Ref. Rpt. at 15.) As explained above, the absence of that statement from the taped interview in 1984 demonstrates that it was never made, and consequently never communicated to Williams.

Respondent agrees that the prosecution had the taped interview of Joseph DiLeonardo and that Judge Allegro was familiar with the extent of the investigation into Kesselman's allegations. (Ref. Rpt. at 15-16.)

Respondent objects to the referee's credibility determinations under the heading "Credibility." (Ref. Rpt. at 16-18.) The referee found not credible Williams's evaluation of Kesselman's speculation of Angarita's involvement in the murder as not credible. For the reasons explained above, to the extent the referee based his findings on his threshold determination that Kesselman was more credible than Williams, those

findings are unsupported by the record and incorrect. The nine specific reasons cited by the referee also do not support his conclusion.

First, the referee points out that, for a period of time the prosecution treated Angarita as a suspect and noted that "the murders possibly were a 'hired hit.'" (Ref. Rpt at 16.) This predicate fact, however, does not support his point. Once Williams and Kracht received the information from Kesselman of Angarita's possible involvement, they would have been remiss in not investigating further and treating Angarita as a suspect while pursuing that investigation. As explained by Williams and Kracht, Kesselman's information was presented as nothing more than her speculation and their investigation did not support any of her claims. Her description of the man she met on the drive to San Francisco did not match petitioner's description. It did not conform to the known facts of the case. Indeed, it did not even match petitioner's own confession to the police, in which he explained that he was at his home in Palo Alto on the evening before the murders, not in San Francisco. (Resp. Exh. 2 at p. 8.) Critically, the fact that they took Kesselman's allegations seriously, investigated her account, and determined it was not accurate, fully supports Williams view that Kesselman's information was not credible, rather than detracts from it. Investigation and looking for corroboration are the best methods for testing an informant's credibility.

The referee's second point is that Williams gave a presentation to Kracht on Kesselman's allegations that Angarita may be involved, which the referee views as refuting her testimony that she perceives no connection between Angarita and the killings. (Ref. Rpt. at 16-17.) The referee unfairly compresses time to cite a fact that occurred before the full investigation to disprove a conclusion reached after a full investigation.

As noted, Williams properly took the allegation as serious enough to warrant further investigation, even though it was speculation. She

contacted the San Jose Police Department and requested the assistance of a police investigator to assist in looking into this allegation, and Sergeant Kracht was given this assignment. (25 RRT 2294-2300.) Upon being assigned to assist on April 16th, Kracht attended a presentation or meeting by Williams recounting the information she had obtained to that point about the possibility of Angarita's involvement. (25 RRT 2294-2300.)[54] Of course, *after* they had concluded their investigation, they both agreed that Angarita was not involved in the killing.

The referee's third point is that "early in her investigation of the murders during 1984, Sandra Williams confronted Steve Price with a photo of Jose Angarita and told him she wanted Jose Angarita because he was the shot-caller, the king pin." (Ref. Rpt. at 17.) This predicate fact is also insignificant. The first claim that this encounter occurred "early in the investigation" is unsupported. Williams did not have a picture of Angarita until Angarita came down to the police station on March 19th to discuss the Guerrero family, at which point Williams was able to take a Polaroid picture of Angarita. (Ref. Exh. 29B.) March 19th is hardly "early in the investigation." Rather, Williams's notes reflect that she and Officer Smith showed pictures to Price on March 30th, when they were trying to get Price to provide them with the location of Kesselman. (Ref. Exh. 22 at p. 4.)

Second, at this stage, Williams was still trying to determine precisely who Nance had been referring to when he identified the dealer as "Jose."

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[54] This event has been alternately characterized as a "meeting" or a "presentation." (19 RRT 1427; 21 RRT 1797; 25 RRT 2294-2295.) The referee places great significance in labeling this a presentation rather than a meeting. However, to the extent there is a semantic distinction, respondent fails to understand how that distinction has any significance to the issues here. This event was to get Kracht up to speed, by presenting him with what was known. Given that Kracht was new to the case, the "meeting" obviously involved a "presentation" of that information to Kracht.

Showing Price a photograph of Angarita was consistent with her investigation at that point in time. Similarly, her description to Price calling Angarita a king pin was nothing more than a repeating of the account given by Nance at a time when she was pressuring Price to lead her to Kesselman in order to get to the source of Nance's allegations. None of this undermines the conclusions she reached after conducting her investigation.

The referee next notes: "Fourth, Sandra Williams knew that the Guerrero Brothers' family thought that Jose Angarita had killed the Guerrero Brothers." (Ref. Rpt. at 17.) The referee, however, ignores Williams explanation that the family members only suspected Angarita *after* Williams questioned them about Angarita, which caused them to draw inferences about the course of the investigation. (18 RRT 1306-1307, 1324.) They had no independent knowledge of the killing or Angarita, and their actions would not have caused Williams to view Angarita with greater suspicion.

The referee next points out that although "Sandra Williams consistently discounted and/or denied any drug connection to the killings," the DEA found Kesselman to be a credible source and rewarded her for helping to set up the sting on Laureano. (Ref. Rpt. at 17.) This fact assumes too much. There was a significant difference between Kesselman's knowledge of the drug operation, in which she was intimately involved, and her speculation about a possible hit by Angarita, which she had no involvement with or direct knowledge of whatsoever. The 1984 taped interview shows that Kesselman was engaging in guesswork and supposition. The fact that she provided information on the drug trade that ultimately proved reliable in setting up a drug sting, does not support the

conclusion that there was a drug-relation to the *murders*, or that her speculation on the murders was equally credible.[55] To the contrary, the investigation proved otherwise, as has Kesselman's subsequent recantations and contradictions.

The referee next lists Williams's contacts with the DEA during the course of her investigation, including arranging to have a DEA agent present when interviewing Kesselman on April 18th, as proof that "that Sandra Williams's repeated testimony in these proceedings that she was not investigating a drug case, but only a homicide case, is not supported by the record and not credible." (Ref. Rpt. at 17-18.) Actually, this factual background shows just the opposite of the referee's finding. This shows that Williams recognized that Nance's and Kesselman's information had a drug investigation overlap, and Williams consistently turned to others, namely drug investigators such as Mike Miceli, and DEA agents like Rod Alvarez, to handle any drug-related information that came up, while she focused exclusively on the homicide investigation. The fact that Williams turned over the ledgers to the DEA, rather than attempt to analyze them herself, shows she was *not* conducting a drug investigation. The same is true for bringing in DEA Agent Alvarez to the interview with Kesselman, so that he would be responsible for investigating and pursuing any drug information provided by Kesselman rather than Williams. The record shows that, whenever her murder investigation turned up drug information, Williams handed it off to the appropriate drug investigators, rather than

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[55] Moreover, it is difficult to determine how much information Kesselman possessed about the drug operation based on her work for the DEA. It appears that her primary role for the DEA was in connecting Laureano with an undercover DEA in setting up a cocaine purchase. She never testified at the federal trial. (11 RRT 483.)

pursue it herself. The referee's finding that Williams was pursuing a drug investigation is illogical and unsupported by the record.

Respondent also objects to the referee's suggestion that there was ample evidence known to the prosecution that Karlos Tijiboy was involved in drug trafficking or part of Angarita's circle. (Ref. Rpt. at 17.) Our objections to the suggestion that Tijiboy was involved in drug dealing have already been set out above.

The referee next found:

> Sixth, Sandra Williams' testimony that by February 29, 1984 she had concluded that the information from Nance was a "dead end" is equally not supported by the record. Sandra Williams testified that Nance did not give her Jose Angarita's name. Yet Jose Angarita's name appears in her Investigation Checklist several times before her meeting with CI-2 on March 31, 1984. The court concludes that Nance gave Sandra Williams Jose Angarita's name, and she used it in her investigation of the case prior to the interview with CI-2 on March 31, 1984.

(Ref. Rpt at p. 18.)

This finding is not supported by the record. First, the referee mischaracterizes Williams's testimony. She explained that did not find Nance's *information* to be a "dead end," but rather she concluded that by February 29th, Nance himself was a dead end because she had learned all he had to say, he had no personal knowledge of the information he provided, and did not know how to locate "Gale." (21 RRT 1761.) Williams would not get any further in her investigation until she located Price and "Gale." (21 RRT 1761.)

As for Angarita's name, a review of Nance's taped statement shows that he did not provide Angarita's name, referring to him only as "Jose." (Ref. Exh. 46.) Williams explained that she did indeed learn of Angarita's name before March 31st. She learned it on March 6th from Scott Burke,

not from Nance. (Ref. Exh. 22; 21 RRT 1691-1699, 1703.) The referee's finding of a contradiction is unsupported by the record.

For the referee's seventh point, he found that Williams directed Kesselman "not to testify at the in camera hearing in 1985 about facts suggesting that the murders were contract hits or revenge killings." (Ref. Rpt. at 18.) Respondent objects to this finding as unsupported in the record. This was an allegation made by Kesselman in 1997, retracted in 2001, and reasserted in 2006 after claiming that her retraction was either fabricated by Kracht or a lie. Williams denied giving Kesselman any such orders. (19 RRT 1482-1492; 21 RRT 1834-1835.) For the reasons set out above, the referee's finding that Kesselman was credible on this point or any other point in her 2006 testimony is unwarranted and unsupported by the record.

The referee, in his eighth point, notes that Williams testified that Kesselman was not believable because her stories were "all over the map," yet Williams and Agent Alvarez had several meetings with Kesselman in early April, which the referee concluded indicates Williams actually believed Kesselman. (Ref. Rpt. at 18.) This conclusion is unwarranted. Kesselman's stories were serious enough to warrant further investigation, notwithstanding that they were all over the map, and Williams acted responsibly by taking them seriously and investigating. The results of the investigation proved the unreliability of Kesselman's speculation about the murders. Moreover, as noted above, Kesselman's subsequent history in this case only reinforces Williams's assessment that Kesselman is "all over the map," to put it mildly.

The referee's final point was as follows:

> Finally, Sandra Williams' claim that [Kesselman] gave only "scenarios" or speculation is not supported by the record. The evidence suggests that the inconsistencies in [Kesselman's] testimony and statements were actually minor and immaterial.

> For example, it was not material whether [Kesselman] remembered petitioner's name ("Miguel") during the first interview on March 31, 1984.

(Ref. Rpt. at 18.)

The referee's finding is unsupported. A review of the tape shows that Kesselman's discussions about Angarita's statements and beliefs regarding the murders do indeed reflect only speculation. The taped interview also reveals inconsistencies that were not merely about minor points, such as whether she remembered the name "Miguel." The entire account of the drive to San Francisco to meet a high powered drug dealer from New York named Miguel, staying in a hotel in San Francisco, who may have in fact been petitioner is rife with inconsistencies. These inconsistencies were not only by noted by Williams, but also by Kracht. (21 RRT 1783-1784; 32 RRT 3135-3146.)

First, Kesselman's description of the man they met was inconsistent with petitioner's physical description and habits. (21 RRT 1783-1784; 32 RRT 3135-3146.) It was also inconsistent with petitioner's financial situation and lack of transportation. Kesselman recounted in the interview that the man they were meeting was actually staying at the hotel, and when she called, she got his room number, which she thought might be something like room 1011. (Ref. Exh. 3A at 58.) Petitioner was quite poor and had no means of getting to San Francisco other than taking public transit. He certainly did not have the money to afford a room at a downtown San Francisco hotel such as the Hyatt Regency or Hilton. (21 RT 1780-1791.) This account was also inconsistent with petitioner's own statement to the police upon his arrest. (Resp. Exh. 2 at p. 8.) Contrary to the referee's finding, Williams and Kracht conclusion that Kesselman's account was full of inconsistencies was supported by the record.

With respect to the referee's summary of information in possession of the prosecution (Ref. Rpt. at 18-19), respondent generally agrees as to the tapes and interviews. Respondent, however, objects to the referee's finding that "everything testified to at these proceedings by [Kesselman] was disclosed by [Kesselman] to the prosecution in 1984." (Ref. Rpt. at 18.) For all the reasons previously discussed, Kesselman's testimony at the reference hearing was inherently contradictory, not credible, and must be discarded to the extent it differs from the taped interview. The full extent of the information the prosecution had from Kesselman in 1984 is the information contained in her taped interview, and nothing more.[56]

B. Information Provided to the Defense

Respondent objects to the referee's finding that "with the exception of Exhibits 19 and 34, none of the information from [Kesselman], Nance or DiLeonardo possessed by Sandra Williams and disclosed to Joyce Allegro and known to the prosecution team was given to the defense." (Ref. Rpt. at 19.)

Specifically, respondent objects the finding that the prosecution did not provide the tape of the Nance interview (Ref. Exh. 29), the tape of the DiLeonardo interview (Ref. Exh. 50), or the tapes of the Angarita interview

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[56] Respondent is uncertain about the nature of the referee's finding regarding Exhibit 19, the summary of the defense interview of Ron McCurdy. (Ref. Rpt. at 19.) To the extent the referee is suggesting that the prosecution was in possession of the full content of that report, respondent objects for the reasons previously set out regarding that report. To the extent that the referee's finding refers solely to the particular statement from Reference Exhibit 19 that "the defendant had indicated that he was forced to make a hit for the Columbian Mafia because they had threatened to kill his parents" (Ref. Rpt. at 9), respondent objects to the extent the referee has found that the prosecution was in possession of statements of the petitioner other than his taped confession following his arrest. (See Resp. Exh. 2 [petitioner's confession].)

(Ref. Exh. 23A & 23B) to the defense. This finding is unsupported by the evidence. Indeed, the referee's finding stems from a fundamental misunderstanding of the prosecution's *Brady* requirements.

It is well established that the prosecution satisfies its *Brady* obligations by making materials available to the defense to examine and obtain when that discovery practice is standard and known to the defense. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1134.) Here, it is undisputed that the standard discovery practice for taped interviews in the prosecution's possession was for the defense to go to the police department where the tapes were held in the defendant's file, identify which tapes to copy and present a blank tape to the police department to be exchanged for the copy of the interview tape. (24 RRT 2031, 2047, 2051 [testimony of Judge Allegro]; 28 RRT 2666, 2679 [testimony of defense counsel John Aaron]; 27 RRT 2543 [testimony of defense investigator Alayne Bolster].)

In March 1985, petitioner's second trial counsel Michelle Forbes filed a discovery motion in court, in which she requested copies of taped statements. (1 CT 233-235 [from original trial record]; see also 1 CT 228-232 [points and authorities in support of discovery].) She specifically pointed to the reference in Kracht's police report (Ref. Exh. 34), which she attached to her motion, that indicated the existence of a taped interview of DiLeonardo. (1 CT 228-235; Ref. Exh. 32 at pp. 23-26; 24 RRT 2139-2140.)[57]

Judge Allegro testified that, in response to this motion, she authorized the release of all taped interviews to the defense except for the taped

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[57] Under the entry for 4-18-84 in Kracht's police report provided to the defense (Ref. Exh. 34), Kracht wrote: "Attorney Joseph W. DiLeonardo was contacted because of statements attributed to him describing the murders of the Guerrero brothers as a contract killing. The conversation was recorded."

interview of the confidential information Kesselman. (24 RRT 2052, 2138-2142.) Judge Allegro explained that as a result of her authorization, Forbes would narrow the focus of her motion to the confidential informant, which would be the subject of the in camera hearing. (24 RRT 2052, 2141.) Judge Allegro's account is reflected in copy of her authorization, which she retained in her files and which reflects the notations she made on the discovery request authorizing release of all tapes except for that of the confidential informant. (Ref. Exh. 32 at pp. 23-25.) Judge Allegro's authorization is further reflected in a memorandum between members of the district attorney's law and motions team, regarding the upcoming hearing to disclose the confidential informant. (Ref. Exh. 32 at p. 41.) As Judge Allegro explained, all the defense had to do was bring the blank tapes to the police department to receive copies of the taped interviews. (24 RRT 2052, 2138-2142.) Critically, there was no evidence presented to dispute that Judge Allegro authorized the release of these tapes. Michelle Forbes did not testify at the hearing, and John Aaron conceded that he did not maintain any records of discovery requests or authorizations. (28 RRT 2619, 2667; see also 27 RRT 2471, 2477.)

The referee found the absence of physical tapes from the defense files significant, noting:

> The court's finding is supported in part on the fact that neither the trial attorney, the appellate attorneys, nor the habeas attorneys ever saw the transcripts or the recordings of these matters until years after petitioner's trial had ended. The court finds the prosecutor's claim that these items individually or collectively had been provided in discovery to have no basis in fact.

(Ref. Rpt. at 19.)

The absence of a complete set of tapes in the defense file is legally irrelevant, however, because the prosecution's burden is satisfied by

making the tapes available to the defense. That the tapes may not have been picked up by the defense cannot be attributable to the prosecution.

The finding is also factually flawed. First, the referee indicates that "the trial attorney" did not see the transcripts or recordings until the state habeas proceedings began. However, this reference ignores the fact that petitioner had two other trial attorneys before John Aaron who were not called as witnesses at the hearing.

Second, the record of the hearing indicates that several tapes that were copied by the defense were lost at some point, likely before or during the process of transferring the files to appellate counsel. The defense investigator initially assigned to petitioner's case was Russell Keubel. (27 RRT 2409-2411, 2416-2417.) Notably, the first entry in Keubel's expense log for his first action, is listed as "Tapes – Phone – Review," which occurred on "1-11." (Ref. Exh. 44 at p. 1.) The first entry in Keubel's activity log, is also for "1-11," and the action listed is "P.M. Atty phoned – will send 'I' req. P/U tapes at ¶ - no assigned investigator – ordered A-top photos." Above the words "P/U tapes" is a notation "5/60's – 2/90's." (Ref. Exh. 44 at p. 2.)[58] John Aaron explained that "¶" refers to the police department. (28 RRT 2678.) Aaron also noted that "5/60's" meant five 60-minute tapes, and "2/90's" meant two 90-minute tapes. (28 RRT 2679.)

Not coincidentally, those numbers correspond to the standard tape lengths for the first seven interview tapes contained in the police files as of January 11, 1984. Kracht explained that Tapes #1, #2, and #3 were interviews with Maria Guerrero consisting of two 60-minute tapes and one 90-minute tape, respectively. Tape #4 was a 60-minute tape of an interview with Encarcion Guerrero. Tape #5 was a 90-minute taped interview of

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[58] On the third page of the activity log is a list of items, with the first entry reading: "(1) TAPES - - - 1-11." (Ref. Exh. 44 at p. 4.)

petitioner. Tape #6 was a 60-minute taped interview with Carlos Valdiviezo. Tape #7 is a 40-minute microcassette of a taped interview of petitioner. (32 RRT 3152-3153.) All these interviews were from December 29, 1983, (32 RRT 3152-3153), and therefore were available for Keubel to pick up on January 11, 1984, in exchange for equivalent blank tapes.

Notwithstanding that these entries indicate that Keubel obtained seven tapes (five 60-minute tapes -- #1, #2, #4, #6, #7, and two 90-minute tapes -- #3 and #5), only the tapes of petitioner's interviews were still in the file upon transfer to appellate or habeas counsel. (29 RRT 2740, 2799.) The other five tapes were not in the file. (29 RRT 2800-2802.) Moreover, Investigator Alayne Bolster, who took over the investigation from Keubel, testified that tapes are not kept in the investigator's file, they are given to the attorney for his files. (27 RRT 2475.)

John Aaron testified that he did not keep tapes in the legal files, because of their bulk. Instead he kept them separate from the file, most likely putting them on a shelf. (28 RRT 2667.) However, he conceded that he did not keep records as to how or where such tapes were maintained and whether they were turned over to appellate counsel. (28 RRT 2667-2668.)

The only logical conclusion from this information is that at least the first seven tapes in the police files were obtained by Keubel and the five tapes not pertaining to petitioner's confession were subsequently misplaced or lost before the file was transferred to appellate or habeas counsel.[59]

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[59] Indeed, it is inconceivable that trial counsel would proceed to trial without having obtained and listened to a tape of the interview of Carlos Valdiviezo (tape #6), who was the only surviving eye-witness to the double homicide, who led the police to petitioner and all but ensured his conviction. Counsel plainly obtained and reviewed this tape,

(continued...)

Consequently, no negative inference can be drawn about the prosecution's discovery compliance from the absence of the any other tapes from the defense file, when it is readily apparent that the defense did not maintain its files in the transfer to subsequent counsel. The referee's drawing of a negative inference from this fact is unsupported by the record.

This information also reflects that the defense was well aware of the general discovery practices for making taped interviews available at the police station in exchange for blank tapes, and indeed had already utilized this procedure at an early stage in the investigation. Accordingly, Judge Allegro's authorization of the release of all tapes, save for the Kesselman interview, provided the defense with complete access to that material and satisfied the prosecution's *Brady* obligations. This discovery practice and Judge Allegro's authorization is further reinforced by the fact that the police file contained all 13 tapes of the interviews conducted, including the interviews of Nance, DiLeonardo, and Angarita, with each tape clearly labeled as to who was the interview subject. (32 RRT 3151-3156.) The only exception was the interview of Kesselman (tape #8), which was segregated and placed in a sealed envelope with the designation that she was a confidential informant. (32 RRT 3154.) Kracht testified that, given Judge Allegro's authorization, the tapes (except for Kesselman's) were available to the defense. (32 RRT 3159.)

Accordingly, the referee's finding that the prosecution did not provide the Nance interview tape, the DiLeonardo interview tape, or the Angarita interview tapes to the defense is unsupported by the record in this case.

(...continued)
notwithstanding its absence from the subsequent files upon review by habeas counsel.

The prosecution provided those tapes by making them available through standard discovery procedures.

III. OBJECTIONS TO REFEREE'S FINDINGS FOR QUESTION TWO

The second question asked by this Court was:

> Did the confidential informant who testified at an ex parte hearing on September 6, 1985, tell a district attorney investigator or other member of law enforcement connected with this case that the informant had witnessed petitioner's meeting with Angarita and others a day or so before the murders? If so, did the prosecution convey this information to the defense? If the confidential informant told a district attorney investigator or other member of law enforcement about a meeting between petitioner and Angarita, was this information reliable?

(Ref. Rpt. at 20.)

A. Question Two, Part One

The full scope of the information provided by Kesselman in 1984 is contained in her taped interview. The interview reflects that when she initially met with Williams, she did not identify the individual whom she met as "Miguel," let alone as being petitioner. Indeed, to the extent she saw or was shown a photograph of petitioner, she did not identify him right away as the person in the car. (Ref. Exh. 3A at pp. 50, 65-66.) She explained that, after thinking about it for a few days, she thought that the man she was introduced to in San Francisco was named "Miguel." (Ref. Exh. 3A at pp. 50, 65-66.) As she thought about it some more, she decided, "I think it's the same man that, I had driven Jose to San Francisco to meet with . . . ." (Ref. Exh. 3A at p. 50.)

B. Question Two, Part Two

Respondent agrees that this information was not provided to the defense. Instead, this information was provided to the trial court for an in camera review, for a determination of whether it had to be provided to the defense. The trial court heard testimony and listened to the taped interview

of Kesselman in making its ruling that the information did not need to be turned over.

Respondent objects to the referee's description of the information as being provided to the prosecution. (Ref. Rpt. at 20-21.) As detailed above, the only credible account of what was provided to the prosecution is contained in the 1984 taped interview. Respondent reiterates the objections to the referee's description which have already been stated above.

Respondent also objects to the finding that Kesselman's information was reliable.

Respondent objects to the inclusion of the testimony of Steve Price in his description of the trip. (Ref. Rpt. at 21.) As Price readily acknowledged at the hearing, he did not provide any information to the prosecution when he was contacted by Williams. He only provided Williams with information on how to locate Kesselman. (14 RRT 799, 818, 860.) Thus, his 2006 testimony cannot be attributed to the prosecution and should not be included in the referee's discussion here.

C. Question Two, Part Three

Respondent objects to the referee's findings that the information conveyed to law enforcement was credible. (Ref. Rpt. at 21.) Respondent has already addressed Kesselman's lack of credibility above.[60]

The referee finds additional support for the credibility of Kesselman's account in the testimony of Laureano. (Ref. Rpt. at 21.) Respondent objects to this finding. The credibility problems with Laureano's testimony

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[60] To the extent this Court's inquiry is focused on the credibility of Kesselman's statement at the time it was made to the prosecution in 1984, respondent objects to the referee's reliance on Price's or Laureano's 2006 testimony, given that neither of them provided any information until well after trial, and their hearing testimony was not available to the prosecution before petitioner's trial.

have already been addressed above. With regard to his testimony about accompanying Kesselman and Angarita on the drive to San Francisco, respondent notes that his account is directly contrary to the account given by Kesselman to the prosecution in her taped statement in 1984.

Kesselman gave substantial detail about the drive to San Francisco, at a time when it was still relatively fresh in her mind, less than four months after the date of the trip. In her account, she made clear that the third passenger was Augustine, not Laureano. Indeed, she does not merely mention Augustine in passing, but discusses him for several transcript pages. (Ref. Exh. 3A at pp. 54-57, 62-63.) Moreover, at another point during the interview she describes a conversation she had with Laureano that occurred within the past two weeks (after she had been introduced to Agent Alvarez). (Ref. Exh. 3A at pp. 14-16.) Notably, in recounting her discussion with Laureano, including their musings about whether Angarita had anything to do with the murders, she makes no mention of the trip to San Francisco, nor does she report Laureano making such a reference. (Ref. Exh. 3A at p. 16.)

As noted above, when first asked about the name Miguel at the March 31, 1984 meeting with Sandra Williams, Kesselman could not recall meeting anyone named Miguel. It was only after thinking about it all weekend that she thought the man introduced to her in San Francisco by Angarita was named Miguel. She elaborated that she had seen a photo of the man arrested for the murders and, as of April 18, 1984, believed it could be the same man she and Angarita met with in San Francisco. However, when asked to describe the man she met in San Francisco she told the investigators he was in his mid-to late thirties. (Ref. Exh. 3A at p. 61) Petitioner was 22 years old at the time of the murders. (*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 151.)

Kesselman told the investigators in 1984 that it was difficult to remember the bottom half of the man's face she met in San Francisco, because his coat collar was turned up. She told investigators he had acne scars on his face, real bushy eyebrows, and a beard or facial growth like stubble. (Ref. Exh. 3A at p. 61) According to the testimony of both John Kracht and Sandra Williams that description did not match petitioner. (21 RRT 1783-1784; 25 RRT 3135-3146; see also Ref. Exh. 53.) Based upon the description given by Kesselman to investigators in 1984, it was reasonable for the investigators to conclude that Kesselman's suggestion that the man they met in San Francisco was not petitioner.

Kesselman's identification of petitioner is also not credible based upon the absurdity of the proposed scenario. Witnesses called by the petitioner at the hearing described Jose Angarita as having at least one "sicario" or hired assassin in his employ at all times and having the ability to hire others at will from Colombia to do his bidding. (16 RRT 1057-1060, 1094-1095; 34 RRT 3398-3399, 3479-3480, 3511.) Angarita's ex-wife, Julie Hovgaard, described one of the professional hit-men that Angarita brought into the country, named Enrique, whom Angarita had set up to run his driving school and who stayed in San Jose throughout this time period. (16 RRT 1057-1060, 1094-1095.) Laureano testified that Augustine was also one of the hired killers whom Angarita brought to San Jose. (34 RRT 3479-3480, 3511.) Laureano described these sicarios as repeatedly performing jobs without getting caught. (34 RRT 3398-3399.)

Angarita lived and worked in San Jose and Santa Clara County. The victims lived and worked in San Jose. Petitioner, by contrast, lived with his mother in Palo Alto, had no car and very little money, and rode to work on the bus. For Kesselman's identification of petitioner as the man she met in San Francisco to be credible, the following scenario must have occurred:

Angarita decided to forego his stable of hired assassins and chose the petitioner, a twenty-two year old amateur without a car or money. Angarita devised a plan to have the twenty-two year old amateur masquerade as a high-powered New York City cocaine dealer who had just flown in to San Francisco from the East Coast. Angarita decided to have this meeting take place late at night in San Francisco, some fifty miles or so from where both petitioner and Angarita were located. Notwithstanding, that the two men must have been in communication with each other (given that they arranged the meeting in San Francisco), Angarita still must have felt the need to discuss the matter personally with petitioner in San Francisco.

Moreover, notwithstanding that the meeting had been planned in advance to give petitioner time to get to San Francisco, Angarita did not make advanced preparations with Kesselman to drive him there, and had to scramble at the last minute to include Kesselman on the trip. Angarita went to all this trouble, time, and inconvenience in order to conduct a five-minute meeting with someone he was already in communication with. Angarita must have paid for petitioner's room at the hotel since petitioner lacked the means to pay for it himself. However, they did not use that room to conduct business. Instead, Angarita chose a public place to encounter the man in San Francisco, and set it up so two additional people, Kesselman and either Laureano or Angarita's cousin Augustine, depending upon which of Kesselman's versions one believes, were present during whatever plans or schemes were being discussed. Moreover, despite this meeting arranging the hit, Angarita did not provide petitioner with any money for the job or for a plane ticket to New York to assist in petitioner's getaway, leaving petitioner with no viable means of fleeing after the murders.

This scenario is nonsensical. The lack of credibility of this scenario is only reinforced by the inconsistencies in the description of the man

provided by Kesselman. In sum, Kesselman's identification of the person she met in San Francisco as petitioner is not credible.

IV. OBJECTIONS TO REFEREE'S FINDINGS FOR QUESTION THREE

The third question asked by this Court was:

> Did the prosecution from any source, including those specified below, obtain any information that it did not provide to the defense that would have supported petitioner's claim to the police that he had killed Orestes and Jose Luis Guerrero acting under the Colombian Mafia's death threats to himself or his family?
>
> (a) Interviews of Ronnie Nance or Steve Price?
>
> (b) Interviews of the confidential informant?
>
> (c) In connection with federal prosecutions for which the confidential informant furnished evidence?

(Ref. Rpt. at 22.)

Respondent objects to the referee's finding that "Nance's statement that petitioner was forced to make a hit for the Colombian Mafia because they threatened to kill his parents. This appears to have been orally communicated to the defense." (Ref. Rpt. at 24.) The assertion by the referee that Nance made such a statement is wholly unsupported by the record. A review of Nance's taped statement (Ref. Exh. 29), and of all of the witnesses' descriptions of Nance's statements reflects such an allegation was never made by Nance.

The mystery of the basis for the referee's suggestion that Nance made such a statement is revealed on page 34 of the referee's report. There, the referee refers to Exhibit 19, the 1986 report by Bolster purportedly documenting an interview with McCurdy, in which Bolster wrote: "Ron [McCurdy] states in the Padilla case the defendant had indicated that he was forced to make a hit for the Colombian mafia, because they threatened to kill his parents." (Ref. Exh. 19.) Inexplicably, the referee attributes this

information (being recounted by McCurdy) as coming, not from petitioner's confession to the police, but from Nance. The referee writes on page 34 of his report: "The prosecution also had the *statements of Nance*, including the statement memorialized in Exhibit 19 . . . ." (Ref. Rpt. at 34, italics added.) The referee's attribution of this information to Nance is bizarre and factually unsupported.[61]

Critically, nothing in the report suggests that McCurdy attributed this information to Nance. Indeed, Nance is not mentioned anywhere in the McCurdy report. Nor would McCurdy have attributed this information to Nance. There has never been any suggestion in *any* of the evidence that Nance ever even spoke to petitioner, let alone garnered information about the murders from petitioner. The same is true for Kesselman (the source of Nance's information), who never spoke to petitioner. Accordingly, there is no way Nance would even be in a position to relate what "the defendant had indicated." The referee's attribution of that statement to Nance is irreconcilable with the facts of the case.

Respondent also objects to the reliance on the content of Reference Exhibit 19 for the truth of what is contained because the document is hearsay.

Respondent objects to the remainder of the referee's discussion as incorrect and an inaccurate response to this Court's question. First, as detailed above, Nance's interview was not withheld from the defense.

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[61] Respondent can only assume that, at some point in his analysis, the referee must have mistaken the reference in the report that "Ron states in the Padilla case . . . ," to mean Ron *Nance*, instead of Ron *McCurdy*. Although the referee subsequently clarified the reference by writing it as "Ron [McCurdy] states . . . ," he apparently had already incorporated his Nance mistake into his findings.

Judge Allegro authorized the release of the tape, and it was therefore made available to the defense well before trial.

Price did not submit to an interview and did not provide any information to the prosecution other than helping to locate Kesselman. Thus, there was nothing to turn over regarding Price.

Moreover, there was nothing in any of the information provided to the prosecution by Nance (or Price) that gave any hint that whoever carried out the murders was threatened in any way. Nance's taped interview contains no suggestion of any death threat against petitioner or his family. (Ref. Exh. 29.) To the contrary, Nance's assertions that the murderer was *hired* by Angarita to kill the victims (Ref. Exh. 29 at pp. 11, 36), indicated a financial motive for the murders that directly undermined petitioner's claim that he committed the murders under duress due to threats against himself or his family. Nothing in Nance's statement was supportive of petitioner's duress claim.

The same is true for Kesselman's taped interview, which was not provided to the defense. Kesselman never suggested that Angarita threatened petitioner in any way. She indicated that Angarita made allusions to the crimes being a "professional murder," and committed by a "professional." (Ref. Exh. 3A at pp. 46-47.) Such references are directly contrary to the murderer being threatened with death or committing the crimes under duress. Kesselman's account of the meeting in San Francisco similarly described a professional business meeting. Angarita characterized the encounter as a meeting with a large scale drug operative. (Ref. Exh. 3A at p. 54-55.) There was nothing in Kesselman's description of the meeting in the car to suggest that the man in the back of the car with Angarita was threatened in any way. (Ref. Exh. 3A at pp. 62, 67.) Accordingly, Kesselman's interview did not provide support for any claim of duress or threats against his family.

Moreover, Kesselman's account of a meeting in San Francisco with Angarita was directly contrary to petitioner's account of receiving a phone call from Tijiboy with the death threats and orders to commit the murders. (Resp. Exh. 2 at pp. 8-9.)

Respondent objects to the referee's reliance on the 2006 testimony of Kesselman regarding information not contained in her 1984 interview, including the purported incriminating statements by Angarita that were not mentioned during that interview. (Ref. Rpt. at p. 23.)

For the reasons already stated, respondent also objects to the referee's reliance on Exhibit 19 for the truth of the assertion that the prosecution knew of a connection between Tijiboy and Angarita or that Tijiboy was a drug dealer. (Ref. Rpt. at p. 23, quoting Ref. Exh. 19.) The only admissible evidence, namely Williams's testimony, demonstrated that the prosecution had no evidence of any connection between Angarita and Tijiboy or that Tijiboy was a drug dealer. Moreover, notwithstanding the inaccuracy of the information in the McCurdy report, there is no dispute that this information was in the possession of the defense, and thus the defense was aware of this allegation. (Ref. Rpt. at p. 23.)

Respondent agrees with the finding that there was no evidence from the federal drug prosecution of any threat to petitioner or his family. Furthermore, the prosecution did not have any of the materials regarding the federal prosecution submitted in the reference hearing. Those materials were first obtained by the defense and filed as exhibits to the instant state habeas petition. (Pet. Exh. A-56; 11 RRT 544, 30 RRT 2944-2946, 2976-2977.)

V. OBJECTIONS TO REFEREE'S FINDINGS FOR QUESTION FOUR

The fourth question asked by this Court was:

> If the prosecution withheld from the defense information (a) about a possible connection between Jose Luis Angarita and

> the murders of Orestes and Jose Luis Guerrero; or (b) about a meeting between petitioner, Angarita and others a day or so before the killings; or (c) that would have supported petitioner's claim to police that he killed the Guerrero brothers acting under death threats to him and his family, what penalty phase evidence not otherwise known or available to the defense at the time of trial would have come to light had the withheld information been disclosed?

(Ref. Rpt. at 24.)

Respondent objects to the referee's findings in answering this question. First, the only information not provided to petitioner was the taped interview, in which Kesselman described the trip to San Francisco. The Nance taped interview was made available, as was the DiLeonardo taped interview. Moreover, it is undisputed that the defense was, at the very least, aware of the fact that Nance made allegations that the murders were drug hits, and of the existence of the DiLeonardo interview and the allegations that Angarita was connected to the murders.

Kracht's police report (Ref. Exh. 34), which was turned over to the defense, provided this information. Under the April 16, 1984 entry, the report noted, "It was suggested that an investigation be undertaken into the possibility that Miguel PADILLA murdered Orestes and Jose Luis GUERRERO, acting as the agent of Jose ANGARITA." (Ref. Exh. 34 at p. 1.)

The April 18th entry for 10 a.m. noted, "Inspectors Williams and McCurdy provided a confidential informant for the purposes of an interview, which was recorded. [¶] The informant, relaying statements Jose ANGARITA made after the murders, suggested that revenge and not robbery was the motive and that the incident that was revenged happened some years ago." (Ref. Exh. 34 at p. 1.)

The April 18th entry for 4:30 p.m. noted,

> Attorney Joseph W. DiLeonardo was contacted because of statements attributed to him describing the murders of the GUERRERO brothers as a contract killing. The conversation was recorded. [¶] DiLeonardo denied making that statement, saying he was so informed by Santa Clara Police Sgt. Hensley, a detective handling the case against Ronnie NANCE, charged with the attempted armed robbery of a drug trafficker. DiLeonardo said that business records of the drug trafficker were seized during the investigation.

(Ref. Exh. 34 at p. 1.)

Kracht's report further explained that Sergeant Hensley attributed the information to Nance. (Ref. Exh. 34 at pp. 1-2.) It then noted that Kracht interviewed Nance, who attributed the description to the confidential informant. (Ref. Exh. 34 at p. 2.) The report also recounted that Kracht interviewed Angarita's ex-wife, Julie Hovgaard. (Ref. Exh. 34 at p. 2.)

The defense was also in possession of the report by defense investigator Alayne Bolster regarding her interview with McCurdy, which discussed Angarita in the context of petitioner's case and linked Angarita and Laureano. (Ref. Exh. 19.)

John Aaron acknowledged that he had all this information before trial, but elected not to investigate it because he did not consider it to be beneficial. (15 RRT 950-965.) Similarly, petitioner submitted with his habeas petition a declaration by defense investigator Keubel, in which Keubel acknowledges he had all of that information prior to trial, but did not investigate. (Pet. Exh. C.)

Accordingly, the defense already had all the information it needed to pursue this line of inquiry. The defense could have obtained the Nance and DiLeonardo interviews from the police files. It could have interviewed DiLeonardo, Sergeant Hensley, and Ronnie Nance based on Kracht's report. And it could have located the confidential informant through Nance, just as Williams had and just as Schryver subsequently did.

The only information that the defense did not have was Kesselman's identity and her taped statement. Specifically the interview recounted her speculation about whether Angarita was involved, and her description of the trip to San Francisco. Neither of these pieces of information would have led to any beneficial evidence supporting petitioner's penalty phase claim of duress. Kesselman's speculation of Angarita's involvement does not help petitioner because it was just that, speculation. The taped interview does not reveal any incriminating statements made by Angarita, nor does it offer any suggestion of death threats. Moreover, this statement would not have led to any beneficial information from Angarita himself. In his taped interview with the police, Angarita denied any involvement, and it is unlikely he would have been available for trial.

Kesselman's recounting of the San Francisco meeting in the interview also would not have provided petitioner with any evidence beneficial to his duress defense. First, as detailed above, her identification of petitioner as the man Angarita met in San Francisco was dubious. Second, there was nothing in her account to suggest any death threats were leveled against petitioner or his family. To the contrary, if anything, her account suggested petitioner was hired, rather than threatened, which would have damaged his defense. Third, if accepted as true, Kesselman's account did not provide the defense with information they did not already have. If Kesselman's account was correct, then petitioner was already aware of the alleged meeting in the car with Angarita, since he was supposedly present. This knowledge did not cause the defense to pursue any further leads before trial, and there is no reason to believe Kesselman's account would have provided additional leads.

Kesselman herself was not helpful to any duress defense. At best, she merely put petitioner in the car. She could not understand the content of the conversation in the back seat, which was in Spanish. (Ref. Exh. 3A at

p. 64.) And her account indicates the meeting involved a financial transaction, rather than duress or extortion.

Furthermore, Kesselman's taped statement indicated that the only other person in the car was Augustine. Augustine did not testify at the hearing and little is known about him. There is no evidence that Augustine would have provided beneficial evidence to the defense or was available for trial in 1987.[62]

Contrary to the referee's finding, there was nothing in Kesselman's account in 1984 that would have led the defense to investigate Laureano. In her 1984 interview, she explained that, when she called Laureano, he told her that he did not believe that Angarita was involved in the killing. (Ref. Exh. 3A at p. 16.) Accordingly, releasing Kesselman's 1984 account would not have led to additional information.[63]

If, on the other hand, Kesselman's and Laureano's 2006 hearing testimony is credited, as referee did, then Laureano was in the car with petitioner, Kesselman, and Angarita. Under that scenario, turning over Kesselman's account still would not have provided petitioner with additional material.

If Laureano's account was true, then the trip with Laureano was already known to petitioner. According to Laureano, petitioner and he were friends long before the murders. Indeed, Laureano claimed that petitioner was introduced to him by Angarita. (34 RRT 3492-3493.) Thus, petitioner

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[62] Indeed, if Laureano's description of Augustine as a "sicario" is correct, then it makes no sense that the murders would be assigned to petitioner, an amateur thief, rather than Augustine, the professional hit man.

[63] For this reason, respondent objects to the referee's suggestion that "[t]he DA would have had to provide discovery concerning Laureano." (Ref. Rpt. at 25.) The prosecution did not interview Laureano and had no other information about Laureano for which discovery could have been provided.

would have been well aware that he was in the car with Laureano and Angarita, and the defense was therefore in the same position to pursue and obtain information regarding Laureano and the car ride, long before Kesselman was interviewed by Williams.

The defense never pursued this route, notwithstanding petitioner's own knowledge of what occurred the night before the murders. Petitioner did not testify at the hearing, and his attorney asserted attorney-client privilege as to what discussions he may have had with petitioner regarding the duress defense. (15 RRT 894, 934.) The defense offered no evidence or explanation at the hearing as to what would have precluded them from following this trail without Kesselman's taped interview.

For these reasons, the referee's finding that "[t]he defense would have identified, located and interviewed or attempted to interview Luis Laureano," and "[t]he defense had no idea that Laureano knew so much about the Guerrero Brothers murders [or] Jose Angarita's connection to the murders," is unsupported by the facts. (Ref. Rpt. at 25.) Kesselman's 1984 taped interview would not have led to Laureano. By contrast, if Laureano is to be believed, then petitioner *already knew* that Laureano was in the car when Angarita allegedly ordered the hit, and yet the defense never tried to locate or interview Laureano, notwithstanding petitioner's own knowledge of events, as well as the fact that Laureano's name also appeared in the McCurdy report (Ref. Exh. 19).

Moreover, the account of the San Francisco trip as presented by Kesselman and Laureano was not consistent with petitioner's own confession and would have risked undermining even that beneficial evidence, which was the only evidence of duress.

To the extent Laureano's testimony at the hearing described Angarita's threatening and ruthless nature, and linked him to the Medellin Cartel, such information still would not have been beneficial to petitioner's

duress defense. None of that evidence offered any explanation for why Angarita would select petitioner to be the murderer and would threaten to kill his family to encourage him to do the crimes, when Angarita had ready access to the professional assassins on his payroll and knew full well that any failure by petitioner could easily be traced back to him. Indeed, the bigger and more influential a drug kingpin Angarita was shown to be, the less likely he would have stooped to arranging a personal meeting in San Francisco to talk to a poor, two-bit thief to set up a murder, which required death threats against petitioner's family as motivation to commit the crime. Bringing out a detailed story on Angarita's drug business would only make petitioner's story all the more implausible.

For these reasons and for the reasons already discussed above regarding the lack of credibility of Laureano's testimony, respondent objects to the referee's findings on pages 24 through 26, which depend entirely on the veracity of Laureano's accounts.[64]

Respondent strenuously objects to the referee's finding that "[t]he defense would have presented evidence that petitioner had a conversation with Luis Laureano wherein petitioner said that Jose Angarita told him, petitioner, that he had to do a job for Jose Angarita and that if he did not do it Jose Angarita was going to kill his family members, beginning with his mother." (Ref. Rpt. at 26.) The referee's reliance on this exchange as

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[64] Respondent also objects to the referee's reference that the defense would suddenly have decided to investigate the ex-wife of Angarita, Julie Hovgaard. (Ref. Rpt. at 25.) Nothing in Kesselman's account suggested any further reason to contact Hovgaard. Moreover, the defense was already aware that Kracht interviewed Hovgaard, as is reflected in his report. (Ref. Exh. 34 at p. 2.) She was also mentioned in the McCurdy report. (Ref. Exh. 19.) Accordingly, the defense already had all available information regarding Hovgaard and elected not to pursue that inquiry. There is no evidence that the Kesselman interview would have changed that determination. The referee's suggestion is unsupported speculation.

something petitioner would have discovered and presented if Kesselman's information had been released, is nothing short of an embarrassment.

This information—*if true*—necessarily would already have been known to petitioner, since he was the one doing the talking. The fact that he was speaking to Laureano, if true, was also already known to the defense. Yet, this exchange was not introduced at trial.[65] Contrary to the referee's finding, petitioner's own statements are not something the defense would have suddenly *discovered* had Kesselman's statement been turned over.

Moreover, petitioner's alleged statements to Laureano, (which the referee describes as "very dramatic evidence") are patently self-serving hearsay that could not be introduced through Laureano. The only way petitioner's statements could come in would have been for petitioner to take the stand and testify about them. Of course, petitioner had a full and fair opportunity to testify had he so chosen (and to subpoena Laureano as a witness at trial based on his own knowledge of Laureano being on the other end of this alleged conversation), yet petitioner declined to do so. Petitioner presented nothing at the hearing to suggest that the release of Kesselman's statement would have caused petitioner to testify at trial, nor did petitioner take the stand at the reference hearing to offer what he would have said about this alleged conversation had he taken the stand. The referee's finding that this information (if true) would have been discovered by the defense, is baseless.

Respondent also objects to the referee's finding that the defense would have learned of and used the fact that Williams and Kracht, at one

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[65] The fact that it was not pursued at trial is a strong indicator that it never occurred, as is the fact that petitioner had not yet entered the country at the time Laureano claimed this exchange occurred. This shows Laureano's account is pure fiction.

point in their investigation, had "tentatively, associated petitioner with Jose Angarita the night before the homicides and that the homicides were carried out as a hit or for financial gain at the direction of another, namely Jose Angarita." (Ref. Rpt. at 26.) The referee fails to explain how a police officer's view or opinion that someone is a suspect can constitute *evidence* of guilt or of a crime. To the contrary, the investigator's views or opinions about the case and about a suspect's involvement is not admissible to prove any actual fact of involvement or to bolster anyone's credibility.[66] Nor are the changing opinions of a police officer during the course of an investigation even subject to discovery under *Brady*, as they constitute classic work product. (*Morris v. Ylst* (9th Cir. 2006) 447 F.3d 735, 742 [*Brady* "does not encompass an obligation on the prosecutor's part to reveal his or her strategies, legal theories, or impressions of the evidence"]; *United States v. White* (8th Cir. 1982) 671 F.2d 1126, 1133 ["*Brady* requires the prosecution to produce 'evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment(.)' [Citation.] An intra-agency legal opinion does not constitute such evidence."]; *Williamson v. Moore* (11th Cir. 2000) 221 F.3d 1177, 1182; cf. *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 169 [explaining under current discovery statutes, mental impressions are work product not subject to discovery].)

Finally, respondent objects to the referee's sweeping discussion of the evidence of the Medellin Cartel, of distant or past drug debts, and

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[66] Indeed, to the extent the passing views of Williams and Kracht during one period of their investigation can constitute substantive evidence of a connection or of petitioner's reduced culpability, their final conclusions after a complete investigations should be even stronger evidence, albeit of his increased culpability. But, of course, the referee does not suggest that Williams's and Kracht's conclusions as to the *lack* of any connection would be admissible or useable as substantive evidence by the prosecution.

subsequent federal prosecutions pursuant to the DEA's drug sting operation. (Ref. Rpt. at 26-27.) The referee's findings fail to undertake any assessment as to the admissibility of this wide-ranging evidence, such as how the defense could overcome hearsay, foundation, and relevance problems with this information.

Respondent next objects to the referee's stunning leap of logic (or illogic) that additional information about Angarita's drug dealing would have caused the defense to conduct a mental evaluation of petitioner. (See Ref. Rpt. at 27-28 ["Once a viable duress defense became available the defense would have pursued psychiatric and psychological avenues showing thereby that petitioner was a more vulnerable target to people like Jose Angarita. A complete mental evaluation of petitioner would have been undertaken."].) The referee's findings inexcusably ignore the fact that the defense conducted a comprehensive mental evaluation of petitioner in August and September 1986, and presented that evaluation as mitigation evidence at petitioner's trial. (12 RT 3866-3938; *People v. Bacigalupo*, *supra*, 1 Cal.4th at pp. 120, 150.) The referee offers no rational explanation of how or why revealing the Kesselman interview would have caused the defense to somehow abandon the evaluation that was conducted and undertake a duplicative evaluation in the hopes of obtaining different results.

The referee's findings also improperly credit the conclusions of Dr. Rosenthal conducted years after his conviction without even considering, let alone critically assessing the findings and conclusions of Dr. Brady, petitioner's expert at trial. For example, the referee suggests the defense would have had petitioner evaluated to show petitioner had an I.Q. of 83, and was borderline retarded, while ignoring Dr. Brady's testimony that his testing showed petitioner had an I.Q. of 94, which is within the normal range, and that he suffered from no organic brain damage. (12 RT 3874-

3875, 3898, 3981; see also Resp. Exh. 1 at pp. 3-4 [noting I.Q. score of 94 and noting that petitioner successfully attained his G.E.D. while in prison].) The referee's failure to consider the trial evidence concerning the defense examination of petitioner's mental status as mitigation renders his findings on this point unsupported and unworthy of deference. (*In re Ross*, *supra*, 10 Cal.4th at p. 205; *In re Marquez* (1992) 1 Cal.4th 584, 602.) Moreover, although it is patent from the referee's findings that he did not even consider the contemporaneous evaluation conducted by Dr. Brady and his testimony at petitioner's trial, to the extent the referee is crediting subsequent evaluations over that performed by Dr. Brady, such findings exceed the scope of this Court's directions and are not properly considered by this Court. (*In re Ross*, *supra*, 10 Cal.4th at p. 204 [ignoring findings outside scope of questions]; cf. *In re Visciotti*, *supra*, 14 Cal.4th at p. 349 [explaining any "extraneous findings of the referee are irrelevant"].)

Respondent also objects to the final finding by the referee that, "The expert would have disclosed that petitioner told him that the same people who had murdered his brother in New York, drug dealers from a Colombian mob, had ordered him to kill these other people." (Ref. Rpt. at 28.) This finding once again reflects the referee's misunderstanding of the rules of hearsay. While an expert is entitled to rely on hearsay statements in making an evaluation, the defense may not introduce a defendant's self-serving hearsay statements through the guise of expert testimony as substantive evidence of guilt or innocence. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 895 [explaining it is improper to use expert testimony recounting hearsay statements for an "improper hearsay purpose, namely as 'independent proof of the facts.'"]; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525; see also *People v. Catlin* (2001) 26 Cal.4th 81, 137; *People v. Nicolaus* (1987) 54 Cal.3d 551, 582-583; *People v. Young* (1987) 189 Cal.App.3d 891, 913 ["The rule which allows an expert

to state the reasons upon which his opinion is based may not be used as a vehicle to bring before the jury incompetent evidence."].) Accordingly, the defense would not have been able to use psychological expert testimony to introduce petitioner's self-serving hearsay claims of duress.

VI. OBJECTIONS TO REFEREE'S FINDINGS FOR QUESTION FIVE

The fifth question asked by this Court was:

> Did a district attorney investigator or other member of law enforcement connected with this case instruct the confidential informant to withhold information at the ex parte hearing held on September 6, 1985? If so, what information, if any, did the confidential informant withhold at that hearing? Did the district attorney investigator testify truthfully at the hearing?

(Ref. Rpt. at 28.)

Respondent objects to the referee's findings with respect to question five. Williams did not instruct Kesselman to lie or withhold information at the hearing, Kesselman did not voluntarily withhold information, and Williams was truthful at the hearing.

A. Question Five, Part One

Respondent objects to the referee's finding that Williams directed Kesselman to withhold information at the 1985 in camera hearing. All of the referee's findings are predicated on his conclusion that Kesselman's 2006 reference hearing testimony was credible, notwithstanding the contradictions with her 1984 taped interview and her 2001 interview with Kracht. For the reasons detailed above, the referee's findings on Kesselman's credibility are legally suspect and factually unsupported. The same is true for the referee's findings that Williams was not credible. A comparison of Kesselman's in camera testimony with her taped statement reflects that she did not withhold information and that she was not told to withhold information during the in camera hearing.

First, Williams denied instructing Kesselman to withhold information during the in camera hearing. Williams testified about what she told Kesselman in advance of that 1985 hearing. She described for Kesselman the hearing format, explaining the defense would not be present. Only the judge, a court reporter, and the prosecutor would be present. (19 RRT 1483.) Williams told Kesselman to be truthful and answer the questions truthfully, including anything she knew about the homicide. Williams did not discuss with Kesselman William's own opinions that what Kesselman had told her about the homicides was speculation. (19 RRT 1483-1488.) Williams opined that Kesselman may have guessed as much because, despite Kesselman's speculation in April 1984, by May 1984 the prosecution was not pursuing the angle that Angarita was involved in the homicide. (19 RRT 1488-1490.) Williams told Kesselman to answer the questions and tell the truth. Williams did not instruct Kesselman not to speculate about things she did not know to be true. (19 RRT 1491-1492; 21 RRT 1834-1835, 1838.)

Kesselman, by contrast, testified that she wanted to say more during the in camera hearing, but did not reveal additional information because she was instructed by Sandra Williams to withhold information. (10 RRT 308-309.) Kesselman first made this allegation in her 1997 sworn declaration prepared by defense counsel. (Ref. Exh. 1.) However, when she was questioned about this declaration in 2001, she recanted this very allegation. Indeed, her recantation is quite telling. When Kracht interviewed Kesselman in her home, he asked her to read over her declaration. As she read it over, when she reached the part of the declaration which averred that Williams instructed her to withhold information, Kesselman spontaneously blurted out, "No. I did not say . . . that." (Ref. Exh. 5A at pp. 8-9.)

She and Kracht then had the following candid exchange:

Kracht: Sandy never told you that?

[Kesselman]: Sandy never told me that. Sandy never told me that.

Kracht: Why did that woman [Karen Schryver] put it in?

[Kesselman]: That I don't know. Now what . . . maybe she supplicated into this, with . . . I told her . . . I told her that I wondered all of those things. And Sandy had asked me about those things. But I told Sandy I had no knowledge of that as being true. But Sandy never ever . . . never told me not to mention that possibility. Never. She never said that. . .

(Ref. Exh. 5A at p. 9; see also Ref. Exh. 5A at p. 10 ["It's not accurate. It's . . . it's what . . . that was not accurate."]; Ref. Exh. 5A at p. 11 ["I discussed those things with Sandy – but Sandy never told me what to say or not to say. Ever."].)

The tape reflects that Kesselman was quite emphatic in her unprompted denials that Williams ever instructed her to withhold information at the in camera hearing. She also made clear in the interview that she had no personal information, and that Angarita made no admissions to her. (Ref. Exh. 5A.)

[Kesselman]: I told . . . I told this woman that . . . that at one time . . . that I . . . wondered if that was the case. But I never told her . . . I never told Sandy Williams specifically that I had knowledge, for sure, that it was a contract killing. That . . . that my suspicions from what they were talking about, that maybe it was a possibility. But I never had . . . I've never had any knowledge that it was a contract killing, period.

Kracht: O.K. So . . .

[Kesselman]: . . . And I never told Sandy that.

Kracht: And Sandy . . . O.K. Well . . . part . . . where it says, Sandy said . . . Sandy told me . . .

[Kesselman]: He told . . . let's see. Oh, O.K. This is about what Nance told to . . . But maybe Nance may have said that. But I never said . . . I never said . . . I may have said that I

wondered that but I was never told by anyone that it was a contract murder.

(Ref. Exh. 5A at p. 8.)[67]

In Kesselman's 2001 interview, she also listened to her 1984 taped interview and agreed it was complete and accurate, with nothing left out. (Ref. Exh. 11 at pp. 1-3.) And she read over her in camera testimony and agreed it was accurate. (Ref. Exh. 13A at p. 1.)

When she testified at the 2006 hearing, Kesselman recanted her 2001 interview, claiming Kracht threatened her, stopped and started the tape while giving her instructions during the tape breaks, and doctored the interview transcript. (11 RRT 505; 12 RRT 575, 579-581, 586-589.) Kesselman's claims that she was instructed to withhold information are not credible. Her repeated recantations, and her recantations of those recantations, as well as the fact that she necessarily lied under oath, makes all of her testimony on this point thoroughly suspect. Her testimony cannot be trusted, let alone credited. (*In re Roberts*, *supra*, 29 Cal.4th at p. 742; see also *In re Cox*, *supra*, 30 Cal.4th at pp. 998, 1004.)

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[67] The content of the 1997 declaration is notable in that it, too, lacked any account of the admissions supposedly made by Angarita, to which she testified in 2006. In her declaration, she stated that she "began to *suspect*" Angarita was involved in the killings based upon his odd behavior after the killing, her knowledge that the victims had at one time worked in his jewelry store, and a complaint he made about the Guerrero brothers being a burden on him. (Ref. Exh. 1 at p. 3 [italics added].) Later, Kesselman stated she told Sandy Williams all the information in the declaration and that it was "very *likely*" that Angarita was following orders to have the Guerreros killed and Bacigalupo met Angarita and that petitioner "*could have*" carried out those orders. (Ref. Exh. 1 at p. 4 [italics added].) Her account is once again couched in terms of speculation and possibility with no assertion of direct knowledge or admissions. No suggestion of any admission by Angarita comes out until her 2006 testimony.

Turning to the only reliable material, namely Kesselman's 1984 taped interview and the transcript of the in camera hearing, a comparison of the two reflects that Kesselman did not withhold information at the behest of Williams.

First, it should be noted that Williams was not present when Kesselman was questioned, so Williams had no immediate knowledge of what Kesselman told the judge, nor any means of directing her to answer any of the questions a specific way. (Ref. Exh. 2 at p. 17.) Second, Kesselman's testimony was fully consistent with her 1984 taped interview. Kesselman described the scene in front of the fireplace when Angarita was very upset about the murders and speculated that it must have been an execution based on the way the men were killed. (Ref. Exh. 2 at pp. 20-21.) And as with her taped statement, she acknowledged that Angarita's statements were all his own speculation, without any admissions of involvement. (Ref. Exh. 2 at pp. 20-21.) As detailed above, this account was entirely consistent with her 1984 taped statement, in which she characterized Angarita's statements as his own speculation about the murder.

The referee's findings that Kesselman lied at the in camera hearing at the behest of Williams (Ref. Rpt. at 28-29) are factually unsupported because they ignore the content of the 1984 taped interview, and are based on Kesselman's 2006 hearing testimony that lacks any credibility. Specifically, the referee found Kesselman lied when she answered negatively to the question, "Did Mr. Angarita give you any information that he knew it was a contract killing?" (Ref. Rpt. at 29; Ref. Exh. 2 at p. 17.) The referee's conclusion is based on his earlier finding that Angarita had told Kesselman that he was an instrument in setting up the murder and was involved in making it happen. As detailed above, this finding is unsupported and incorrect. The 1984 taped interview contains no

suggestion of any admission by Angarita and reflects that Angarita never made such an admission. He merely speculated based on the location of the bodies and the nature of the injuries. (Ref. Exh. 3A at pp. 43-48.) Accordingly, Kesselman's testimony at the in camera hearing was truthful and accurate.

The same is true for the question, "Did he give you any specific information that he knew it was a revenge killing?", to which she answered, "No." (Ref. Rpt. at 30; Ref. Exh. 2 at p. 21.) The 1984 taped interview shows that this answer was accurate.

Accordingly, the record reflects that Williams did not direct Kesselman to lie or withhold information during the in camera proceeding. Kesselman's in camera testimony was entirely consistent with her 1984 taped interview and her 2001 interview reaffirmed that. To the extent her 1997 declaration and her 2006 testimony are to the contrary, they are not credible and must be rejected.

B. Question Five, Part Two

Respondent objects to the referee's finding that Kesselman withheld information at the in camera hearing. Specifically, the referee found that Kesselman withheld information about the car ride to San Francisco. (Ref. Rpt. at p. 30 [incorporating his findings from Question two, part two].) While it is true that Kesselman did not testify about the San Francisco meeting at the in camera hearing, there is no indication she intentionally *withheld* that information. Rather, the hearing reflects that the questions she was asked focused on Angarita's statements and did not elicit information about the San Francisco meeting. Any failure by her to provide that information was an oversight, rather than an intentional omission.

A review of the in camera hearing shows that the questions to Kesselman focused first on her statements to Nance about Angarita, and

then on what Angarita said about the murders. (See Ref. Exh. 2 at p. 20 ["Now, going to what Mr. Angarita told you about the killing, would you please indicate to the court what you received from Mr. Angarita in that respect?"].)

After going through a litany of questions about what Angarita told to Kesselman, the prosecution then asked Kesselman about her meetings with Williams. (Ref. Exh. 2 at pp. 20-23.) Kesselman described her first meeting with Williams in March 1984, in which Williams described that she heard from Nance that Angarita may have been involved and Kesselman said, "No way," and explained that Angarita was just upset. (Ref. Exh. 23.) That was an accurate account as reflected in her 1984 interview in which she explained that she did not have real suspicions about Angarita until after she was interviewed by Williams. (Ref. Exh. 3A at pp. 40, 48-50.)

She was then asked about what she told Williams. Although this was an open-ended question, given the nature of the questions preceding it, Kesselman could easily have understood it to mean in relation to what Angarita told her, and she respondent "Just what I mentioned here." The next question asked if she left out of her conversations with Williams any of the things she testified to at the hearing, and she replied, "Not that I recall." (Ref. Exh. 2 at p. 23.) The questioning then returned to the issue of Angarita's statements. (Ref. Exh. 2 at p. 24-27.) Kesselman's responses to the questions about what Angarita said to her or indicated he "knew" as a fact were all entirely consistent with her 1984 taped interview.

Accordingly, the questioning during the in camera hearing focused almost exclusively on Angarita's statements and actual knowledge. Kesselman was not asked about the San Francisco meeting, and never willingly refused to answer any questions about that meeting nor

dissembled or obfuscated about that meeting. There is no indication in the hearing that she *intentionally withheld* that information.

C. Question Five, Part Three

Respondent objects to the referee's finding that Williams was untruthful at the hearing. (Ref. Rpt. at 30-32.) Once again, the referee's findings are predicated entirely on Kesselman's untrustworthy testimony at the reference hearing, rather than on the content of the 1984 taped interview.

Specifically, the referee found that Williams lied when she testified at the in camera hearing that Kesselman had no actual information about the murder case. The referee based his finding on Kesselman's testimony at the reference hearing "that Jose Angarita told [Kesselman] that the man they met in San Francisco had killed the Guerrero Brothers." (Ref. Rpt. at 31.) As detailed above, the 1984 taped interview refutes this precise claim that Angarita ever identified the man they met in San Francisco as the killer. (Ref. Exh. 3A.) Kesselman's claim first came to light at the reference hearing, and is even inconsistent with other statements she made at the reference hearing. (Compare 12 RRT 691, with 12 RRT 666.) Given the content of the 1984 interview, Williams's testimony was accurate.

The same is true for Williams's testimony that Kesselman did not indicate that Angarita had "specific knowledge that it was a revenge killing," or that Angarita had heard from any source that it was a revenge or contract killing. (Ref. Rpt. at 31; Ref. Exh. 2 at pp. 31-32.) These responses were entirely consistent with the content of the 1984 taped interview in which Kesselman describes only speculation on Angarita's part and recounts no information from Angarita revealing specific knowledge relating to the murders. (Ref. Exh. 3A.) Notably, before providing those negative answers to the court, Williams first accurately recounted Kesselman's description of the fireplace scene as described in the

1984 taped interview, along with Angarita's speculation about the nature of the double murder based on the position of the bodies. (Ref. Exh. 2 at pp. 29-30.)[68] Williams accurately noted that Kesselman's suggestions that Angarita had ordered the murders were her opinions and speculations. (Ref. Exh. 2 at pp. 30-31; Ref. Exh. 3A.) The referee found this testimony to be false, based on Kesselman's 2006 testimony that she told Williams about specific incriminating admissions made by Angarita. (Ref. Rpt. at 31.) As detailed above, that testimony is contrary to the 1984 taped interview and is untrustworthy, as is Kesselman herself. Because of the errors documented above, the referee's findings crediting Kesselman's 2006 testimony are unsupported.

The referee finds additional support for his conclusions that Kesselman was credible in describing the murders as hits, noting,

> "Yet, at one point Steve Price and Ronnie Nance also heard what [Kesselman] had said and placed sufficient credence in what she said to go to one of Jose Angarita's apartments to rob the apartment's residents of money and/or drugs. They certainly did not understand what [Kesselman] said to be speculation or mere opinion. Steve Price worked for or with Jose Angarita in the drug sales business; he knew what Jose Angarita was about.

(Ref. Rpt. at 31.)

This analysis involves a rhetorical slight-of-hand, substituting credibility on one point for that of another to bolster a claim for which the

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[68] The referee's suggestion that "Williams never answered the question about what Jose Angarita said to [Kesselman]," when Williams responded to the question about whether Kesselman was recounting what Angarita said or what her opinions were (Ref. Rpt at 31 [referring to Ref. Exh. 2 at p. 31], is unsupported because it ignores the fact that Williams had just accurately recounted what Angarita had said to Kesselman a few questions earlier (Ref. Exh. 2 at pp. 29-30), and consistent with the taped interview, explained that Kesselman was drawing her own opinions and conclusions from that incident.

predicate fact does not provide support. Specifically, Williams's testified that Kesselman gave unsupported opinion or speculation about Angarita's possible involvement in the murder, a topic about which Kesselman had no direct knowledge. (Ref. Exh. 2 at pp. 30-31.) Williams was not saying that Kesselman was speculating over Angarita's drug business. However, the referee attempts to show that Kesselman's thoughts about the murder were more than mere speculation, since Nance and Price committed a crime based on Kesselman's statements.

The logical flaw in this analysis is that Nance and Price did not "place credence" in Kesselman's speculation about the possible connection of Angarita *and the murders* in deciding to commit the drug rip-off. Her thoughts on the murders had nothing to do with their ill-fated robbery attempt. It was her actual, personal knowledge of Angarita's drug business, a topic about which Price also had first-hand experience that encouraged Price and Nance to attempt the drug rip-off, not any speculation she offered about a double murder. The referee's finding is based on making an overbroad assertion and improperly substituting one component in the logic chain for another to reach an unsupported conclusion. The referee points to Nance's and Price's trust in Kesselman's drug operation knowledge to commit a crime as showing they "placed credence in what she said," and then improperly substitutes into that equation the assertion that "what she said" was a link between Angarita and the murders, when in fact "what she said" was an account of inside information on his drug operation.[69] The referee's finding is logically flawed and unsupported.

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[69] It should also be noted that her information on Angarita's drug operation, upon which Nance and Price relied, proved to be less than reliable given the actual outcome of the supposedly simple drug rip-off.

Respondent also objects to the referee's finding that Williams lied at the in camera hearing about the San Francisco car trip. (Ref. Rpt. at 31-32.) While it is undisputed that Williams did not mention the car ride at the in camera hearing (Ref. Exh. 2), the flaw in the referee's finding is that she was not asked about that trip and there is no point in the hearing in which she dissembled, or withheld information about that car trip, or was unresponsive to a question about the car trip. (Ref. Exh. 2 at pp. 28-37.) Moreover, this in camera hearing occurred on September 6, 1985, over a year after the taped interview itself, and after Williams and Kracht had finished their investigation and concluded the individual was not petitioner. A review of the in camera hearing testimony reflects no attempt to lie to the court or withhold material evidence. Indeed, Williams was aware that the court was going to listen to and evaluate the interview tape as well as the testimony at the in camera hearing. Accordingly, Williams did not lie or intentionally omit any relevant information.

The referee, by contrast, found that Williams lied at the in camera hearing about the drive to San Francisco. (Ref. Rpt. at 31-32.) Notably, in finding she lied, the referee never cites to any statement Williams made at the in camera hearing or any question she refused to answer in withholding information about the drive. All of the referee's citations on this point are to her 2006 hearing testimony, not to the in camera hearing testimony. (Ref. Rpt. at 31-32.) The referee cites Williams's testiness at the 2006 hearing when she was questioned about whether she told the judge about the drive in 1985, as evidence that she must have withheld information. (See Ref. Rpt. at 31; 19 RRT 1506-1510.) Once again the referee's conclusion is not logically supported by the premise. The referee substitutes Williams's demeanor or testiness at the at the 2006 hearing in place of what occurred in 1985. Indeed, the referee focuses almost exclusively on the fact that Williams did not answer to the referee's liking

the question posed to her in 2006 about whether she told the judge during in camera hearing about the San Francisco drive. However, as the prosecutor pointed out at the 2006 hearing (and as the referee seemed to agree), the 1985 transcript speaks for itself in terms of what questions were asked and what answers were given by Williams. Any analysis of whether Williams lied or withheld information has to begin with her answers and demeanor in 1985, rather than her demeanor or responsiveness in 2006 to a fact already contained in the record from 1985.

For the reasons already stated above, Williams did not lie at the in camera hearing about the car trip. Moreover, to the extent Williams did not mention the car trip as part of the information conveyed by Kesselman, that omission was remedied by the production of the taped interview for the court to review before making its ruling. Accordingly, even though Williams did not refer to the San Francisco car ride, the prosecution did not withhold that information from the court at the in camera hearing. It provided that information in the form of the taped interview.

VII. OBJECTIONS TO REFEREE'S FINDINGS FOR QUESTION SIX

The sixth question asked by this Court was:

> Is it likely that disclosure of the confidential informant's identity to the defense would have led to evidence not otherwise known or available to the defense at the time of trial that would have supported petitioner's claim to have acted under death threats from the Colombian Mafia? If so, what is that evidence?

(Ref. Rpt. at 32.)

Respondent objects to the referee's conclusions about what evidence was not otherwise known to the defense that would have become available to the defense to support petitioner's claim he acted under death threats from the Columbian Mafia. (Ref. Rpt. at 32-33.) In identifying what would have been learned had Kesselman been disclosed, the referee "incorporates its findings of fact on Questions One, Two, and Three supra,

herein as if fully set forth." (Ref. Rpt. at 32.) The referee also incorporated his findings from Question Four. (Ref. Rpt. at 33.) Respondent has already objected to the referee's findings with regard to those questions as unsupported, and we explained the errors and flaws in those findings. Accordingly, the referee's findings as to this question are similarly unsupported and flawed.

Respondent also objects to the referee's findings because the referee's analysis fails to take into account that the taped interviews of Nance, DiLeonardo, and Angarita were already available to the defense, as was the Bolster memo on McCurdy.[70] As detailed above, all of this information was available to the defense, regardless of whether they took advantage of it. The defense could easily have located Kesselman through Nance, just as the prosecution had and as Schryver later did. Additionally, this information included numerous references to Angarita's drug operations. (Ref. Exhs. 19, 29, 50; see also Ref. Exh. 34 at p. 1 [Kracht report referring to Angarita as a suspect].) Accordingly, the defense already had substantial information referring to Angarita's drug operation to pursue had it chosen to do so. It did not. Given that history, revealing Kesselman's identity would not have altered that approach.

Respondent also notes that Kesselman's statement, in and of itself, was not beneficial to the defense because it contained no evidence of any threats or duress. As noted above, at most it showed a financial transaction that was contrary to any claim of threats.

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[70] Indeed, the referee expressly finds that revealing Kesselman as the confidential informant would also include the disclosure of the Nance, DiLeonardo, and Angarita interviews (Ref. Rpt. at 33), without acknowledging that these materials had already been provided to the defense through standard discovery procedures.

The referee asserts that, since Kesselman would have linked Angarita to petitioner's case, the defense would have sought additional evidence about the federal drug prosecution of Angarita. (Ref. Rpt. at 32-33.) However, the defense already had numerous references to Angarita in the discovery already provided. Moreover, *if* Kesselman's account of petitioner being in the car with Angarita was true, then the defense already had Angarita's name and link to petitioner's case from petitioner himself. And the defense could have learned of the federal drug prosecution from readily available public records.

The referee also found that, had Kesselman's identity and interview been turned over, "the defense would have learned the identity of Luis Laureano, located his person and learned of his information about Angarita and the double homicides." (Ref. Rpt. 33.) This finding ignores the fact that the defense already had Laureano's identity. Laureano's name and connection to the drug business is mentioned in the Nance interview, the DiLeonardo interview, the Angarita interview, and in the Bolster report on McCurdy. (Ref. Exh. 19 at p. 1; Ref. Exh. 23B at pp. 6-7; Ref. Exh. 29 at pp. 29, 55; Ref. Exh. 50 at pp. 1-2, 8-9.)

Moreover, nothing in Kesselman's taped interview suggests that Laureano would have been a lead worth pursuing. In her taped interview, she does not state that Laureano was in the car, she identified Augustine as the other person in the car. (Ref. Exh. 3A at pp. 54, 56-57.) And her account of the one discussion with Laureano on the subject indicated that he did not have any information linking Angarita to the murders. (Ref. Exh. 3A at p. 16.)

If, on the other hand, Kesselman's and Laureano's 2006 hearing testimony is to be believed about the car ride, then the defense already knew about the car ride from petitioner, and knew of Laureano's presence in the car, since the two were allegedly friends. Accordingly, the defense

would already have had more information about the car ride than the prosecution. Indeed, the referee's findings are flawed because the referee repeatedly fails to take into account what would already have been known to the defense via petitioner, if Kesselman's and Laureano's testimony were true. This flaw is best exemplified by the referee's finding that "[t]he defense would have learned from Luis Laureano (*who learned this from petitioner*) that Jose Angarita had threatened to kill petitioner's family if petitioner did not kill the Guerrero Brothers." (Ref. Rpt. at 33, italics added.) This finding is self-defeating. If it was known to petitioner (as the original declarant and one of two parties to the conversation), then it is not something that is *learned* by the defense. "Learned" information presupposes the information was unknown at the start, whereas defendant's conversations and associates are necessarily already known to the defense.[71]

Locating Laureano would not have benefitted petitioner's defense because Laureano would not have testified against Angarita at that time. Laureano made it clear during his federal prosecution that he would rather spend time in prison than testify against Angarita because he feared for his life. (34 RRT 3413-3418.) Also, for the reasons already set out above, Laureano's testimony was not credible.

Finally, Laureano's information would not have supported petitioner's claim because Laureano did not provide any direct evidence of threats against petitioner nor offer any reason why Angarita would not have used one of his paid assassins to commit the murders in a professional manner, rather than relying on petitioner to commit the murders and threatening him with death. Indeed, even though Laureano recounted Angarita's use of

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[71] By this same token, if Laureano's testimony is to be believed, the defense could have learned Kesselman's identity through Laureano as well.

death threats in his line of work, those threats were leveled against rivals or employees who crossed him. (34 RRT 3398-3401.) Laureano's testimony did not suggest that Angarita used death threats to force others to perform particular tasks against their will. Here, petitioner was neither a rival nor an employee of Angarita. If believed, he was an outsider who was recruited to perform the murders simply because of his nationality and prior prison record, with death threats serving as the only encouragement to force him to commit the offenses against his will. That modus operandi was contrary to Laureano's account of Angarita's use of assassins ("sicarios") for that very purpose.

In sum, the information contained in the Kesselman taped interview in 1984 would have provided the defense with little information that was not already available to the defense at the time, and would not have provided the defense with any additional information beneficial to petitioner's claim of duress. Accordingly, for these reasons and those already stated, respondent objects to the referee's findings to the contrary.

VIII. OBJECTIONS TO REFEREE'S FINDINGS FOR QUESTION SEVEN

The seventh question asked by this Court was:

> At the time of trial, what information was known to the prosecution that would have supported a theory that petitioner was hired to commit the murders or that otherwise could have been used to impeach a penalty phase case in mitigation based on petitioner's having acted under duress?

(Ref. Rpt. at 33.)

The only information known to the prosecution that had any connection to this allegation, i.e., that petitioner was hired to commit the murders was the following: petitioner's original confession to the police (Resp. Exh. 2), the hearsay assertions in the Nance interview (Ref. Exh. 29), the hearsay assertions in the DiLeonardo interview (Ref. Exh. 50), and

the statements made by Kesselman, recounting the speculation of Angarita (Ref. Exh. 3A).

The referee breaks down his findings by subject area. We address the referee's findings using that same structure.

A. Kesselman's Statements

With respect to the referee's findings that the prosecution knew of Kesselman's statements, respondent objects to the referee's finding "that Jose Angarita told [Kesselman] that the person from San Francisco whom she had met killed the Guerrero Brothers," and that "Jose Angarita claimed to have been an instrument in the killings." (Ref. Rpt. at 34.) These claims come solely from Kesselman's 2006 hearing testimony and are contrary to the content of the 1984 taped interview. As detailed above, these claims are incorrect, factually unsupported, and cannot be credited.

B. Petitioner's Statement

Respondent agrees that the prosecution had petitioner's statements made to the police at the time of his arrest. Respondent objects to the referee's finding that "[t]he DA's investigators had developed a link between Karlos Tigiboy and Jose Angarita, whom they thought at the time was a drug dealer." (Ref. Rpt. at 34.) As detailed above, the only source of this claim is the content of the McCurdy interview (Ref. Exh. 19), which was prepared by Defense Investigator Bolster and is inadmissible hearsay. McCurdy did not testify at the hearing. Accordingly, the referee erred as a matter of law in relying on this information for his findings. (See *In re Miranda*, *supra*, 43 Cal.4th at p. 574 [rules of hearsay apply to reference hearing].) Contrary to the referee's finding, the only admissible information on this point was Williams's testimony that the prosecution never developed any link between Tijiboy and Angarita or drug dealing (19 RRT 1341-1342; 20 RRT 1594-1597, 1665-1668; 21 RRT 1818-1820; 25

RRT 2188-2191, 2226; Ref. Exh. 26), and Tijiboy's own sworn trial testimony denying any drug dealing or connection to Angarita (10 RT 3352-3360). Accordingly, the *evidence* establishes that the prosecution did not have any knowledge that Tijiboy was involved in drug dealing or connected to Angarita. The referee's finding on this point is unsupported and erroneous.

C. Nance's Statements

Respondent agrees that the prosecution had knowledge of the content of Nance's taped interview (Ref. Exh. 29). Respondent objects to the referee's finding that "[t]he prosecution also had the statements of Nance, including the statement memorialized in Exhibit 19 in which Alayne Bolster wrote: 'Ron [McCurdy] states in the Padilla case the defendant had indicated that he was forced to make a hit for the Colombian mafia, because they threatened to kill his parents.'" (Ref. Rpt. at 34.) This finding fails for two distinct reasons. First, as noted above, the contents of the McCurdy report were inadmissible hearsay, and thus could not be relied on by the referee.

Second, as detailed above, the referee erred in attributing this statement to Nance. There is nothing in Reference Exhibit 19 to suggest that this statement came from Nance, and there is no basis for so finding. Indeed, there is not even a single reference in the entire report to Nance, let alone a suggestion that Nance was the source of this particular statement, or any statement described in the report. Nance never suggested he met or spoke to petitioner (Ref. Exh. 29), and thus could not be the source of this information.[72] It is patent that the source of this statement by McCurdy was

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[72] As pointed out above, it appears the error came from the fact that the reference in the report begins with "Ron states in the Padilla case . . . " (Ref. Exh. 19), and the referee may have inadvertently assumed at some

(continued...)

petitioner's confession to the police (Resp. Exh. 2), and not any information obtained from Nance.

The referee compounds his error by transferring the attribution of this information from Nance to Kesselman. The referee found, "Since everything that Nance knew about the threat from the mafia to kill petitioner's parents came from [Kesselman], [Kesselman] had that information. [Kesselman] gave this information to the prosecution." (Ref. Rpt. at 34-35.) This finding is plainly not supported by the facts. Indeed, this finding is contrary to all the testimony at the hearing. Kesselman never claimed to have spoken with petitioner, except for her reference in her taped statement to having been introduced to the man in San Francisco. (Ref. Exh. 3A at pp. 59-61.) Kesselman consistently denied hearing any of the conversation in the back of the car, noting that it was all in Spanish. (10 RRT 287; 11 RRT 446, 465; Ref. Exh. 3A at p. 62.) Kesselman also never suggested that Angarita reported threatening petitioner. Accordingly, there is no basis for attributing this information to Kesselman. Nor is there any basis for finding that Kesselman reported this claim to the prosecution. (Ref. Rpt. at 35; see Ref. Exh. 3A.) The referee's finding is without factual basis.

D. Other Information About Angarita and the Murders

The only information known to the prosecution about Angarita and his possible connection to the murders came from Kesselman in her 1984 interview. Although the prosecution also had the Nance and DiLeonardo

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(...continued)
point in his analysis that the name "Ron" referred to Nance, rather than Ron McCurdy. The referee subsequently attempted to clarify the declarant by writing "Ron [McCurdy] states in the Padilla case . . . ," but failed to fix his findings to remove his erroneous reliance on the initial error attributing the statement to Ron Nance, instead of Ron McCurdy.

interviews, neither claimed to have actual knowledge of any of the information they were relaying. DiLeonardo traced his information back to Nance via Hensley, and Nance credited Kesselman as the source for his information. The prosecution also had the interview of Angarita, in which he denied any connection to the murders.

The referee included in his findings of information known to the prosecution that "Jose Angarita was concerned that the victim's family was accusing him of having something to do with the homicides." (Ref. Rpt. at 35.) However, the referee fails to note that the Guerrero family did so only because Williams had questioned them about Angarita, not because the family had any personal knowledge of a connection between Angarita and the murders. (18 RRT 1306-1307, 1324.) The referee's reliance on the family's unfounded suspicions is bootstrapping to create more "evidence" out of the repetition of rumor, and is unsupported by the evidence.

The referee also points to the prosecution's knowledge of the arrest of Angarita's sister at the airport, carrying two kilos of cocaine. (Ref. Rpt. at 35.) However, the referee's conclusion that this provided information linking Angarita to the murders is unsupported. It potentially links Angarita only to drug dealing, a point not in dispute, without any connection to the murders.

Respondent objects to the referee's finding that the prosecution knew Angarita was linked to the Medellin Cartel. (Ref. Rpt. at 35.) The claim that Kesselman gave this information to the prosecution comes from Kesselman's 2006 hearing testimony. The 1984 taped statement contains no reference to the Medellin Cartel. For the reasons already stated above, Kesselman's 1984 taped statement is the only reliable source of what she reported to the prosecution during the investigation.

Respondent objects to the referee's finding that "[t]he prosecution had information that the Guerrero Brothers worked for Jose Angarita. The

prosecution also had information that the Guerrero Brothers had lost a large quantity of cocaine, and for that reason Jose Angarita ordered their murders." (Ref. Rpt. at 35.) This claim is totally unsupported. This allegation that the Guerrero Brothers worked for Angarita and lost a large quantity of drugs, came from Laureano's hearing testimony, not Kesselman's. (Compare 10 RRT 300-301; 11 RRT 434; 12 RRT 659, 689; Ref. Exh. 1 [Kesselman referring to Guerreros's old drug debt with another Peruvian Cartel], with 34 RRT 3390-3394 [Laureano's testimony].) There is no suggestion that the prosecution ever interviewed Laureano or was aware of any of his testimony before he submitted a declaration to the defense in support of petitioner's petition. Accordingly, there is no factual basis to support the referee's finding that the prosecution was aware in 1984 of Laureano's allegation that the Guerrero Brothers worked for Angarita, had lost a large quantity of cocaine, and were ordered killed by Angarita. Moreover, for the reasons already set out, Laureano's testimony on this point is thoroughly suspect and his testimony lacks any credibility.

To the extent the referee finds that the prosecution was aware of the content of Kesselman's 2006 testimony regarding the Guerreros, respondent objects to the finding to the extent it is inconsistent with the 1984 taped interview.

Respondent objects to the referee's reference to the fact that Williams indicated for a brief period in March and April 1984 that Angarita was a suspect and that the prosecution was investigating the possibility of a drug hit or hired hit as falling within the category of "*evidence* . . . that would have supported petitioner's claim," within the meaning of this Court's questions to the referee. As explained above, a prosecution investigator's opinions about a case or the role or involvement of various suspects is not *evidence* of a claim of duress or any substantive fact relating to the crime. This is particularly true of a transitory opinion or view of an investigator

that is subsequently discarded as result of further investigation. The referee provides no legal basis for his conclusion that such transitory opinions constitute "evidence," and respondent is not aware of any. The referee's finding on this point, and all related references to the fleeting opinions of members of the prosecution team (particularly opinions that were subsequently discarded in light of further investigation), is legally irrelevant to this Court's inquiry.

E. Knowledge of Judge Allegro and the Prosecution Team

Respondent agrees that Judge Allegro was aware of the contents of the Nance interview (Ref. Exh. 29), the DiLeonardo interview (Ref. Exh. 50), the Angarita interview (Ref. Exh. 23A&B), and the Kesselman interview (Ref. Exh. 3A), as well as Kracht's reports (Ref. Exh. 34). (Ref. Rpt. at 36.) Respondent agrees that Judge Allegro was aware of Kesselman's references to the San Francisco drive to the extent they were contained in Kesselman's 1984 interview, and she was aware of the subsequent investigation by Williams and Kracht debunking the car ride connection. (24 RRT 2056-2059.) Judge Allegro was also aware of Kesselman's speculation about whether the murders were a contract hit as relayed in her taped interview. However, respondent objects to the referee's findings to the extent this speculation is offered as fact or to the extent the referee bases his findings on information other than Kesselman's taped interview, for reasons already detailed above.

Respondent objects to the finding by the referee that "[i]n her handwritten answer to Question Two Joyce Allegro indicated she believed at the time of this hearing that the San Francisco meeting was disclosed to the defense." (Ref. Rpt. at 36 [citing Ref. Exh. 32].) As explained above, the handwritten notation to which the referee is referring in Exhibit 32 is: "Stmts from Angarita & Nance to PD – Ø Devine." (Ref. Exh. 32 at p. 3.) The "Ø" symbol is commonly understood to mean "not," and Judge Allegro

confirmed in her testimony that her notation meant that statements from Angarita and Nance were provided in discovery, but not the statements from Kesselman (a.k.a. Divine). (24 RRT 2044-245; see also 24 RRT 2022, 2049, 2051, 2053.) The referee's finding with respect to Judge Allegro's purported belief that the Kesselman interview was turned over is unsupported by the record.

Respondent objects to the referee's finding that "Joyce Allegro knew that [Kesselman] was shown petitioner's photograph by Sandra Williams and [Kesselman] indicated that the man she and Jose Angarita met in San Francisco was the defendant/petitioner." (Ref. Exh. 36.) Respondent objects to the referee's characterization of this information. Respondent notes that, although it is unclear whether Kesselman saw a photograph of petitioner from Williams or from the news media, her interview reflects that she did not identify the photograph as the man on the San Francisco car ride when she saw it, and her identification was tentative at best, and did not match petitioner's description. (Ref. Exh. at pp. 50, 65-66.)

Respondent objects to the referee's finding that Judge Allegro "knew that there was no reference to the trip and meeting during [Kesselman's] testimony at the in camera hearing" (Ref. Rpt. at 37), as unsupported by the evidence. Judge Allegro knew the in camera hearing occurred, and knew the purpose of that hearing and the nature of the questioning to be undertaken for the judge. Judge Allegro, however, was unavailable for the in camera hearing and was not involved in conducting that hearing. (24 RRT 2029, 2069; Ref. Exh. 2.) Judge Allegro therefore had no knowledge of what specific questions and answers were given at that hearing. Judge Allegro also explained that the hearing and the associated transcript from that hearing were sealed and she did not see a copy of the transcript until well after trial, when a transcript had been prepared as part of the appeal. (24 RRT 2149-2150.) The correctness of Judge Allegro's testimony on this

point is demonstrated by the fact that the transcript of that in camera hearing was not prepared until July 6, 1987, as part of the transcripts on appeal. (Ref. Exh. 2 at p. 38 [reporter certification page].) Petitioner's trial concluded and his death sentence was imposed on June 12, 1987 (12 RT 4048-4075), which was the end of Judge Allegro's involvement in the case until the current habeas petition.[73] Although Judge Allegro was not aware of the specific content of the in camera hearing, she was aware that Judge Ambler had been provided with the taped interview of Kesselman in order for him to make his ruling, and thus was aware that Judge Ambler knew of the car trip as described in that interview. (24 RR 2078.)

Accordingly, the referee's finding that Judge Allegro knew of the precise content of Kesselman's testimony at the in camera hearing is unsupported by the evidence. The evidence demonstrates that Judge Allegro knew the in camera hearing was conducted to provide Kesselman's information to the judge for a determination on disclosure, and that Kesselman's taped statement, which included her account of the car ride to San Francisco, was provided to the judge for his evaluation in rendering his decision.

Respondent agrees that Judge Allegro was aware of the content of Kracht's supplemental police report (Ref. Exh. 34). (Ref. Rpt. at 37-38.) The referee also found that Judge Allegro knew of the specific content of Kracht's rough notes (Ref. Exh. 25). Respondent disagrees with the referee's finding that Judge Allegro knew the precise content of those notes, as she had no recollection of ever seeing them and does not usually receive an officer's rough notes when a report is generated. (24 RRT 2034-

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[73] Judge Allegro first reviewed the in camera hearing transcript in 2001, as part of the current habeas petition allegations. (34 RRT 2038, 2069-2070.)

2036.) However, when presented with those notes, Judge Allegro observed that the content was essentially the same as Kracht's supplemental report (Ref. Exh. 34), with which she was familiar. To the extent the referee identifies the portions of Exhibits 34 and 25 which reflect opinions or investigative decisions as constituting substantive "*evidence*" known to Judge Allegro, respondent objects to the referee's finding as legally erroneous and irrelevant to the question asked, for the reasons stated above.

Respondent agrees that Judge Allegro was aware of the content of the DiLeonardo interview, which included a reference to Angarita and Laureano wanting to get back the seized ledgers. (Ref. Rpt. 38; Ref. Exh. 50 at p. 10.) However, in recounting the content of the DiLeonardo interview known to the prosecution, the referee omits the fact that DiLeonardo reported to the prosecution in the interview that Angarita told him it was not a drug hit.

> DiLeonardo: My ethical problems are this. I have represented all these people in the past. I have represented Jose Angarita. And he has come and seen me in the last two months several times, including after talking to Mrs. Williams over at the District Attorney's Office. He has revealed some things to me that I just cannot, you know, reveal. I don't believe it has in any way anything directly to do with this particular murder. O.K.?
>
> Kracht: O.K.
>
> DiLeonardo: And, in fact his statements to me were that he does not believe it was a drug execution situation.

(Ref. Exh. 50 at p. 6.)

Accordingly, the DiLeonardo interview did not support petitioner's claim of duress for committing a hired murder.

Respondent objects to the referee's finding that "Joyce Allegro erred in her claim in these proceedings that the statements of Nance and Angarita and information about the San Francisco meeting information were turned

over to the defense in discovery. This information was not turned over in discovery." (Ref. Rpt. at 38.) The referee's finding is based on an incorrect legal assumption that discovery requires that materials be physically transferred to the defense to be "turned over." As detailed above, Judge Allegro satisfied her discovery and *Brady* obligations by making the Nance and Angarita interview tapes available to the defense at the police station through the standard discovery practice at that time. Judge Allegro authorized the release of the tapes, and they were in the police file available for copying. (24 RRT 2029, 2031, 2047, 2051-2052; 27 RRT 2543; 28 RRT 2619, 2666-2667, 2679; 29 RRT 2801; 32 RRT 3151-3156, 3159; Ref. Exh. 32 at pp. 23, 41.) Nothing more was required by the prosecution to provide discovery and satisfy *Brady*. The referee's finding that Judge Allegro did not turn over these tapes is factually unsupported and legally erroneous.

Respondent objects to the referee's finding that "Joyce Allegro and the prosecution team considered Jose Angarita a suspect at some point in 1984 and this fact was never disclosed to the defense" (Ref. Rpt. at p. 39), as based on a erroneous legal premise. As detailed above, the transitory opinions or views as to who may or may not be a suspect during an ongoing investigation is not substantive "evidence," and is not a *fact* which the prosecution is obligated to disclose to the defense. (*Morris v. Ylst*, *supra*, 447 F.3d at p. 742; *United States v. White*, *supra*, 671 F.2d at p. 1133; *Williamson v. Moore*, *supra*, 221 F.3d at p. 1182; cf. *Roland v. Superior Court*, *supra*, 124 Cal.App.4th at p. 169.)

Respondent agrees that the prosecution knew Williams attempted to determine if there were any records of petitioner, or even someone named "Miguel," staying at a hotel in downtown San Francisco in evaluating the accuracy and veracity of Kesselman's information (Ref. Rpt. at 39), and the prosecution knew that all those efforts had negative results. (18 RRT 1364-

1367; 19 RRT 1431-1434; 21 RRT 1770-1773, 1787-1788; Ref. Exh. 22 at pp. 3-4.) Accordingly, the prosecution knew there was no evidence to corroborate Kesselman's allegations.

Finally, respondent objects to the referee's singling out of Judge Allegro as complicit in any claim of withholding information in his findings. Judge Allegro was not assigned to the case until after the preliminary hearing, held on April 17-18, 1984. The first indication in the record of her assignment to the case was April 27, 1984, well after the last significant interview with Kesselman. (24 RRT 2034, 2043-2044.)

Respondent has already detailed at length why the record does not support the referee's finding that Kesselman provided any information to the prosecution other than what was detailed in the April 18th taped interview. However, if this Court were to conclude otherwise, respondent submits that any additional information was provided to Williams and was not shared with the rest of the prosecution team, and the referee's finding that any additional information was known to Judge Allegro personally, is unsupported.

Williams conducted all of the interviews of Kesselman, and Judge Allegro did not take part in any of the interviews. Accordingly, Judge Allegro's only direct knowledge of Kesselman's statements came from listening to the taped interview. Judge Allegro would have had to learn of any unrecorded statements from Williams, who did not create any reports on Kesselman other than her entries in her activity log. (See 21 RRT 1819; 23 RRT 1970; Ref. Exh. 22.)

Kracht, who joined the investigation into Kesselman's allegations on April 16, 1984, testified at length that Kesselman never gave him any additional details of Angarita's statements or the car drive other than what was reflected in the April 18th taped interview, and certainly did not tell him about any of the information contained in her 2006 testimony. (32

RRT 3054-3081.) More importantly, Kracht testified at length that Williams never suggested to Kracht that Kesselman made any statements to her other than was contained in the 1984 taped interview and never reported to him any of the information detailed in her 2006 testimony. (32 RRT 3054-3081.) The referee expressly found Kracht's testimony credible. (Ref. Rpt. at 4 ["The court finds that Kracht was a credible witness."].) Accordingly, to the extent this Court agrees with the referee and concludes that additional information was revealed to Williams by Kesselman, the record reflects that no such information was shared with Kracht. The same conclusion applies equally for Judge Allegro, who had less of a role in investigating Kesselman's allegations. Her testimony is consistent with Kracht's in that she never received any information about Kesselman other than what was in the taped interview. Accordingly, if Kesselman did pass on additional information not contained in the 1984 interview to Williams, Williams did not share that information with Kracht or Judge Allegro. Accordingly, although any actions of a member of the prosecution team would be attributable to the prosecution as a whole for purposes of evaluating a *Brady* claim, respondent objects to any suggestion by the referee that Judge Allegro had personal knowledge of such additional information or was personally complicit in any failure to provide such additional information to the defense.

F. Findings Regarding Exhibits

Respondent agrees that the prosecution was aware of the information contained in Exhibits 2 [Kesselman in camera hearing], 3A [Kesselman 1984 interview], 23A&B [Angarita interview], 25 [Kracht raw notes], 29 [Nance interview], and 50 [DiLeonardo interview]. (Ref. Rpt. at 39.) Respondent objects to the referee's findings "that these exhibits were not disclosed to the defense." (Ref. Rpt. at 39.)

As detailed above, Exhibits 23A&B, 29, and 50 were made available to the defense under standard discovery procedures. The referee's findings to the contrary are contrary to the evidence.

Although Kracht's raw notes (Ref. Exh. 25) were not turned over to the defense, the report which was created based on those notes, Exhibit 34, was turned over. And as Judge Allegro observed, there was no meaningful distinction between the discoverable material contained in Exhibit 25 and the report turned over in Exhibit 34.

Finally, the Kesselman interview and the Kesselman in camera hearing transcript (Ref. Exhs. 2 & 3A) were not disclosed to the defense by order of Judge Ambler following the in camera hearing. The prosecution took the legally appropriate step of turning that material over to the court for an evaluation and complied with the court's order based on its finding. The prosecution had no further obligation with respect to those exhibits.

IX. CONCLUSION

In sum, respondent objects to any finding that Kesselman or Laureano were credible witnesses at the reference hearing. The record reflects that they were not credible.

Respondent objects to any finding that Kesselman provided information to the prosecution in 1984 beyond that contained in her 1984 taped statement. The taped interview was contemporaneous with the events and is the best record of what was revealed, as opposed to Kesselman's testimony at the reference hearing 22 years later, which contradicts that taped statement and her sworn in camera hearing testimony.

Respondent objects to any finding that the prosecution did not make available to the defense, pursuant to standard discovery practices, every taped interview other than Kesselman's. The record overwhelmingly establishes that the tapes were authorized for release and made available to the defense.

Respondent objects to any finding that the prosecution directed Kesselman to lie or withhold information from the court at the in camera hearing or that Williams lied during that hearing. The record reflects that the testimony at the hearing was consistent with the taped interview, and the taped interview was provided to the court for review.

Finally, respondent objects to any finding that the prosecution failed to reveal information beneficial to petitioner's claim of duress. As detailed above, the prosecution turned over all information, save for the taped statement which was ordered withheld by Judge Ambler. Moreover, the information was not beneficial.

The referee's findings are not only factually unsupported, they are predicated on fundamental legal error which infected the referee's analysis and results. The referee ignored the applicable rules of hearsay, not only admitting inadmissible evidence, but basing his findings and conclusions on such evidence. (*In re Miranda*, *supra*, 43 Cal.4th at p. 574; *In re Fields*, *supra*, 51 Cal.3d at p. 1070 & fn. 3.) The referee failed to apply the governing standards for evaluating a recanting witness's credibility. (*In re Roberts*, *supra*, 29 Cal.4th at p 742; *In re Cox*, *supra*, 30 Cal.4th at p. 998, 1004.) And the referee did not review the original record in making findings that depended on knowledge and evaluation of the original testimony. (*In re Ross*, *supra*, 10 Cal.4th at p. 205; *In re Marquez*, *supra*, 1 Cal.4th at p. 604.) These legal errors render the referee's findings critically flawed and unreliable. Consequently, this Court must set aside the referee's findings and conduct its own independent review of the record applying the correct rules of evidence and applicable guiding legal principles.

RESPONDENT'S BRIEF ON THE MERITS

In his petition for writ of habeas corpus, petitioner contends that the prosecution committed misconduct because it "failed to disclose the names of a confidential informant and other witnesses and their statements which supported a duress defense . . . ." (Pet. at 143 [claim G]; See generally *Brady v. Maryland*, *supra*, 373 U.S. 83.) In claim G, petitioner argues that the prosecution improperly withheld the identity of and information given by Kesselman. (Pet. at 143-146.) Petitioner also contends in claim G that the prosecution committed misconduct by instructing the confidential informant to withhold information from the court at the in camera hearing. (Pet. at 146.) In claim I, paragraph 6, petitioner contends that the prosecution withheld exculpatory information from the defense regarding Ronnie Nance, Steve Price, and Luis Alberto Albarran-Arnal (a.k.a. Luis Laureano). (Pet. at 154.) Petitioner's claims lack merit.

I. THE PROSECUTION DID NOT WITHHOLD ANY EXCULPATORY INFORMATION IN VIOLATION OF *BRADY V. MARYLAND*

Petitioner's first claim is that the prosecution withheld exculpatory material by failing to turn over the taped interviews indicating the murders were hired hits rather than the product of a robbery. Petitioner's claim is unavailing.

A. Standard of Review

In *Brady*, the Supreme Court held that a failure to disclose material evidence favorable to the defense may constitute a violation of due process. "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."

(*Strickler v. Greene* (1999) 527 U.S. 263, 281-282.) "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses." (*In re Sassounian* (1995) 9 Cal.4th 535, 544.) "[E]vidence is 'material' under *Brady*, and the failure to disclose it justifies setting aside a conviction, only where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." (*Wood v. Bartholomew* (1995) 516 U.S. 1, 5 (per curiam), citing *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434); *United States v. Bagley* (1985) 473 U.S. 667, 682 (opinion of Blackmun, J.); *id.*, at p. 685 (White, J., concurring in part and concurring in judgment); see also *Strickler v. Greene*, *supra*, 527 U.S. at pp. 281-282; *People v. Memro* (1995) 11 Cal.4th 786, 837 [applying *Bagley*].)

Although the term "'*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence," that is to "any suppression" of so-called *Brady* material, "strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." (*Strickler v. Greene*, *supra*, 527 U.S. at pp. 281-282; footnote omitted.) A reasonable "possibility" that the suppressed evidence might have produced a different result is insufficient to satisfy the defendant's burden to establish a "reasonable *probability* of a different result." (*Id.* at p. 291 [emphasis in original] [citing *Kyles v. Whitley*, *supra*, 514 U.S. at p. 434].)

"[T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. [Citation.] Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' [Citation]." (*Ibid.*)

"Materiality includes consideration of the effect of the nondisclosure on defense investigations and trial strategies." (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1132.)

Moreover, to establish a *Brady* violation, a defendant must also show that he "did not possess the evidence nor could he have obtained it himself with any reasonable diligence." (*United States v. Newton* (11th Cir. 1994) 44 F.3d 913, 918.) "'Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession *or is available to a defendant through the exercise of due diligence*, then . . . the defendant has all that is necessary to ensure a fair trial. . . .'" (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1134, alterations in original; see also *United States v. Wilson* (4th Cir. 1990) 901 F.2d 378, 380 ["'[T]he *Brady* rule does not apply if the evidence in question is available to the defendant from other sources.'"]; see also *United States v. Davis* (11th Cir. 1986) 787 F.2d 1501, 1505; *United States v. Grossman* (2d Cir. 1988) 843 F.2d 78, 85 [no *Brady* violation when defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence" (citations omitted)]; *Lugo v. Munoz* (1st Cir. 1982) 682 F.2d 7, 9-10 [government has no *Brady* burden when facts are available to a diligent defense attorney].)

Applying these standards, petitioner's claim is unavailing.

B. Disclosure of Nance, DiLeonardo, and Angarita, Interviews

Petitioner contends that the prosecution failed to disclose to the defense information about Nance and Price. As detailed above, this claim is factually incorrect. The prosecution made the taped interviews of Nance, DiLeonardo, and Angarita available to the defense pursuant to standard discovery practices.

It is undisputed that, at the time of petitioner's trial, the standard discovery practice in Santa Clara County for taped interviews in the prosecution's possession was for the defense to go to the police department where the tapes were held in the defendant's file, identify which tapes to copy and present a blank tape to the police department to be exchanged for the copy of the interview tape. (24 RRT 2031, 2047, 2051 [testimony of Judge Allegro regarding discovery practice]; 28 RRT 2666, 2679 [testimony of defense counsel John Aaron regarding discovery practice]; 27 RRT 2543 [testimony of defense investigator Alayne Bolster regarding discovery practice].)

On March 8, 1985, petitioner's second trial counsel Michelle Forbes filed a discovery motion in court, in which she requested copies of all taped statements. (1 CT 233-235 [from original trial record]; see also 1 CT 228-232 [points and authorities in support of discovery].) She specifically pointed to the reference in Kracht's police report (Ref. Exh. 34), which she attached to her motion, that indicated the existence of a taped interview of DiLeonardo. (1 CT 228-235; Ref. Exh. 32 at pp. 23-26; 24 RRT 2139-2140.)

In response to this motion, Judge Allegro authorized the release of all taped interviews to the defense except for the taped interview of the confidential information Kesselman. (24 RRT 2052, 2138-2142.) Judge Allegro explained that, as a result of her authorization releasing all tapes except for the informant's, Forbes planned to narrow the focus of her discovery motion to just requesting the disclosure of the confidential informant's identity and taped statement, which would be the subject of the in camera hearing. (24 RRT 2052, 2141.) Judge Allegro's account is reflected in the copy of the defense discovery request containing her authorization, which she retained in her files. That record contains the notations she made authorizing release of all tapes except for that of the

confidential informant, with an indication that she granted Forbes's request on August 12, 1985. (Ref. Exh. 32 at pp. 23-25.) Judge Allegro's authorization is further reflected in a memorandum between members of the district attorney's law and motions team regarding the then-upcoming hearing to disclose the confidential informant's identity. (Ref. Exh. 32 at p. 41.)

Judge Allegro's account is confirmed by the fact that, on August 13th—the day after the noted "granted as modified date" on the discovery request—Forbes filed a new discovery motion focused exclusively on revealing the confidential informant's identity and taped statement. She no longer indicated any request for DiLeonardo's taped interview or other taped interviews in the prosecution's possession. (1 CT 240-241.) The narrow focus of this new motion demonstrates that Forbes had already received the authorization from Judge Allegro to obtain copies of all other interviews contained in the police files, which necessarily included the Nance, DiLeonardo, and Angarita interviews, with the sole exception being the Kesselman interview. The court's order following the in camera hearing, likewise reflects that the only remaining discovery controversy presented to the court by the defense was access to the Kesselman taped interview. (1 CT 250-251.)

As Judge Allegro explained, following her authorization for release of all tapes except for Kesselman's, all the defense had to do was bring the blank tapes to the police department to receive copies of the taped interviews. (24 RRT 2052, 2138-2142.) And as noted above, the evidence indicates that this discovery practice had already been acted upon earlier in the proceedings when, on January 11, 1984, defense investigator Keubel brought five 60-minute tapes and two 90-minute tapes to the police department (which corresponded to the lengths of first seven tapes in the police files), to copy the seven tapes then in the police files, including the

tapes of petitioner's confessions. (27 RRT 2411, 2416-2417; 28 RRT 2678-2679; 32 RRT 3152-3153; Ref. Exh. 44 at p. 1-2.) Petitioner has not offered any evidence to refute the showing that the tapes in the police files were *available for copying* based on Judge Allegro's authorization, notwithstanding whether the tapes were ever actually picked up or the absence of these tapes in petitioner's appellate or habeas files. Petitioner bears the burden of proving that the challenged evidence was not disclosed to him. (*Coe v. Bell* (6th Cir. 1998) 161 F.3d 320, 344 ["Though it would be a good precautionary policy for the government to keep such records, the burden remains on [the defendant] to prove that the evidence was not disclosed to him."].)

Accordingly, as of August 1985, the Nance, DiLeonardo, and Angarita interviews were available for the defense to examine and copy. It is of no legal significance that the defense may not have obtained those tapes from the police department. All that is required is that they be made available. (*People v. Zambrano*, *supra*, 41 Cal.4th at p. 1134.) As this Court observed in *Zambrano*:

> [T]he prosecutor's *Brady* obligation may, under proper circumstances, be satisfied by an "open file" policy, under which defense counsel are free to examine all materials regarding the case that are in the prosecutor's possession. [Citations.] Of course, if the prosecutor relies on such a policy to comply with *Brady*, the defense may assume his files contain all the evidence he is obligated to share. [Citation.] Concerns might also arise if the prosecutor used the policy to impose impracticable or unduly oppressive self-discovery burdens on the defense.
>
> But, for reasons detailed above, those concerns are not raised by this record. For all that appears, the letter was in the prosecutor's files, and would have been revealed by a timely, practicable examination of those files pursuant to the prosecutor's multiple invitations.

(*Id.* at pp. 1134-1135.)

The same is true here. The tapes were in the police department files and were readily accessible to the defense, pursuant to standard discovery practices known to the defense, and their release was expressly authorized by the prosecution. This practice satisfied the prosecution's *Brady* obligation with respect to these tapes. As this Court made clear in *People v. Morrison* (2004) 34 Cal.4th 698, 715:

> [T]he prosecutor had no constitutional duty to conduct defendant's investigation for him. Because *Brady* and its progeny serve "to restrict the prosecution's ability to suppress evidence rather than to provide the accused a right to criminal discovery," the *Brady* rule does not displace the adversary system as the primary means by which truth is uncovered. [Citation.] Consequently, "when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no *Brady* claim."

(*Ibid.*)

Accordingly, petitioner's Brady claim with respect to Nance is unavailing. Nance's interview was made available to petitioner.

Petitioner's claim regarding information pertaining to Steve Price also fails. It was undisputed at the hearing that Steve Price did not provide the prosecution with any exculpatory information. At the time Price was questioned by Williams, he denied any knowledge of the murders or of Kesselman's statements. (14 RRT 799, 818, 852-855, 860-862.) The only information he provided was Kesselman's location. Accordingly, the prosecution had no information regarding Price other than that contained in the Nance interview, which was already available to petitioner. Consequently, petitioner cannot establish a *Brady* violation with respect to Price.

C. Kesselman's 1984 Interview

Petitioner's claim of prosecutorial misconduct for not turning over the Kesselman taped interview is also unavailing. First, the prosecution did not commit misconduct because it did not withhold Kesselman's identity or taped statement in violation of *Brady*. The prosecution fulfilled its legal obligation by presenting Kesselman's identity and information to a judge for in camera review. (Cf. *United States v. Todd* (6th Cir. 1990) 920 F.2d 399, 405 ["[T]he government tendered these reports to the District Court for an *en camera* review to determine if they contained exculpatory evidence that defendant would be unable to discover through his own interviews. Given this procedural safeguard, we think that the defendant's due process rights were protected adequately notwithstanding his inability to discover the FBI reports." Footnote omitted]; *United States v. Dent* (3d Cir.1998) 149 F.3d 180, 191 ["[t]he district court's in camera inspection of [a police officer's] personnel files fully satisfied *Brady*'s due process requirements."].) The appropriate challenge would be to the trial court's ruling that the information did not need to be discovered. Notably, petitioner has already unsuccessfully challenged the trial court's ruling as violating *Brady* by ordering that Kesselman's identity and taped interview need not be revealed to the defense. This Court reviewed the records from the in camera hearing and rejected petitioner's claim in his original appeal. (*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 123.)

Petitioner contends that Kesselman provided additional information to the prosecution which was not turned over to the court for the in camera review or to the defense. We disagree. As detailed above, Kesselman's taped statement was a full and complete account of what she provided to the prosecution.

Petitioner cannot satisfy the requirements for demonstrating a *Brady* violation for not providing the Kesselman taped interview to the defense.

Indeed, petitioner's claim fails all three prongs; the information was not exculpatory, it was reasonably available to the defense through the exercise of reasonable diligence, and it was not material.

1. Not exculpatory

The taped interview is not exculpatory, in that it neither helps petitioner nor hurts the prosecution. Specifically, the key to petitioner's mitigation claim at the penalty phase was that he acted under "extreme duress" within the meaning of Penal Code section 190.3, factor (g). It is not enough merely to suggest that petitioner committed the murders as a hired assassin for a drug lord, as that alternative view of the murders is even more inculpatory than committing the murders as part of a botched robbery. Such information would only become exculpatory if it showed that petitioner acted under duress. Kesselman's information did not provide any support for his claim of duress, nor would it lead to any potential admissible information to support his claim.

There are two components to the taped interview relevant to the inquiry—the references to Angarita's statements, and the San Francisco drive—which require distinct analyses. First, Kesselman's accounts of Angarita's statements are not exculpatory. The statements she described were speculation, containing no admissions by Angarita, and as such, the statements would not have been admissible at trial.

Kesselman initially noted that Angarita stated that one of the victims worked for him. However, Angarita later elaborated for Kesselman that Orestes Guerrero had initially worked for Angarita in Angarita's jewelry business, before starting his own business with Angarita's help. (Ref. Exh. 3A at p. 46.)

Kesselman also reported that Angarita initially told her he knew the killings were an "organized murder" and was "payback" over some type of bad blood from back in Columbia. (Ref. Exh. 3A at pp. 37, 41-42.)

However, Angarita later explained his "organized murder" comment to Kesselman, stating that he thought it was a professional hit due to the positioning of the bodies in the jewelry store. (Ref. Exh. 3A at pp. 46-49.) When Kesselman asked him why the Guerreros were killed, Angarita said "I don't have no idea." (Ref. Exh. 3A at p. 11.) Kesselman viewed Angarita's actions and statements as suspicious, but explained it was just her impression of the events.

> Well I got the impression, I told her three, but . . . [¶] . . . Yeah, that it was the payback over an old debt, but I got the impression that it was something from Columbia, you know. But I don't know if that's true or not, but that's just the impression I got. I don't know what reason I have to have gotten that impression, but from the conversation I had.

(Ref. Exh. 3A at p. 12.) She goes on to explain that it was her "gut feeling" that Angarita might be involved, but offered no admissions by Angarita. (Ref. Exh. 3A at p. 12.)

In sum, Kesselman's 1984 account includes no admissions by Angarita of involvement or assertions of actual knowledge of petitioner's actions. More importantly, she offered no admissible evidence relating to petitioner's allegation of duress. Indeed, nothing in her discussion even hints at any threats made against the perpetrator of the crime. There is nothing exculpatory for petitioner's duress claim in her account of Angarita's statements.

There is also nothing in her account to suggest that her information would lead to admissible exculpatory evidence through any other witness. In her account, she reported that Laureano told her he did not believe Angarita was involved in the double murder. (Ref. Exh. 3A at p. 16.) Angarita already gave a statement to the police denying any knowledge of the murders. (Ref. Exhs. 23A & 23B.) Accordingly, there was nothing exculpatory in her statement regarding Angarita's comments, nor were her

statements likely to lead to exculpatory evidence admissible at petitioner's trial.

The same holds true for Kesselman's account of the car ride to San Francisco. First, as detailed above, her account of the possibility that the person Angarita met in San Francisco was petitioner was not credible. None of the evidence fits that petitioner was the person whom they met in San Francisco.

Second, even taking Kesselman's account in the most generous light, identifying petitioner as the person whom they met in San Francisco, her account still is not exculpatory. At best, it puts petitioner in the car with Angarita before the murders. However, it lacks any information about what occurred in that car. Kesselman did not understand the conversation in the back seat, as it was in Spanish. (Ref. Exh. 3A at p. 64.) Nothing in the nature of the meeting or the conversation suggested that there were any threats made or duress placed on petitioner to murder the victims. (Ref. Exh. 3A at pp. 59-68.) Accordingly, without the evidence of any threats, the account was not exculpatory.

Moreover, the account conflicted with petitioner's own statement about the orders to murder the victims and the threats against his family. Petitioner claimed he was at his home in Palo Alto the night before the murders, when he received a call from Tijiboy who gave him the orders to murder the victims and threatened that his family would be killed by the Peruvian mafia if he refused. (Resp. Exh. 2 at pp. 8-9, 10.) Petitioner never mentioned any trip to San Francisco or meeting with Angarita the night before the murders. Accordingly, the account by Kesselman not only failed to provide any evidence of duress, it conflicted with and undermined petitioner's own post-arrest statements, upon which his entire duress claim was based. Kesselman's information was not exculpatory.

2. Reasonably available to the defense

Petitioner's *Brady* claim also fails because the information was either already known to petitioner or available through the exercise of reasonable diligence. As this Court explained:

> The second element of a *Brady* claim is that the evidence must have been "suppressed" by the government. [Citations.] Although the prosecution may not withhold favorable and material evidence from the defense, neither does it have the duty to conduct the defendant's investigation for him. [Citation.] If the material evidence is in a defendant's possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the defendant has all that is necessary to ensure a fair trial, even if the prosecution is not the source of the evidence. [Citations.] Accordingly, evidence is not suppressed unless the defendant was actually unaware of it and could not have discovered it "'by the exercise of reasonable diligence.'" [Citations.]

(*People v. Salazar* (2005) 35 Cal.4th 1031, 1048-1049.)

As noted above, the only evidence actually known to Kesselman from the 1984 taped interview was the car ride to San Francisco. If petitioner was in fact the person Angarita met in San Francisco, then that meeting was necessarily already known to petitioner. As such, it does not come within *Brady*. Moreover, Kesselman explained in her taped interview that she was introduced to the man they met in San Francisco, which was how she knew his name. (Ref. Exh. 3A at pp. 59, 61.) If that man was petitioner, then petitioner already knew Kesselman's name through that same introduction.

Furthermore, although Kesselman's identity was not disclosed to the defense, her identity was readily obtainable by the defense through the exercise of reasonable diligence. As noted above, Kracht's supplemental police report indicated that Ronnie Nance had reported that the murders were "drug related executions." (Ref. Exh. 34 at p. 2.) The report further

indicates that Nance was interviewed and attributed these statements to the confidential informant. The report also noted that Ronnie Nance had been interviewed while in custody at the Santa Clara County Jail on April 19, 1984. (Ref. Exh. 34. at p. 2.) The report detailed that the informant reported statements by Angarita suggesting the murders were based on revenge, not robbery. (Ref. Exh. 34 at p. 1.)

Accordingly, from this report alone, the defense knew that the informant had information about Angarita's statements. The informant had told Nance about those statements. Nance related those statements to Santa Clara Police Sergeant Hensley, and similar statements were related by a local attorney named Joseph W. DiLeonardo. Based on this information, the defense could easily have located Sergeant Hensley at the Santa Clara Police Station or attorney DiLeonardo through public records. They could also have located Nance by researching public records, examining Santa Clara county jail records for April 19, 1984, consulting Sergeant Hensley, or even reviewed the public defender's records, in light of Nance's county jail status.

Moreover, not only did the defense have the supplemental police report, it also had access to Nance's taped interview and DiLeonardo's taped interview. The defense was certainly aware that DiLeonardo's interview was taped based on the supplemental police report (Ref. Exh. 34), and Nance's interview was available in the same file. Any effort to follow up on Forbes's successful discovery request for the release of all available tapes, except the confidential informant's, would have provided them with Nance's interview.

Nance's taped interview identified the confidential informant as "Gale." (Ref. Exh. 29 at pp. 13, 16, 26-27, 29-30.) If petitioner was the man at the meeting in San Francisco, then he would have known "Gale" to

be the person to whom he was introduced by Angarita the night before the murders. (Ref. Exh. 3A at pp. 59, 61.)

Nance provided a direct path to locating "Gale" through Steve Price. (Ref. Exh. 29 at pp. 13, 29-30, 36, 46, 56.) Nance reported that Gale and Price live in Boulder Creek, he gave directions to Price's house, and he gave Price's beeper number. (Ref. Exh. 29 at p. 25, 48-50.) Price testified at the hearing that, had he been contacted by the defense, he would have given them Gale Kesselman's name and told them how to locate her. (14 RRT 819, 872, 875.) Indeed, federal habeas counsel Karen Schryver was able to follow this trail to locate Kesselman through Nance and Price, based solely on Kracht's supplemental report. (11 RRT 522-523; 29 RRT 2872-2784, 2871-2872.)

Accordingly, the defense already had Nance's account of Kesselman's statements, her first name, and the means by which to obtain her via Steve Price. Moreover, Judge Allegro authorized the release of the tapes in August 1985, and petitioner's trial did not begin until February 1987, giving petitioner ample time to locate Kesselman had they so chosen. Accordingly, petitioner's claim fails. (*People v. Salazar*, *supra*, 35 Cal.4th at pp. 1048-1049.)

3. Not material

Finally, Petitioner cannot meet his burden of showing a reasonable probability that had the evidence been disclosed, petitioner would have received a different outcome for the penalty phase of his case. (*People v. Earp* (1999) 20 Cal.4th 826, 866.) First, none of Angarita's speculation about the murders being a professional hit or payback were admissible or likely to lead to any admissible evidence. Kesselman's opinion of Angarita's involvement—which was premised on Angarita's odd behavior and her gut feeling—likewise was not admissible evidence, nor likely to

lead to admissible evidence. Accordingly, it would not have resulted in a more favorable outcome.

Kesselman's account of the San Francisco trip also was not material. As explained above, Kesselman's account of petitioner's involvement in the San Francisco meeting was dubious at best. In her account, Kesselman acknowledged that Angarita repeatedly referred to the person they were meeting as a major Columbian cocaine distributor from New York. (See, e.g., Ref. Exh. 3A at pp. 53-55.) The man was already staying in a hotel in San Francisco, and Kesselman called the hotel and confirmed he was staying there, possibly in room 1011. (Ref. Exh. 3A at pp. 58-60.) Kesselman also acknowledged that Angarita had "been making all these phone calls to New York." (Ref. Exh. 3A at p. 68.) None of this information supports a meeting with petitioner, a poor twenty-two year old former robber, who was now working alternately as a busboy and an employee at a Jack in the Box restaurant in Palo Alto.

Angarita's statement that he was going to meet the man again the next day at 2:00 p.m. in San Jose, also undermines any suggestion that Angarita met petitioner to set up the double murder. (Ref. Exh. 3A at p. 62.) Plainly, if petitioner was being directed to kill the victims the next day, he was not going to be meeting Angarita that day, and petitioner's description of events after the murder negates any suggestion of such a meeting. Accordingly, nothing about Angarita's comments suggests that he was meeting with a busboy to arrange the murder of the Guerreros.

As detailed above, Kesselman's description also did not match petitioner. The man she described was at least a decade older than petitioner, and had acne scars and maybe a stubbly beard. (Ref. Exh. 3A at p. 61; 21 RRT 1783-1784; 25 RRT 3135-3146; see also Ref. Exh. 53.) He also was wearing clothing that was not consistent with petitioner's known wardrobe. (21 RRT 1788-1789.) Also, petitioner did not have the means to

afford to stay at a downtown San Francisco hotel. Indeed, he had no personal means of getting himself to and from San Francisco, and would have had to rely on public transportation.

Kesselman's 1984 account also did not mesh with petitioner's story that he told to the authorities upon his arrest. And, nothing in Kesselman's account bolstered petitioner's claim of duress. Given the flimsy and speculative nature of Kesselman's account, the obvious conflicts with petitioner's own account, the inherent contradictions between what was known about petitioner and what was reported by Kesselman, and the absence of any evidence of threats or duress in Kesselman's account, there is no reasonable possibility that had Kesselman's information about the car ride been turned over to the defense and presented at the penalty phase that petitioner would have received a more favorable outcome at the penalty phase.

For all these reasons, the superior court correctly ruled that Kesselman's information did not need to be revealed to the defense, and this Court properly affirmed the trial court's decision after reviewing the same material. (*People v. Bacigalupo*, *supra*, 1 Cal.4th at p. 123.)

D. Kesselman's 2006 Testimony

Even if this Court accepts the referee's findings that Kesselman was credible in her 2006 testimony about what she told prosecution witnesses, petitioner's claim fails for the same reasons.

Even taking Kesselman's 2006 testimony as true that Angarita acknowledged that he was an instrument in arranging for the murders and identified petitioner as the man they met in San Francisco, her information still is not exculpatory. Kesselman's account is missing the key component that would render the information exculpatory, namely evidence of duress. There was no dispute throughout the proceedings that petitioner was the murderer. Additional evidence connecting him to the murders would not

have provided petitioner with exculpatory material. To the contrary, evidence showing a planned and organized murder, with petitioner acting as a hired assassin would only serve to increase his culpability. Kesselman's 2006 account does not offer any evidence of *threats* against petitioner. Accordingly, her testimony is not exculpatory.

As explained above, Kesselman, who was identified as "Gale" in the Nance interview, could have been located based on the information provided to the defense with reasonable diligence. Nothing in her 2006 testimony suggests she would not have been cooperative or forthcoming had she been contacted earlier.

Finally, Kesselman's 2006 account provides no evidence of threats or duress. It is therefore not material to petitioner's duress claim. There is no reasonable likelihood of a more favorable penalty phase result had Kesselman been identified to the defense.

E. Luis Laureano

Petitioner also contends that the prosecution violated its *Brady* obligations by failing to turn over information pertaining to Laureano. This claim is unavailing.

First, the prosecution never had any exculpatory material pertaining to Laureano. It is undisputed that the prosecution did not interview Laureano. The prosecution only had minimal information about Laureano from second-hand sources, and most of that information was turned over. Specifically, the prosecution first learned of Laureano's name from the Nance interview, which was made available to the defense. Laureano was also mentioned in the DiLeonardo interview, which linked Laureano and Angarita. That interview was made available to the defense. Angarita acknowledged knowing Laureano, without providing any detail, during his

interview. That interview was made available to the defense.[74] Notably, in none of these interviews was there any suggestion that Laureano had any information pertaining to the double murder, or would lead to admissible evidence pertaining to the double murder.

The only information about Laureano not turned over was contained in Kesselman's interview. She noted that Laureano was a loyal employee of Angarita and was heavily involved in Angarita's drug trade. However, she reported that Laureano did not have any information about the double murder. She recounted that she asked Laureano if he thought Angarita was involved in the murders, and Laureano replied, "I don't think so." (Ref. Exh. 3A at p. 16.) Accordingly, Kesselman's report on Laureano was not exculpatory. Critically, in her 1984 taped interview, Kesselman did not suggest that Laureano was in the car with Angarita when they met with the man in San Francisco. She identified Augustine as the other person in the car. Consequently, most of what was known about Laureano was made available to the defense, and none of what was known about him was exculpatory.

Moreover, given what was provided, the defense had ample opportunity to locate and interview Laureano if it deemed him to be an important witness. The defense had his name and knew his connection to Angarita. The defense could have located him and interviewed him with the exercise of reasonable diligence. The prosecution did not withhold any exculpatory information from the defense with respect to Laureano.

Second, if Laureano's testimony at the hearing was true, then petitioner already knew the critical aspects of Laureano's account at the time of trial. According to Laureano's 2006 testimony, petitioner

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[74] Laureano's name was also linked to Angarita in the Bolster report on McCurdy, which was necessarily in the possession of the defense.

purportedly was friends with Laureano. Petitioner would have known of Laureano's claim that Angarita introduced petitioner to Laureano. Petitioner was necessarily aware of any admissions he made to Laureano. Petitioner also would have known that his friend Laureano was in the car when he met Angarita in San Francisco. Accordingly, if Laureano's testimony is true, petitioner already knew Laureano's identity and significance, and could have obtained him as a witness between 1984 and 1987 while his trial was pending. Accordingly, Laureano's identity and information was known to petitioner and readily available with reasonable diligence.

Third, Laureano's testimony was not material. As detailed above, Laureano's testimony was so patently false, and so thoroughly contradicted by known facts, that it was not credible. There is no reasonable likelihood that petitioner would have received a more favorable outcome based on Laureano's claims. Petitioner has not established a *Brady* violation.

II. THE PROSECUTION DID NOT COMMIT MISCONDUCT BY DIRECTING KESSELMAN TO WITHHOLD INFORMATION FROM THE COURT AT THE IN CAMERA HEARING

Petitioner contends that the prosecution committed misconduct by directing Kesselman to withhold information at the in camera hearing. Petitioner's claim lacks merit.

This claim is predicated entirely on Kesselman's 1997 declaration and 2006 testimony. As detailed above, Kesselman swore under oath at the in camera hearing in 1985 that her testimony was truthful and that she had nothing else to add. (Ref. Exh. 2.) Her 1997 declaration was a recantation of her sworn testimony. (Ref. Exh. 1.) However, she recanted that 1997 declaration in her 2001 interview. (Ref. Exh. 5A at pp. 8-11.) She then recanted her 2001 interview in her 2006 testimony, claiming she was

threatened by Kracht, and asserting that Kracht doctored the interview tape and transcript. (11 RRT 505; 12 RRT 575, 579-581, 586-589.) Her allegations were rebutted by Kracht's testimony and the actual tapes of those interviews. (32 RRT 3088-3089, 3093-3098, 3106-3109, 3112, 3125-3126; Ref. Exhs. 4, 4A, 6, 6A, 7, 7A.) Given the twist and turns in her statements, her repeated recantations of recantations, and her baseless allegations of intimidation and evidence tampering, her allegation that she was directed by Williams to lie and withhold information cannot be deemed credible. (*In re Roberts*, *supra*, 29 Cal.4th at p. 742; *In re Cox, supra*, 30 Cal.4th at pp. 998, 1004.) By contrast, Williams's testimony denying ever instructing Kesselman to lie or withhold information at the in camera hearing was consistent and credible. (19 RRT 1483-1492; 21 RRT 1834-1835, 1838.) Indeed, it defies belief that Williams would direct Kesselman to withhold information when testifying before Judge Ambler, or lie herself about Kesselman's information, knowing full well that Kesselman's taped statement was going to be turned over to the judge as part of the in camera review.

The most telling fact demonstrating that Kesselman was not directed to withhold information was that her testimony was entirely in conformity with her taped interview. The consistency between her taped statement and her testimony prove petitioner's allegation of misconduct lacks merit. (Compare Ref. Exh. 2 with Ref. Exh. 3A.) Kesselman was not directed to withhold information.

The same is true of Williams's testimony, which also accurately matched the content of the 1984 taped interview. Williams did not lie to, nor intentionally withhold information from, the judge at the in camera hearing.

Petitioner focuses on the fact that the San Francisco drive was not mentioned in the in camera hearing by either Williams or Kesselman.

However, as detailed above, that was simply a consequence of the questions asked focusing on Angarita's admissions, rather than the inquiring about the drive. This focus was entirely appropriate given the speculative and dubious nature of the drive to San Francisco actually involving petitioner. At most it was an unintentional oversight.

More importantly, the prosecution cured any omission by providing the court with the tape of Kesselman's interview which recounted the San Francisco trip in detail. Thus, no information about the car ride was withheld from the court. Petitioner's claim that Williams lied at the hearing or directed Kesselman to withhold information is meritless.

III. THE PROSECUTION DID NOT COMMIT MISCONDUCT BY PRESENTING PERJURED TESTIMONY AT THE TRIAL

Petitioner also raises the allegation that the prosecution knowingly presented perjured testimony. He asserts that the prosecution presented Tijiboy's testimony, knowing that it was false. Respondent disagrees.

There are two bases for petitioner's claim, the Bolster memo regarding the McCurdy interview and Laureano's declaration and testimony. Neither support petitioner's claim.

A. The Bolster Memo

First, as detailed above, the content of the Bolster memo (Ref. Exh. 19) is inadmissible hearsay and thus may not be considered by this Court as substantive evidence. (*In re Miranda*, *supra*, 43 Cal.4th at p. 574; *In re Fields*, *supra*, 51 Cal.3d at p. 1070 & fn. 3.)

Second, for the reasons already set out above, the allegation raised in this memo that the prosecution knew of a drug dealing connection between Tijiboy and Angarita has been thoroughly debunked. (15 RRT 968-970, 978, 1018-1019; 18 RRT 1266, 1268-1270, 1341-1342, 1378-1379; 19 RRT 1414-1416; 20 RRT 1574-1610; 23 RRT 1933-1943, 1975; 34 RRT

3566-3568 [testimony of Iraida Golden]; 9 RT 3080-3082; Ref. Exh. 17; Ref. Exh. 22 at p. 1; Ref Exh. 26 at pp. 3-6.)

Third, any claim of prosecutorial misconduct for presenting perjured testimony is forfeited by a failure to object at the time of Tijiboy's testimony. The defense was in possession of the Bolster memo at the time of trial, and thus could have made a timely and specific objection. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1253 [claim that prosecutor presented perjurious testimony forfeited]; *People v. Marshall* (1996) 13 Cal.4th 799, 830-831 ["We conclude defendant waived his claim that his conviction was based on false testimony by failing to raise it at trial when the falseness of Mitchell's testimony was well known to him . . . ."].)

B. Laureano's Testimony

Petitioner also cannot sustain this contention based on Laureano's declaration and testimony. The prosecution never spoke to Laureano, and petitioner has never demonstrated that the prosecution was aware of any of Laureano's allegations at the time of trial. Thus, Laureano's 2006 testimony cannot support a claim that it was aware of any falsity in Tijiboy's testimony in 1987.

Moreover, as detailed above, Laureano's testimony was demonstrably false and unreliable. Thus, the fact that Laureano's testimony was contrary to that of Tijiboy's does not support the conclusion that Tijiboy's testimony was false. Accordingly, petitioner cannot demonstrate any misconduct, related to Tijiboy's trial testimony. Petitioner's claim fails.

IV. PETITIONER'S CLAIMS MUST BE DISMISSED AS UNTIMELY AND AS PART OF AN UNEXCUSED SUCCESSIVE PETITION

Respondent reiterates the arguments made in our informal opposition to petitioner's petition that his claims are untimely and his petition must be dismissed as successive without justification.

Respondent already set out in our informal opposition the procedural history of petitioner's appeals (decided in 1991 and 1993), and his prior state habeas petition (denied on May 12, 1994), as well as the applicable legal standards for an untimely petition and a successive petition. (Resp. Inf. Opp. at pp. 2-3, 11-24.) Petitioner has not demonstrated diligence or good cause to overcome the timeliness bar or to justify filing a second or successive petition.

As detailed above, petitioner already had all of the information he needed to pursue the claims raised in Claims G and I. He had Kracht's supplemental report, and full access to the DiLeonardo interview, and most importantly, the Nance interview which identified the confidential informant as "Gale" and indicated that she could be located through Steve Price. The interviews also identified Laureano as working for Angarita's drug network.

Karen Schryver, who was appointed by the federal court as petitioner's federal habeas counsel explained how she was able to locate Kesselman from the materials already in the defense files. First she located Nance based solely on the reference to him in Kracht's supplemental report. (11 RRT 522.) Nance directed her to Price, from whom she obtained Kesselman's name. (11 RRT 523.) And based on that information she located Kesselman. (11 RRT 523-526.) Notably, Schryver acknowledged that defense counsel could have located Kesselman before trial through the same means she undertook for the second habeas petition. (29 RRT 2750.) The same can be said for the first habeas petition, which was handled by Cliff Gardner, with the assistance of Karen Schryver, who was then employed by CAP. (29 RRT 2731-2734.) Petitioner offers no justification for the delay in investigating Nance, no explanation for the lack of diligence in pursuing this claim, nor any reason why this investigation could not have been undertaken as part of the first state habeas petition.

The same holds true for Laureano. The defense had access to Laureano's name in the Nance interview, the DiLeonardo interview, the Angarita interview and the Bolster memo on McCurdy. Moreover, the defense had the name of Angarita's ex-wife Hovgaard from the Kracht supplemental report. Schryver explained that she located Laureano through interviewing Hovgaard, who referred Schryver to her ex-boyfriend who was acquainted with Laureano. (29 RRT 2754-2756.) The defense offers no justification why this investigation could not have been undertaken sooner or as part of the first habeas petition. Accordingly, petitioner's claims are also barred as untimely and successive.

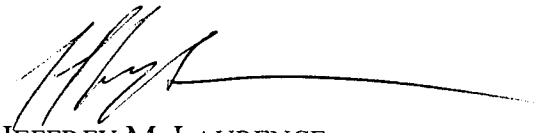
CONCLUSION

For the reasons stated above, respondent respectfully objects to the referee's findings. Respondent respectfully submits that petitioner is not entitled to any relief on his claim that the prosecution failed to turn over to the defense material, exculpatory evidence or that the prosecution committed prejudicial misconduct. The petition for writ of habeas corpus should be denied.

Dated: November 30, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
GLENN R. PRUDEN
Supervising Deputy Attorney General



JEFFREY M. LAURENCE
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S EXCEPTIONS TO FINDINGS OF REFEREE AND BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 61,658 words.

Dated: November 30, 2009

EDMUND G. BROWN JR.
Attorney General of California

JEFFREY M. LAURENCE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Miguel Angel Bacigalupo, on habeas corpus**

No.: **S079656**

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 November 30, 2009, I served the attached **RESPONDENT'S EXCEPTIONS TO FINDINGS OF REFEREE AND BRIEF ON THE MERITS** 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:

Robert R. Bryan
Law Offices of Robert R. Bryan
2088 Union Street, Suite 4
San Francisco, CA 94123-4124
(2 copies)

Robert S. Mahler
Macdonald, Hoague & Bayless
705 Second Ave., 15th Floor
Seattle, WA 98104-1705
(2 copies)

Karen S. Schryver
California Appellate Project
One Ecker Place
San Francisco, CA 94105-3647
(2 copies)

California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105-3647

The Honorable Dolores Carr
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Hall of Justice
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

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 November 30, 2009, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature