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No: S 130495 | DEATH PENALTY

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

PETITIONER'S REPLY TO RETURN

TO ORDER TO SHOW CAUSE

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

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

Attorneys for Petitioner
JARVIS J. MASTERS

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TO: THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATES JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner, Jarvis J. Masters, filed a Petition for Writ of Habeas Corpus with this court on January 7, 2005.

After asking for and receiving informal briefing from the parties, on February 14, 2007, this court issued an Order to Show Cause, directing the respondent, the Director of the Department of Corrections and

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

The respondent filed his Return to the Order to Show Cause on July 16, 2007. The return consists of eight roman-numeraled sections and numerous subsections, and incorporates by reference one exhibit, but no declarations.

I. GENERAL DENIAL

Petitioner herein realleges and incorporates by reference the entire Petition, Informal Reply and accompanying exhibits previously filed with this Court. Petitioner also makes the following response to the Attorney General's Return to the OSC:

Respondent has not presented any facts sufficient to directly contradict the facts alleged in the Petition. To the extent that respondent suggests that petitioner's declarants may have some bias (or, in respondent's words, "nothing to lose"), he has merely raised the possibility of a lack of veracity – a possibility which can only be tested in an evidentiary hearing, following discovery, in which a referee has the opportunity "to observe the demeanor of witnesses and their manner of testifying." *In re Marquez* (1992) 1 Cal. 4th 584, 603 (regarding deference accorded factual findings of referee).

It is incumbent upon the Attorney General that the Return "respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful." *People v. Duvall* (1995) 9 Cal.4th 464, 476. Failure to factually address petitioner's claims constitutes an admission of their truth. "Facts set forth in the return that are not disputed in the traverse are deemed true. (Citation) Conversely '[W]hen the return effectively acknowledges or "admits" allegations in the petition and traverse which, if true, justify relief sought, such relief may be granted

without hearing on other factual issues joined by the pleadings.'" *Duvall* at p. 477, quoting *In re Saunders* (1970) 2 Cal.3d 1033, 1048.

Accordingly, petitioner denies the claims in paragraph V of the Return that petitioner is guilty in fact, lawfully under a sentence of death, and lawfully confined. Petitioner furthermore denies the underlying judgment is valid, and denies that the judgment is neither infected nor impaired by error.

II. MATTERS DEEMED ADMITTED

An OSC has issued in this case on the factual allegations contained within Claims II, III, and V of the Petition for Writ of Habeas Corpus. Because the Attorney General has not controverted the following factual allegations contained within those claims, and which are realleged and incorporated by reference herein, they must be deemed admitted:

A. Paragraph 132 of the Petition is within Claim II, relating to petitioner's factual innocence, and concerns the evidence the trial court excluded concerning Harold Richardson, who admitted to prison officials his involvement in the Burchfield murder, in the role attributed by the State to petitioner, and who fit the description given by Willis of the person he named "Masters." Richardson is important to items (1)-(3) in the Order to Show Cause, as it corroborates petitioner's claim that Willis' testimony was unreliable and coerced.

Respondent made no mention of any allegations in the Petition herein regarding Richardson. Accordingly, the allegations of paragraph 132, that the fourth inmate involved in the killing was Richardson and not Masters, should be deemed admitted.

B. Paragraphs 192-193 relate to Claim III, the pervasive failure of the State to maintain and disclose exculpatory evidence. Paragraph 192 claims that CDC Special Services Unit Agent James Hahn chronically failed to relay exculpatory information that he found out from parolees and others until he had forgotten the information. Paragraph 193 claims that both of the State's primary witnesses, Rufus Willis and Bobby Evans, destroyed evidence. Respondent's Return did not deny either of these claims, which must therefore be deemed admitted.

III. TIMELINESS

Respondent alleges throughout the Return that the petition, and each of its claims, was untimely. (Return, p. 13, § VII.C; p. 19, § IX.C; p. 20, § X.C; p. 22, §XI.C; p. 27, § XII.C; p. 29, § XIII.C) Petitioner denies each of those allegations, for the reasons set forth in the Petition at Paragraphs 35-44. (Petition, at pp. 14-18)

IV. SPECIFIC DENIALS

A. DENIALS TO SECTION VI OF THE RETURN

Regarding the issue of whether "material false evidence was admitted at the guilt phase of his trial" (Return, pp. 4-9, § VI.B), petitioner makes the following denials, in the order of, and using the same numbering as, the Return:

1. Petitioner denies that Rufus Willis presented truthful testimony at trial.

a. Respondent claims that Willis' trial testimony is corroborated by the two "kites" (inmate communications) in Masters' handwriting, completely ignoring the evidence submitted by petitioner, via declarations by both Willis and Lawrence Woodard, that the content of the kites was supplied by Willis himself, along with orders to petitioner to produce the kites in his own handwriting. (Petition, ¶¶ 148-155, and exhibits there referenced) Respondent also ignores the statements by Bobby Evans which corroborate Willis' declaration:

> 13. Evans also revealed new information regarding the question-and-answer kite written by Willis and Johnson. (Ex. HC-14 [People's Ex. 153-B]) The kite, used by the prosecution in the trial, contains handwritten questions in Willis' handwriting and incriminating answers in Johnson's handwriting. Evans said he knew that the kite was bogus; the entire scheme was engineered by the State. Willis, he said, also gave Johnson the answers to the questions which he told Johnson to insert as his own answers on the questionnaire written out by Willis.

> 14. As for the "Usalama Report" kite in Masters' handwriting relied upon by the prosecution at trial, that, he said, was also engineered by them. (Ex. HC-5 [People's Ex. 159-C])
>
> (Declaration of Joseph Baxter in Support of Petition for Writ of Habeas Corpus, Exhibit HC-7)

Respondent, moreover, has not produced any evidence to dispute the fact that the kites were produced by Masters under Willis' orders, or to dispute the fact that the details within the kites were supplied by Willis. To merely re-state, as respondent does, Willis' testimony *at trial,* and to claim that he was testifying truthfully, proves nothing, for such a statement is meaningless if Willis had been lying at trial, as Willis admits in his declaration (Petition, Exhibit HC-1). Respondent, rather than meeting petitioner's allegations with facts, is merely bootstrapping what was said at trial to support what was said at trial, which responds not at all to petitioner's post-trial evidence and allegations.

b. Petitioner denies that Willis' recantation is either false or internally inconsistent. (Return, ¶ VI.B.1.b.(1)(2))

1) To say, as Willis did in his declaration (Petition, Exhibit HC-1) , that petitioner "had knowledge" of the plan, even that he was present at a meeting where the plan was discussed, is not inconsistent with petitioner's not having taken part in the planning or execution of Sgt. Burchfield. Prior to the conspiracy, petitioner could arguably have been chief of security, and as such could have been merely present at a

meeting, the “minor role” on which respondent relies. What is at issue is not whether petitioner was at one or even more than one of the meetings, but what part he took in those meetings, and specifically what part he took in the planning of the conspiracy. Thus, in paragraph 13 of his declaration, Willis states that Masters was at odds with the BGF leaders prior to the Burchfield murder. He was arguing with Woodard openly on the tier. He had been criticized by Woodard for being incompetent and insubordinate. Masters was not doing his job. (Exhibit HC-1, ¶ 13)

In paragraph 14 Willis also notes that Masters was not given any role in conjunction with the killing of Burchfield. In paragraph 18 Willis states that Masters told him on the yard once before the Burchfield killing that he did not agree with doing the hit. “He told me ‘I'm not with this.’” Finally, in paragraph 31 Willis states that Masters did not play any part in the death of Sgt. Burchfield. (Exhibit HC-1, ¶¶ 14, 18, 31)

Lawrence Woodard also corroborates the Willis declaration. Thus, Woodard specifically refers to a meeting on the yard which Jarvis Masters, Willis, Richardson, and Woodard attended. *Woodard states that Masters talked about a plan to attack other inmates who were rival gangs, but that when that plan was changed to include an attack on a correctional officer, Jarvis Masters opposed it.* After Masters refused to go along with the plan Masters became isolated from the BGF. (Exhibit HC-2, ¶ 3) Accordingly, respondent has made no inroads into the underlying allegation that Masters played no role in the conspiracy.

Moreover, to the extent that respondent may be said to cast doubt on Willis' allegation by virtue of the claimed inconsistencies, these are matters which can and should be resolved in a reference hearing.

2) Respondent argues that Willis' declaration that he tried not to lie is inconsistent with his admissions that he did lie. (Return, ¶ VI.B.1.6.(2)) Petitioner denies that Willis' statements – what he needed to testify to in order to satisfy his government handlers and at the same time *trying* not to lie (*compare* Exhibit HC-1, ¶¶ 20, 23) – are inconsistent. As Willis states in his declaration, he did not *want* to lie, but was *compelled* to lie by the District Attorney. (Exhibit HC-1, ¶ 20) He lied, but only stay alive. (*Id.*) Willis therefore limited his lies to "what I knew they wanted." (*Id.* at ¶ 23)

2. Petitioner denies that Bobby Evans testified truthfully at trial.
(Return, p. 6, ¶ VI.B.2)

a. Again, the use of the trial testimony and exhibits as self-validating evidence does nothing to show its truth in the face of Evans' statement and Willis' declaration admitting that false testimony and the kite exhibits were manufactured at the behest of the state. At most, respondent's argument might answer a claim on appeal that there was insufficient evidence to convict. But it would add nothing to the habeas issues raised herein. Moreover, while there may not be evidence on the record, *yet*, showing collaboration with each other, Willis'

and Evans' collaboration with the Department of Corrections and the District Attorney is what is at issue, and the declarations filed in support of the petition are far more than what is required at this stage to support petitioner's allegations of Bobby Evans' false testimony.

b. Petitioner denies that Evans' recantation is unbelievable. While petitioner has not yet obtained a signed declaration from Evans, there is no reason to believe that counsel's report of what Evans told him (Petition, Exhibit HC-7) was not true. Whether or not Evans' testimony, in a reference hearing, would be credible is something that can only be tested in such a hearing.

c. Evans' recantation, moreover, is supported by a large body of evidence establishing the people's failure to disclose the benefits received by Bobby Evans for his testimony. These facts are set forth at paragraphs 169-173 of the petition:

> 169. Evans testified under oath in three unrelated judicial proceedings: On April 25-26, 1996, in Yolo County preliminary examination proceedings in *People v. Williams*, Case No. 95-8640 (Ex. HC-16); on March 18, 1998, in San Joaquin County Grand Jury proceedings in *People v. Defendant A* (CR No. 97-60419) (Ex. HC-17); and on June 10, 1998, in Yolo County Superior Court proceedings in *People v. Bailey,* No. 98-0029 (Ex. HC-18).
>
> 170. This testimony under oath establishes that:
> (1) Since at least 1988 (before his testimony in the Masters trial), Evans was doing undercover drug buys for San Joaquin County (*People v. Williams,* Ex. HC-16, p. 270, Ex. HC-17, pp. 87-89);

(2) He was not prosecuted for 15 to 20 shootings because he was "granted immunity in Court, in State Court for testifying on a prison murder" of a prison guard at San Quentin. (*People v. Williams,* Ex. HC-16, pp. 82-83)

(3) He got probation following his April, 1989 Alameda County charges as a result of having testified "in a prison homicide" of a prison guard, "a Sergeant" – undoubtedly this case – and for testifying for the federal government on a large drug case (*People v. Bailey,* Ex. HC-18, pp. 94-95); and

(4) He was in the process of being indicted under the RICO Act when he decided to break the BGF oath and testify against the BGF. (*People v. Bailey,* Ex. HC-18, p. 96)

171. Thus, not only was Evans already a government snitch before the 1989 Alameda County arrest which led to his testimony against Masters – a fact not disclosed to Masters' attorneys or, of course, the jury – but he was granted probation in the Alameda County case *because* of his testimony against Masters, *which the government went to great lengths to conceal from the defense.* The State also concealed the fact that Evans was in the process of being indicted under the RICO Act when he agreed to testify against Masters.

172. These State concealments, moreover, are on top of the concealments discovered during the 1989-1990 trial of this case, which the trial court chose to ignore. Thus, during the trial it was discovered that the State concealed:

1. That James Hahn promised to postpone Evans' sentencing until a commitment to state prison could be avoided. (RT 13672-73, 13799, 13832, 13931, 17014; Masters Trial Exhibit 1230)

2. That Evans anticipated that his robbery and parole violation sentence would be modified. (Sealed RT of 1-5-90 at 2-4; RT 13673,16987)

3. That James Hahn interceded to obtain Evans' early release. (RT 16942, 16947-48, 16891, 16901, 16951, 17070; People's Exhibit 268)

173. Evans, moreover, has himself admitted a massive coverup by the State in conjunction with the prosecution of Jarvis Masters. At least as early as 1999, Evans was the target of a Yolo County Public Defenders' investigation as a result of his work as an informant for the State of California during the '90s. According to a *Sacramento Bee* editorial, Bobby Evans committed perjury in conjunction with many of the cases on which he had worked as an informant. (Exhibit A attached to Declaration of Joseph Baxter, Ex. HC-7.) Indeed, over a hundred cases were thrown out by the Yolo County and Butte County prosecutors because of the taint of Bobby Evans' perjury as an informant. (*Id.*) Bobby Evans has now admitted his own perjury in this case.

3. Petitioner denies that Lawrence Woodard's declaration (Petition, Exhibit HC-2) is not credible.

Respondent relies entirely on the claim that Woodard has exhausted his appellate avenues and *allegedly* has no recourse to habeas at this late date, and that, as a result, he has "nothing to lose" by declaring petitioner's innocence. (Return, p. 7, ¶ VI.B.3) This argument does nothing more than suggest that Woodard *might* not be credible, but, again, the argument indicates that a reference hearing is necessary to resolve the question of his credibility.

Respondent, moreover, offers no evidence that Woodard has no recourse to habeas at this stage. Respondent merely speculates. Such speculation is not a substitute for evidence, or an evidentiary hearing.

Woodard, in any case, has nothing to gain by declaring petitioner's innocence, and quite likely his testimony will create enmity with his jailers.

Respondent claims that Woodard's declaration lacks credibility because it does not admit entirely his own role in the Burchfield killing. (*Id.*) Woodard's declaration, however, is about petitioner's questioning of Woodard about *petitioner's* role, not about Woodard's role, and respondent will have ample opportunity to cross-examine Woodard on his role at a reference hearing.

Woodard's declaration, moreover, is corroborated by the declarations of Rufus Willis, Andre Johnson, and Charles Drume, as well as other independent evidence supporting the petition.

4. Petitioner denies that Andre Johnson's declaration (Petition, Exhibit HC-3) is incredible

Again, respondent uses the "nothing to lose" argument to suggest – but not prove – a lack of credibility (Return, p. 8, ¶VI.B.4), and again petitioner replies that this does nothing more than show the need for an evidentiary hearing.

Respondent, moreover, is wrong. Andre Johnson clearly does have something to lose. The Willis and Evans declarations suggest that Johnson was also a victim of prosecutorial misconduct in connection with the kites. By admitting his role in the Burchfield murder, Johnson has sacrificed the benefits he might be able to obtain by proving this prosecutorial misconduct.

Respondent also uses the trial testimony of Willis regarding a kite from Johnson to cast doubt on Johnson's declaration, which, again, is nothing more than bootstrapping some of the very testimony that Willis and Johnson, by their declarations, are putting into question. This is tantamount to saying "they couldn't have lied at trial because their trial testimony is contrary to what they are saying now." Similarly, respondent relies on one of the kites, about which Willis says, in his declaration, "At first, I met with Numark at the prison hospital and then went back to my cell in Carson Section to get writings from Masters. Later, I was put in the Adjustment Center *to get writings from Andre Johnson.*" (Exhibit HC-1, p. 4, ¶ 11) In other words, respondent relies on one of the kites that Willis fabricated for the state, using Johnson's handwriting. How this fabrication proves that Johnson's declaration is not credible is beyond, well, credibility. At best, it again shows the need for a reference hearing.

Respondent, as he does with Woodard, attacks Johnson's failure to completely ascribe to himself his own role, which was, after all, not the purpose of the declaration. And to the extent that Johnson qualifies his statement by saying that "to my knowledge" petitioner was not involved in the Burchfield conspiracy, he is attacking what in fact appears to be an absolutely truthful statement. While it does not directly exonerate petitioner (for Johnson was not in a position to completely exonerate), it goes directly to the *lack* of credibility in his purported kite (Trial Exhibit

153-A) which did not directly implicate petitioner except by virtue of Willis' now recanted trial testimony interpreting it. (53 RT 12926)

Petitioner, accordingly, denies respondent's allegations that there is good reason to question the credibility of the declarations of Rufus Willis, Lawrence Woodard and Andre Johnson and the statement of Bobby Evans to appellate counsel. (Return, p. 9, ¶ VI.C) To the extent that respondent relies on the very trial testimony which these declarations recant, the argument is circular, leading nowhere. To the extent that the credibility of these witnesses may be questioned, this is not something that can be decided on the basis of the pleadings and exhibits without a reference hearing to resolve the very questions respondent purports to raise.

B. DENIALS TO SECTION VII OF THE RETURN

Respondent, regarding the question of whether "newly discovered evidence casts fundamental doubt on the prosecution's guilt-phase case," incorporates by reference its responses to section VI of its return. (Return, pp. 9-10, §§ VII.A-C) Similarly, petitioner hereby incorporates the foregoing denials to section VI of the return, each and in total, to now deny the allegations set forth in section VII of respondent's return. A reference hearing is therefore appropriate and necessary as to whether newly discovered evidence casts a fundamental doubt on the prosecution's guilt-phase case.

C. DENIALS TO SECTION VIII OF THE RETURN

With regard to whether "petitioner's trial was fundamentally unfair because prosecution witness Rufus Willis' testimony was unreliable due to improper coercion by the prosecution," respondent again engages in bootstrapping. Thus, respondent attempts to use Willis' trial testimony to validate his trial testimony, without reference to the crucial fact that if Willis was lying at trial about the facts alleged, no amount of trial testimony can change that. (Return, pp. 10-14, §§ VIII.A-D) Petitioner denies that Willis' testimony was reliable and was not improperly coerced.

1. Petitioner denies that the reliability of Willis' testimony was fully and finally explored at trial and that the jury's implied finding of reliability settles the issue in this proceeding. (Return, pp. 11-13, §§ VIII.A-B) While it may be said that Willis' possible motive to lie was presented to the jury, that is entirely different than Willis' post-trial declaration that he *did* lie. (Petition, Exhibit HC-1) Thus, Willis' trial testimony, quoted in the Return, in which he stated that he felt that he "didn't have no, no other alternative but to continue to cooperate" (54 RT 13067) could well mean that Willis had no other choice but to cooperate with the State's fabrication. Indeed, the trial evidence cited by respondent does not go to the core issue, whether the evidence now presented, that the state had promised a deal, withdrawn the deal, and had Willis trapped by the danger he faced in returning to San Quentin, made Willis' testimony unreliable due to improper coercion. Petitioner

vehemently denies that the trial evidence respondent quotes, and cites, is at all sufficient to undermine petitioner's claim.

2. Respondent cites Willis' failure to admit at trial that he dictated the content of the kites to petitioner and co-defendant Johnson, despite ample opportunity for cross-examination, as self-validating evidence that Willis did not do so. (Return, § VIII.B.2) Respondent's argument misses the point. Claim III directly charges prosecutorial misconduct. Once Willis agreed to lie for the prosecution to, literally, save his own skin, all the cross-examination in the world would not force Willis to admit that he did so.

3. Petitioner admits that Numark was not called by the defense on this issue, but denies that this fact has any relevance to the underlying question before this Court. Defense counsel is not required to call witnesses who will lie.

4. Petitioner denies the assertion by respondent that petitioner's failure to raise the inherent unreliability of Willis' testimony on appeal has any bearing on the underlying question in this proceeding. (*See* Return, p. 13, § VIII.B.4.)

5. Accordingly, petitioner disputes the material facts related to this issue, as presented in the Return and, as suggested by respondent (Return, pp. 9-10), re-asserts the need for an evidentiary hearing as part of a reference order.

D. DENIALS TO SECTION IX OF THE RETURN

With regard to whether "the prosecution violated *Brady v. Maryland* (1963) 373 U.S. 83 by failing to disclose the promises of leniency to prosecution witness Bobby Evans and other facts bearing on Evans' credibility that have come to light after the judgment was imposed" (Return, p. 14, IX.A), petitioner reiterates and reaffirms his claim that there were undisclosed promises and other evidence of Evan's relations with governmental entities that would have undercut his credibility before the jury. (Petition at pp. 75-81, ¶¶ 167-181)

Respondent essentially denies all of the material factual allegations made by petitioner in support of his claim that the prosecutor violated *Brady v. Maryland* by failing to disclose the promises of leniency to Bobby Evans and other facts bearing on Evans' credibility. Respondent appears to concede that a reference hearing is required on these issues. Thus, respondent states:

> If petitioner disputes the material facts alleged in this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings. (Return at p. 19)

Petitioner absolutely disputes the material facts alleged in respondent's return. Respondent essentially argues that Evans and special agent James Hahn testified truthfully at trial. (Return at pp. 15-16) Respondent's argument begs the question: whether Bobby Evans and

James Hahn testified truthfully at trial, and whether all material facts were disclosed by the prosecution.

Neither Evans nor the prosecution disclosed during the trial that Evans was doing undercover drug buys for San Joaquin County prior to his testimony. The petition filed herein, discloses that Evans testified in another case that he was doing undercover drug buys for San Joaquin County since at least 1988, i.e., before his testimony in the Masters trial. (*People v. Williams*, Ex. HC-16 at pp. 76-77, Ex. HC-17 at pp. 87-89) Thus, Evans testified in *People v. Williams* that he was first granted immunity in 1984. (Ex. HC-16 at p. 84) And he repeatedly testified that he started doing buys in 1988. (Ex. HC-16 at pp. 76-77) Respondent essentially disbelieves this testimony. An evidentiary hearing is therefore required.

Respondent also chooses to disbelieve Evans' 1996 testimony in a Yolo County case, during which Evans testified under penalty of perjury that he was granted immunity in State court for his testimony in a case involving the killing of prison guard in San Quentin, i.e., the Masters trial. (Return at p. 17) An evidentiary hearing is therefore required.

Respondent also does not believe Evans' testimony in a second Yolo County case, *People v. Bailey*, in which Evans testified under penalty of perjury that he got probation in 1989 in exchange for testifying on a prison homicide involving a prison sergeant, i.e., the Masters trial. (Return at p. 17) Respondent argues that Evans' testimony is too brief to support the inference that Evans received probation in Alameda County in

exchange for his testimony in petitioner's case. (*Id.*) Evans' testimony, however, speaks for itself:

> Q. What happened in between 1987 and 1989 that you were getting probation in 1989?
> A. Well, I testified for the federal government on a large drug case and they granted me that, and also I testified on a prison homicide.
> Q. That was a homicide that took place in prison?
> A. Yes.
> Q. Who was killed in the homicide?
> A. It was a Sergeant that was killed, a Sergeant.
> Q. One of the prison guards, a Sergeant; is that correct?
> A. Yes.
> Q. And you actually testified for the government in that case?
> A. Yes, I did.
> (Ex. HC-18 at pp. 94-95)

Respondent argues that this "excerpt does not support the inference that Evans received probation in Alameda County in exchange for his testimony in petitioner's case." (Return at p. 17) Respondent's argument is patently frivolous.

Respondent also does not accept the truth of Evans' 1998 testimony in the same Yolo County case in which Evans testified that he dissociated from the BGF because he was going to be indicted under the RICO Act. (Return at p. 18) Given the fact that respondent entirely disbelieves Evans' testimony under oath, a reference hearing is required.

E. DENIALS TO SECTION X OF THE RETURN

In section X of its return, respondent disputes petitioner's claim that the prosecution knowingly presented the false testimony of Bobby Evans. (Return at pp. 19-20) Thus, respondent states:

> If petitioner disputes the material facts alleged in this return, and to the extent that this Court determines the allegations of the petition, if credited, would support habeas relief, the Court should appoint a referee to take evidence and make credibility findings. (Return at p. 21)

For the reasons stated, both in the petition and herein, petitioner disputes the material facts alleged in respondent's return. This Court should therefore follow respondent's invitation and appoint a referee and take evidence and make credibility findings.

To support its position, respondent argues that Evans and Willis corroborate each other, and there is no evidence in the State trial record or in the habeas record suggesting that Evans and Willis collaborated to falsely implicate petitioner. This argument does nothing to avoid the need for an evidentiary hearing. Both Evans and Willis say that they lied at trial and they were coerced and/or influenced by the District Attorney to lie.

Evans' statement to petitioner's counsel, while not under oath, are corroborated by his testimony under penalty of perjury in *People v. Williams,* and *People v. Bailey,* which are attached as Exhibits 16 and 18 to the Petition for Writ of Habeas Corpus filed herein. Petitioner does not need a declaration executed by Bobby Evans to raise the claim that the prosecution knowingly presented his false testimony. His Yolo County

testimony, under penalty of perjury, establishes that he lied at the Masters trial. While petitioner lacks a signed declaration by Evans, it is notable that the government's return does not include a signed declaration by Evans, even though Evans has been a long-time government witness.

Accordingly, petitioner disputes the facts alleged in the Return and fully agrees with respondent that the resolution of this issue requires an evidentiary hearing.

F. DENIALS TO SECTION XI OF THE RETURN

With regard to whether "petitioner's trial was fundamentally unfair because Bobby Evans' testimony was unreliable due to improper coercion by the prosecution," respondent correctly characterizes this as an allegation that Evans was "threatened with the prosecution of various crimes if he didn't testify against Masters and that this was not disclosed to the defense" (Return at pp. 21-23, §XI) Petitioner hereby realleges the claims in his petition (Petition, pp. 79-81, ¶¶ 176, 180), and denies that they are false or lacking in credibility.

1. Respondent claims that Evan's hearsay statements to counsel (Petition, Exhibit HC-7, ¶¶ 9-15), as well as his in-court statement (Exhibit HC-18) lack sufficient specificity to be credible. Respondent, however, offers no counter-evidence, either by declaration, by court record, or by transcript. Evan's admissions to appellate counsel, moreover, were specific. He stated that the government threatened him with prosecution under the RICO Act if he didn't testify against Masters.

(Declaration of Joseph Baxter, Ex. HC-7 at p. 32, ¶ 15) He also stated that the government threatened to prosecute him for three homicides if he didn't testify against Masters. (*Id.*) Evans' admissions, moreover, are corroborated by his testimony under penalty of perjury in *People v. Bailey*. Thus, Evans testified that he agreed to testify against the BGF because the government was going to indict him under the RICO Act. (Ex. HC-18 at p. 96) Evans also testified that he received probation on an Alameda County felony conviction because he testified in a case involving a prison homicide of a sergeant. (Ex. HC-18 at pp. 94-95)

Evans' admissions to appellate counsel are supported by his testimony at trial. Evans admitted that he was a violent person. (RT 13878) He admitted that he had stabbed many people, both inside and outside of prison. (RT 13697-699, 13872, 13908) He also admitted that he committed shootings, extortions and robberies. (RT 13908) He was in charge of the streets nationwide for the BGF. (RT 13852) At some point between 1986 and 1989, however, he decided to work solely for himself. (RT 13854) Evans had stabbed and shot so many people that he could not remember the names of any of his victims. (RT 13908, 13909, 13912)

Significantly, the abundance of evidence presented in the petition is limited to what was obtainable prior to habeas discovery. It should also be noted that timeliness was already an issue when this court decided *In re Steele* (2004) 32 Cal.4th 682. Prior to that, the extent and application of Penal Code § 1054.9 was in question. Petitioner intends to seek

discovery related to the Evans-related claims in a timely fashion. Whatever specificity might be lacking, so far, can be resolved prior to and during an evidentiary hearing following a reference order.

2. Respondent's reliance on the record from trial continues to be unavailing, as it fails to take into account the crucial truth that a coerced witness, having decided to lie, would not readily admit on the stand to either the coercion or the lies.

3. Accordingly, petitioner denies that the trial testimony of Bobby Evans was not coerced or influenced. Any questions regarding this issue can be resolved only in an evidentiary hearing following a reference order.

G. DENIALS TO SECTION XII OF THE RETURN

The Order to Show Cause seeks a response to the question whether "material false evidence—the testimony of Johnny Hoze—was admitted at the penalty phase regarding petitioner's participation in the murder of David Jackson." Petitioner realleges the allegations regarding Hoze in his petition (Petition, pp. 98-105, ¶¶ 218-234), denies that Hoze's penalty-phase testimony was truthful, and denies that it was not prejudicial.

1. Respondent has added nothing of substance to the evidence presented by petitioner. It is clear that Hoze was either lying at the trial and those times he affirmed his trial testimony, or was lying each of the times he recanted his testimony. Perhaps the truth will be made evident at an evidentiary hearing following a reference order. The various writings, declarations, and testimony of Hoze are not, without more, sufficient.

2. Without Hoze's testimony, there was little to link petitioner with the stabbing of Harold Jackson other than the gunrail officer's testimony that Masters was in a group of inmates in the general vicinity when he saw Jackson staggering after being stabbed. There were numerous inmates on the yard that day, none of whom saw petitioner stab Jackson, and three inmates who were present testified at trial that petitioner was some distance away from Jackson when he was stabbed. (90 RT 20540, 20690, 20721, 20729-20729) In addition, there was no physical evidence connecting petitioner to the stabbing. When he was searched while being removed from the yard, there was neither blood nor injuries discovered that would indicate a link to the killing of Jackson. (88 RT 20529) Moreover, petitioner testified and denied killing Jackson. (RT 21818)

3. The testimony and diary entries of LeRoy Patton, a cell-mate of Hoze in the period that included his testimony in petitioner's trial, were introduced at a prior habeas action, and show that Hoze intended from the start to lie at trial in order to get back at the BGF. (See Petition, pp. 100-101, ¶¶ 223-225 and exhibits there cited.)

4. The court at petitioner's sentencing made findings that the prosecution had not proved the other alleged uncharged murder beyond a reasonable doubt, and absent Hoze's testimony, there was similarly too little to tie petitioner to the Jackson murder.

5. It is impossible to say beyond a reasonable doubt that the jury would have sentenced petitioner to death without the Hoze testimony,

especially considering that neither of his codefendants – the actual killer and the BGF captain who was in charge of the conspiracy – were sentenced to death. To the contrary, discussions that petitioner's trial investigator had with three of the jurors following the trial indicated just the opposite – the Hoze's testimony was crucial to their decision to impose death. (See Petition, p. 100, ¶ 221, and Exhibit HC-22.)

6. Accordingly, petitioner denies that Hoze was truthful at his trial, and that the introduction of his untruthful testimony was not prejudicial.

H. DENIALS TO SECTION XIII OF THE RETURN

With regard to whether "newly discovered evidence regarding Hoze's testimony casts fundamental doubt on the accuracy and reliability of the penalty-phase proceedings," petitioner realleges the allegations of Claim V of his Petition (at pp. 98-105, and ¶¶ 218-234), and makes the following specific denials:

1. Petitioner denies that Hoze's recantations are false. In support of this denial, petitioner incorporates the denials and argument above, in section IV.G of this Reply.

2. Respondent's reliance on *In re Roberts* (2003) 29 Cal.4th 726, 742-743 is unavailing. While there are surface similarities, in the sense that *Roberts* involved a recantation by witness Long and then a partial recantation of the recantation, there is a crucial difference: In *Roberts,* Long invoked the Fifth Amendment and refused to testify at the reference hearing, so that the referee had no ability "to observe the

demeanor of witnesses and their manner of testifying." (*Id.* at p. 742; citations and internal quotation marks omitted.) In contrast, petitioner here seeks the appointment of a referee precisely so that Hoze's demeanor and credibility can be observed and tested.

3. Petitioner denies that Hoze's testimony did not cast fundamental doubt on the reliability of the penalty phase proceedings, as set forth in this Reply at p. 26, and incorporated herein.

4. Accordingly, a referee should be appointed and an evidentiary hearing should be granted on this issue.

CONCLUSION

Respondent, with the exception of one hearing transcript, has produced no new evidence, no declarations, nothing other than references to the underlying trial in order to attempt to refute petitioner's claims. The attempts to use the trial transcript to self-validate the trial proceedings are unavailing, and the court should issue its order appointing a referee to hear testimony on all eight of the issues set forth in its Order to Show Cause.

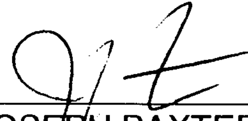
Respondent appears to concede that a referee should be appointed in this case. Thus, respondent, by way of conclusion states:

> If petitioner does deny any material fact asserted herein, a referee should be appointed and an evidentiary hearing should be convened to resolve such disputed fact or facts, after which the petition for writ of habeas corpus should be denied and the order to show cause discharged. (Return at p. 30)

For all the reasons stated herein, and for the reasons stated in the petition filed herein, petitioner re-affirms his petition and denies the material facts asserted by respondent, and requests an evidentiary hearing to resolve disputed facts.

Dated: February 6, 2008

Respectfully submitted



JOSEPH BAXTER
RICHARD I. TARGOW
Attorneys for Petitioner

PROOF OF SERVICE BY MAIL - 1013A, 2015.5 C.C.P.

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

On February 6, 2008, I served a true copy of the document entitled:

PETITIONER'S REPLY TO RETURN TO ORDER TO SHOW CAUSE

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

Jerry Brown
Attorney General of California
455 Golden Gate Avenue,
Suite 11000
San Francisco, CA 94102

Scott Kauffman, Esq.
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Richard Targow
Attorney at Law
P.O. Box 1143
Sebastopol, CA 95472

Jarvis J. Masters
c/o San Quentin Prison
P.O. Box C-35169
San Quentin, CA 94974

I declare under penalty of perjury that the foregoing is true and correct and that this document was executed at Santa Rosa, California on February 6, 2008.

Ken Ward