# In the Supreme Court of the State of California



In re

**JARVIS MASTERS,**

**On Habeas Corpus.**

**CAPITAL CASE**

Case No. S130495 &

Related Appeal No. S016883



Marin County Superior Court Case No. SC010467
The Honorable M. Lynn Duryee, Judge

## RESPONDENT'S EXCEPTIONS TO REFEREE'S REPORT AND BRIEF ON THE MERITS

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## INTRODUCTION

Petitioner was convicted by a Marin County jury of first degree murder (Penal Code § 187), and conspiracy to commit murder and assault on correctional staff (Penal Code § 182) in 1990, for the June 8, 1985, murder of Sgt. Howell Burchfield, at San Quentin Prison. He was sentenced to death for the murder. Petitioner's direct appeal is currently pending before this Court. (*People v. Masters*, No. S016883).

On January 7, 2005, petitioner filed the instant petition for writ of habeas corpus.[1] On April 9, 2008, this Court issued an order for a reference hearing to take evidence on and answer the following questions:

> 1. Was false evidence regarding petitioner's role in the charged offenses admitted at the guilt phase of petitioner's trial? If so, what was that evidence?
>
> 2. Is there newly discovered, credible evidence indicative of petitioner's not having been a participant in the charged offenses? If so, what is that evidence?
>
> 3. What, if any, promises or threats were made to guilt phase prosecution witness Rufus Willis by District Attorney Investigator Charles Numark or Deputy District Attorneys Edward Berberian or Paula Kamena? Was Willis's trial testimony affected by any such promises or threats, and, if so, how?
>
> 4. Were there promises, threats or facts concerning guilt phase prosecution witness Bobby Evans's relationship with law enforcement agencies of which Deputy District Attorneys Berberian and Kamena were, or should have been, aware, but that were not disclosed to the defense? If so, what are those promises, threats or facts?

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[1] Two prior habeas petitions were filed in the Marin County Superior Court – Nos. 147681 and 153140. Both of these petitions were denied by the trial court.

5. Did Deputy District Attorneys Berberian and Kamena knowingly present false testimony by Bobby Evans? If so, what was that testimony?

6. What, if any, promises or threats were made to Bobby Evans by District Attorney Investigator Numark, Department of Corrections Investigator James Hahn, or Deputy District Attorneys Berberian and Kamena? Was Evans's trial testimony affected by any such promises or threats, and, if so, how?

7. Did penalty phase prosecution witness Johnny Hoze provide false testimony regarding petitioner's involvement in the murder of inmate David Jackson? If so, what was that false testimony?

(http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1862173&doc_no=S130495, Order, dated April 9, 2008.)

The referee held an evidentiary hearing on these questions over the course of 13 days between January 4, 2011 and April 8, 2011. In addition, the testimony of Bobby Evans was taken by in-court deposition on May 14, 2010. The referee filed her Summary of the Evidence and Findings of Fact ("Final Report") on April 11, 2011.

## SUMMARY OF EVIDENCE

### I. EVIDENCE RELATING TO BOBBY EVANS

#### A. Bobby Evans

As noted above, Bobby Evans testified by in-court deposition on May 14, 2010. This was done due to petitioner's concerns that Evans's health issues might render him unavailable to appear at the evidentiary hearing.

During petitioner's trial, Bobby Evans provided testimony regarding the general structure and functioning of the Black Guerilla Family (BGF) as well as statements regarding admissions made to him by petitioner and his co-defendants – Woodard and Johnson. Specifically as to petitioner, Evans stated that they spoke at the Adjustment Center in August 1985, that

petitioner stated a vote had been taken on the plan to kill Sgt. Burchfield, and that he, Masters, had voted in favor of the hit.

In his deposition, Evans denied speaking with Masters at the Adjustment Center. (Deposition of Bobby Evans [Evans Depo.], pp. 40-42.) He maintained, however, that his testimony regarding admissions made by Woodard and Johnson were truthful. (Evans Depo., pp. 43, 48, 108.) He confirmed that Woodard mentioned Masters's name to Evans and indicated that Masters had some involvement in the murder, but that he didn't know how to make the weapon. (Evans Depo., p. 109.) As the referee noted, Evans later submitted a correction to his deposition denying that Woodard said Masters had some involvement, and asserting that Woodard said only that Masters was supposed to make the weapon but didn't know how.

Evans also related his history with the BGF, noting that he was qualified at trial as an expert in BGF affairs. He also testified regarding BGF hierarchy and operations. (Evans Depo., pp. 31-40.)

As to his status as an informant, Evans stated that he began in 1986 when he was released from prison. Evans described it as "playing a game with the police" in order to stay out of prison. (Evans Depo., p. 51.) He discussed his involvement with Special Services Unit ("SSU") Officer James Hahn and Oakland Police Officer James Moore. (Evans Depo., pp. 52-59.) Evans indicated that he sometimes gave false information to Hahn and Moore, and sometimes the information was truthful. (Evans Depo., p. 53, 57.) He also stated that he worked with the Bureau of Narcotics Enforcement ("BNE"), a joint state and federal operation dealing with drugs and guns, and the Bureau of Alcohol, Tobacco and Firearms ("ATF"). (Evans Depo., pp. 57-58.) Evans also discussed his criminal activity after his 1986 release from prison, including kidnapping, shootings and robbery. (Evans Depo., pp. 59-60.)

As to his involvement in Masters's case, he stated that he was arrested for a robbery and called James Hahn asking for help. As a part of his discussions, Evans claimed that Hahn and Moore told him the Marin County District Attorney wanted to talk to him about the Burchfield murder. Evans claimed that he was promised release from prison within a year if he agreed to talk. (Evans Depo., pp. 60-64.)

Evans stated that he participated in a taped interview. He claimed that he had no knowledge of Masters but that the DA and Gasser[2] kept telling him, "We've got these three individuals and we gotta charge with this and we need all three of them." (Evans Depo., p. 65.) Evans claimed that he was given information about Masters's involvement – that he participated in the murder, "helped make the weapon and different things like that" – in the Burchfield killing by Hahn and Gasser. (Evans Depo., pp. 65-67.)

Evans also claimed that he was threatened with prosecution in a number of different cases if he failed to testify against Masters. He admitted that some of the cases would have been valid prosecutions, but stated that some he "didn't really know. [He] thought they was just making up...." He was also threatened with prosecution for the Burchfield murder as part of the investigation into all high-ranking members of the BGF. (Evans Depo., p. 71-72.)

On cross-examination, Evans stated that he was the first to mention Woodard and Johnson's involvement in the Burchfield murder when he met with Hahn and Moore. (Evans Depo., p. 110.) Although he continued to claim that it was Hahn and Moore who told him what to say about Masters, he was unable to provide details as to what they said. (Evans Depo., pp.

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[2] Evans was referring to David Gasser, then an investigator with the Marin County District Attorney's Office. Mr. Gasser also testified during the hearing.

106-108.) He again stated that Hahn threatened him with prosecution for a variety of crimes prior to Evans's meeting with DDA Berberian. When asked specifically about the murder of James Beasley, Sr., Evans denied any involvement in the murder and denied ever being questioned by police about the murder. (Evans Depo., pp. 112-113.) Evans did acknowledge working for James Beasley, Jr. and receiving payments from him, although he denied ever being paid by Aaron Johnson. (Evans Depo., pp. 114-115.)

### B. San Francisco Homicide Investigation into Murder of James Beasley, Sr.

#### 1. San Francisco Police Department

Carl Klotz and Edward Erdelatz, retired San Francisco Police Inspectors, testified regarding the 1988 James Beasely, Sr., homicide. Neither had any significant present recollection of events but, based upon their review of the file,[3] they had been given statements indicating that Bobby Evans was the possible shooter. (Erdelatz 2 RT 55-89; Klotz 2 RT 103-117.) The file indicated that they had contact with Bob Conner and

[3] Counsel for the San Francisco Police Department ("SFPD") sought a protective order regarding disclosure of the files as the case, although old, was still unsolved. (1 RT 9-10.) As a result of that motion, the referee reviewed the file in camera and determined that certain information should be redacted. (1 RT 39.) Portions of the file were offered as PE 1-2 and 5-12, over the SFPD's objection, but subject to a protective order. (2 RT 118-119.) Additional documents were offered as RE A, subject to the protective order. (2 RT 124.) Respondent initially offered the redacted file as RE M, under seal. (2 RT 89; 13 RT 707.) Based upon petitioner's continued assertion that the complete, original file was necessary, the referee indicated that she would consider the unredacted version as RE M. (13 RT 708.) Due to some confusion about the designation of the file, respondent inadvertently withdrew RE M (redacted version). (15 RT 825-826.) It is respondent's understanding, however, that the unredacted file, with a sticker designating it as RE M, is a part of the record before this Court.

James Moore, of the Oakland Police Department ("OPD"), apparently passing on information relating to Bobby Evans. (2 RT 69, 71, 114.) Bobby Evans was not arrested or questioned in connection with the Beasley homicide. (2 RT 90, 107-108.) The file contained evidence implicating people other than Evans as the shooter. (2 RT 60, 90, 111.) Nothing in the record indicated that they had contacted the San Francisco District Attorney to seek approval to bring charges.[4] (2 RT 94.) The case was unsolved.

Neither Mr. Klotz nor Mr. Erdelatz was aware of the Burchfield investigation or of Evans's involvement in that case. They did not recall sharing any information regarding the Beasley homicide with James Hahn, the Department of Correction or the Marin County District Attorney's Office. (2 RT 90-91, 123-124.) They would not have ignored a suspect in an ongoing homicide case based on his potential status as a witness in another county. (2 RT 94, 124.)

**2. Oakland Police Department**

Raymond Conner[5] testified that, while working for the OPD, he knew James Moore. (3 RT 163.) Mr. Conner was also familiar with James Hahn[6] who worked for SSU and had regular contact with him regarding violent parolees in Oakland. (3 RT 164-165.) Mr. Conner was familiar with Bobby Evans as an informant who had been developed by Hahn

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[4] In response to a prior subpoena issued by petitioner, the San Francisco District Attorney's office indicated that they had no record of a case being opened in the Beasley homicide.

[5] Mr. Conner is the Bob Conner referred to in the SFPD files.

[6] Mr. Conner noted that there were two men named James Hahn that he knew during the relevant time period – an Oakland homicide detective and the SSU investigator. (3 RT 164.) Edward Erdelatz also indicated in his testimony that he knew a James Hahn with the Oakland Police Department, and subsequently learned that there might be a second person with the same name. (2 RT 73.) All references to James Hahn are to the SSU investigator unless otherwise noted.

and/or Moore. (3 RT 165.) Conner recalled receiving information from Otis/Ernest Graham that Evans might have killed James Beasley Sr., although he did not recall when that occurred. (3 RT 168-170.) Mr. Conner subsequently passed that information on to Inspector Klotz. He also recalled discussing Evans's status as a suspect with Hahn and Moore. (3 RT 172, 182.) The SFPD file notes regarding an interview with Graham summarizing his information appeared to be much more detailed than the information Conner obtained directly from Graham. (3 RT 176, 187.) He had no direct involvement in the Beasley homicide investigation, noting that it "would be a cardinal sin to ask any questions of Bobby Evans, or anybody involved with Bobby Evans, as to the information," since it was not Oakland's case. (3 RT 182-183.) Nor was he aware of any involvement by Hahn in the homicide investigation. (3 RT 183-184.) Similarly, Conner had no involvement in the Burchfield homicide investigation. (3 RT 184.)

James Moore also testified. During the relevant time frame, he worked in the intelligence unit of the OPD. His focus was prison gangs and gathering information on criminal activity. (3 RT 190.) Moore knew Bobby Evans as a member of the BGF, and used him as an informant. Moore knew James Hahn who worked for SSU, and they shared information back and forth. Both men met with Evans on numerous occasions to discuss information Evans was providing. (3 RT 192-193.) Mr. Moore recalled the name Beasley as a San Francisco homicide, but did not recall Evans's role, if any, in that case. (3 RT 194.) In terms of Evans status as an informant, he would provide information on "criminal suspects, narcotics, robberies, you name it, who's doing what, when, and how." Moore would occasionally give Evans money and probably on occasion assisted him in getting out of jail in exchange for such information. (3 RT 197-198.) Moore was not involved in the Burchfield investigation, nor did

he provide any assistance to Evans in exchange for Evans's statements in that case. (3 RT 199.)

### 3. James Hahn

During the time period of the Burchfield murder investigation and trial, Mr. Hahn worked for the Special Services Unit ("SSU") of San Quentin. (8 RT 416.) SSU was created to work closely with local law enforcement tracking, identifying and arresting gang members. They were also involved in personnel investigations, narcotics trafficking, etc. (8 RT 417-418.) Mr. Hahn worked in the East Bay area, and mainly with the Oakland Police Department, primarily with Jim Moore. (8 RT 422.) Hahn's duties were to track and identify gang members to see what they were doing. He worked right beside local law enforcement, primarily with parolees. (8 RT 427.) If a person wanted out of a gang there was a protocol for debriefing. Sometimes that would include polygraph examinations, but not always. If a person was involved in a case with another agency, "I wouldn't touch him." (8 RT 429-420.)

Hahn did recall hearing something about Evans's possible connection to the Beasley murder, but believed that he learned of it significantly after the murder. Hahn said that the Beasley murder was all over the papers at the time. (8 RT 454-455.) Hahn did recall that SFPD indicated that Evans was a possible suspect but they didn't have anything solid. (8 RT 474-475.)

## C. Evidence of Threats or Promises

### 1. Marin County District Attorney's Office

Edward Berberian testified that no deals were made with Bobby Evans. (3 RT 157.) His interview with Evans was recorded. He was contacted by the Alameda Superior Court regarding Evans and wrote a letter informing the court that nothing had been promised to Evans nor did he intend to seek any benefit for Evans in exchange for his testimony. (3

RT 157-158.) Mr. Berberian knew James Hahn, and recalled that Bobby Evans was brought to his attention through the Department of Corrections and that Hahn had some involvement in that. (3 RT 153-154.) Mr. Berberian was not aware of anyone from his office directing Mr. Hahn to do anything in regards to the Burchfield investigation, nor did he recall Hahn's involvement with Evans extending beyond an introduction at the time of the taped interview. (3 RT 155-156.)

David Gasser also testified. At the time of the murder, Mr. Gasser worked as an investigator for the Marin County District Attorney's office. (12 RT 641-642.) To the best of his recollection, the office obtained information on Bobby Evans from James Hahn. (12 RT 657.) Mr. Gasser was present for a taped interview of Bobby Evans that also included Edward Berberian and Paula Kamena. (12 RT 657.) Evans was in jail at the time of the interview. (12 RT 658.)

Mr. Gasser, based on a reference in some notes, indicated that he recalled some mention of "the Beasley stuff" although he did not recall what it was. (12 RT 661-663.) There was some information that came out at trial to the effect that Evans was involved with James Beasley, Jr., and a Carolyn Davis. That might have been the matter referenced in the file notes he reviewed. (12 RT 678.) He did not recall having any contact with the SFPD regarding Bobby Evans. (12 RT 665.)

**2. James Hahn**

Hahn met Bobby Evans in the mid- to late-80's. Evans was a member of the BGF, and his Swahili name was Joka Damu. (8 RT 431.) Evans was an enforcer or hit man for the gang. Hahn said that he would describe Evans as a professional liar. (8 RT 432.)

Hahn used informants as a part of his work, and that included Bobby Evans. (8 RT 433.) He would occasionally give informants a few dollars, usually enough to buy a burger. (8 RT 473.) He stated that he got both

good and bad information from Evans, noting that none of the snitches are extremely reliable. (8 RT 433.) Hahn told Chris Reynolds (habeas defense investigator), during an interview, that Evans was responsible for dozens of good arrests during the late '80's. (14 RT 750-751.)

Although Mr. Hahn interviewed Evans prior to his 1989 disclosures regarding BGF activity, it was not an official debrief. During that interview Evans did not talk about the Burchfield murder. (8 RT 434-435.) In June 1989 Evans came forward and gave information. Although Hahn acknowledged that it was possible Evans said something about the Burchfield case prior to that, Hahn indicated that he didn't think any such information was reliable. (8 RT 435.) Hahn's jail interview of Evans regarding the Burchfield murder was not extensive. According to Hahn, "I specifically told him not to tell me too much because I didn't want to testify, I didn't want to get involved in the case." Evans gave the District Attorney's office more detailed information. (8 RT 473-474.)

Mr. Hahn recalled that Evans was in jail for something when he approached Hahn about the Burchfield murder. (8 RT 461.) Evans told Hahn that he couldn't afford to go back to prison, and asked what Hahn could do for him. (8 RT 462-463.) Hahn made no representations to him at that time beyond offering safe housing. As Hahn noted, "he was a state ward so we had to protect him." (8 RT 481.)

After Evans testified, Hahn stated that they had to get him out of the Bay Area/State. Evans was fearful for his life because of several activities including his relationship with "Lady," the former girlfriend of a high-ranking BGF member. (8 RT 475.) An agreement was initially worked out to place Evans on parole in Texas. (8 RT 464-465.)

Evans wanted to participate in the witness protection program. He gave information to federal authorities about James Beasley Jr. (8 RT 465-466.) In order to be eligible for the witness protection program, Evans had

to be out of custody. Mr. Hahn wrote a letter to the parole board seeking release of Evans for that purpose. Hahn's supervisors specifically directed him to include information about Evans's testimony in the Burchfield case in the letter. The Board of Prison Terms didn't like to release people early, so it was important to put in anything possibly favorable. The letter included references to other things Evans had done to assist law enforcement. (8 RT 476-477.)

**3. Other Agencies**

As noted above, neither Inspectors Klotz nor Erdelatz had any contact with Evans, or with anyone directly involved in the Burchfield murder investigation. (2 RT 90-91, 107-108, 123-124.) They also denied taking any action to forego prosecution of Evans in return for his testimony in petitioner's trial. (2 RT 94, 124.) James Moore similarly denied any promises to Evans relating to his testimony in the Burchfield murder trial. (3 RT 199.)

**D. Graham McGruer**

At trial, Bobby Evans testified that his meeting with Masters took place at the Adjustment Center in August 1985. Petitioner introduced evidence at that time that he was not sent to the AC until December 1985. At the reference hearing, Graham McGruer, a private investigator, was called as an expert in CDC classifications, policies, procedures, and knowledge of prison gangs.[7] (5 RT 281.) He created a chart from prison records showing the dates that various inmates were housed in the Adjustment Center following the Burchfield murder, and discussed policies

[7] Mr. McGruer's expertise was derived from his prior employment with the Department of Correction, although he was not so employed at the time of the Burchfield murder and had no involvement in the investigation. (5 RT 292-293.)

regarding inmate yard status. (PE 16; 5 RT 282-289.) Those records reflected that Masters was not sent to the AC until December 1985. (5 RT 286.)

Mr. McGruer also provided some general background information on the workings of the BGF. He stated that a hit on a prison guard would normally be something ordered by the gang leadership and, if not, it would be considered "unsanctioned." (5 RT 299.) In the case of an unsanctioned hit, the gang leadership would act quickly to reassert control and confront those involved. Such a confrontation and internal investigation would take place as quickly as possible. They would not wait six months to have a commission meeting to discuss such an occurrence. (5 RT 299-301.) A senior BGF member would be assigned to conduct the investigation, and they would likely want to speak directly to those involved rather than taking second-hand information. (5 RT 304.)

### E. Michael Rhinehart

Michael Rhinehart, another BGF member, testified that he knew Bobby Evans, and was housed with him at Tehachapi in the Spring of 1987. According to Rhinehart, he gave Evans information about the Burchfield murder. He claimed that Evans stated he did not know anything about the murder and had not previously been told about it. (6 RT 333-335.)

## II. EVIDENCE RELATING TO RUFUS WILLIS

### A. Rufus Willis

At trial, Rufus Willis testified regarding the planning and execution of the murder of Sgt. Burchfield. He testified that the murder was part of a BGF plan to assault prison staff and that, as part of the C-section leadership, he, Woodard, Masters and Rhinehart met on multiple occasions to plan the hit. According to Willis, Carruthers cut pieces from his bed frame to be

used for weapon stock and Masters was going to sharpen one of the pieces to send to Johnson. Masters set the signal, "Solid Gold," to be given when Sgt. Burchfield came on to the second tier. Willis also turned over several kites[8] to authorities after the murder, two of which were in Masters's handwriting.

Petitioner subpoenaed Rufus Willis to testify at the evidentiary hearing. Prior to the hearing, Willis requested that counsel be appointed to represent him. Attorney William Prahl was appointed. Willis was scheduled to testify on January 13, 2011. When called and questioned regarding his involvement in the Burchfield murder, Willis asserted his rights under the Fifth Amendment and refused to testify. (9 RT 492-497.) As a result, the referee found that Willis was unavailable. (9 RT 498-499.) The following day, Willis sent a note to the court stating that he had changed his mind and wished to testify. (10 RT 515.) On Tuesday, January 18, 2011, the referee advised the parties that she was willing to allow Willis to be called if petitioner wished to him testify, or she would allow petitioner to proceed based upon her prior unavailability ruling. (10 RT 519-520.) Petitioner declined the court's offer, choosing to rely on declarations and statements by investigators to support his claim that Willis had recanted his trial testimony. (10 RT 520.)

**B. Statements Made by Willis**

Michael Satris, one of petitioner's trial counsel, testified that in January 1999, he received a letter from Rufus Willis asking that Satris represent him in an upcoming parole board hearing. (PE 15; 5 RT 268-269.) Mr. Satris stated that he had an obvious conflict and could not represent

[8] The term "kites" is used to designate notes passed between inmates.

Willis, but he passed the letter to Melody Ermachild who was still working as an investigator on petitioner's case. (5 RT 270; 11 RT 587.)

**1. February 2001 declaration**

Pamela Siller and Melody Ermachild are private investigators working on petitioner's case. They were involved in his case during the trial and have continued their involvement with the habeas proceedings. (10 RT 556; 11 RT 586.) The two visited Rufus Willis twice prior to obtaining a declaration from him in 2001 regarding his involvement in the Burchfield murder. (10 RT 558; PE 22.)

The two spent several hours at the prison where Willis was being housed. When they met, Willis was not shackled nor was he escorted to them. Ms. Ermachild conducted the interview and Ms. Siller served as a witness. (10 RT 559-560; 11 RT 590.) Ms. Ermachild took notes and prepared a handwritten declaration that Willis signed. (10 RT 562; 11 RT 592-595; PE 28, 29.) During that same visit, Willis gave them a letter to forward to Masters. (11 RT 595; PE 23, 30.) Some time later, the two returned to the prison with a typed declaration. (RE S.) They reviewed the typed version of the declaration with Willis, and Ms. Ermachild again took notes. (11 RT 601-602; PE 33.) After Willis reviewed the typed draft and noted changes, Ms. Ermachild, who had brought a computer and printer, created a revised declaration. (10 RT 563-564; 11 RT 603-604.) Willis then signed the revised version. (11 RT 604.)

None of the meetings between the investigators and Willis were tape recorded. Ms. Siller stated that it was not her practice to tape interviews and that was how she had been trained by Ms. Ermachild. (10 RT 570.) Ms. Ermachild stated that she normally was not allowed to bring a tape recorder into a prison and just assumed that Utah would not let her. (11 RT 593.) Although both women testified that Willis was cooperative and

friendly, Ms. Ermachild's notes contained some indications of hesitancy or an effort to avoid answering. (11 RT 615-617; PE 28.)

Ermachild and Siller prepared a total of three declarations, one handwritten version signed at the first visit, a second typed version that was not signed, and a third typed version that was signed on February 23, 2001, and filed as an exhibit to the petition for habeas corpus. (10 RT 572; Exhibit 1 to the Petition; PE 21, 22; RE S.)

**2. Letter recanting declaration**

Willis subsequently wrote a letter to prison authorities recanting the statements in the declaration and stating that Masters's defense team had pressured him to sign the declaration. (RE FF).

**3. May 2010 meeting with petitioner's counsel**

Chris Reynolds, a private investigator working for petitioner, testified that he and Joseph Baxter, one of petitioner's counsel, met with Willis in May 2010 to review the 2001 declaration. (10 RT 530-531.) The meeting lasted several hours and Mr. Reynolds described Willis as being cooperative. (10 RT 532.) Reynolds reviewed Willis's 2001 declaration with Willis, making notations on a copy as they went. (10 RT 533-535; PE 26.) During that review, Willis indicated that some things from the declaration needed to be changed, or that he simply did not recall saying. (10 RT 535- 543.)

Willis expressed concerns over his safety, and in particular he indicated that he did not want to be housed at San Quentin if he came back to California to testify. (10 RT 546.) Prior to the meeting, Mr. Baxter sent Willis a letter that included a representation that Mr. Reynolds had a lot of experience with the parole board. (RE D; 10 RT 549.) Mr. Reynolds did not, however, offer to assist Willis with the board. (10 RT 549.) Reynolds did not tape record the meeting with Willis. (10 RT 551.) Although he

stated that he had been denied permission to do so in the past, he did not ask permission in this case. (10 RT 551.) He did not offer to create a new declaration incorporating the changes Willis made. (10 RT 551-552.)

Mr. Reynolds also testified that, according to Willis, the "hint hint" letter (PE 25) sent by Willis to Mr. Baxter was referencing kites that were hidden in a television set Willis had in his cell at the time. The kites would have included information regarding the Burchfield murder, and kites about Masters. (14 RT 749-750.) Mr. Reynolds also testified that Willis told him that Mr. Berberian said he would be retuned to San Quentin if he did not testify consistently with his original statements. Willis indicated that he felt he would be killed if that happened. (14 RT 750.)

#### 4. June 2010 telephone interview with respondent's counsel

On June 30, 2010, Willis participated in a telephone interview with respondent's counsel regarding his testimony at trial. (RE HH.) A transcript of the conversation was also provided as an aid during review of the recording. (RE II.) In that conversation, Willis affirmed that his trial testimony was truthful and reaffirming Masters' involvement.

#### 5. Other documentary evidence regarding Willis's testimony

Respondent also submitted a number of documents from the CDCR files indicating that Willis had, over the years, affirmed his testimony against petitioner by requesting additional credits, preferential housing, and parole based upon his role at trial. (RE T-GG.) Petitioner introduced several documents from the CDCR files indicating Willis's concerns over his safety. (PE 60-65.)

### C. David Gasser

Mr. Gasser became involved in the Burchfield case when Inspector Numark was removed from the case. (12 RT 643-644.) Mr. Gasser had

some contact with James Hahn and James Moore regarding Donald Carruthers, one of the inmates involved in the killing. (12 RT 649-654.)

**D. Lawrence Woodard**

Lawrence Woodard was a co-defendant at Masters's trial. He was in charge of the BGF in Carson section ("C-section") after Redmond was sent to the AC. (4 RT 217.) Rufus Willis was the intelligence officer for C-section. (4 RT 217.) In April or May 1985, Willis told Woodard of a plan to attack the Aryan Brotherhood and the Mexican Mafia due to their involvement in the prior murder of an inmate named Montgomery. (4 RT 220.) When plans of attack were being made, discussion would be limited to those in a leadership position who, for security purposes, had a "need to know." When the plan to attack rival gangs was being discussed, that group included Willis, Woodard, Masters, Rhinehart and one other person. (4 RT 220-222.)

Subsequently, Willis and Redmond changed the plan to an attack on Sgt. Burchfield, purportedly because he was bringing weapons and ammunition in to members of the Aryan Brotherhood. (4 RT 222.) Masters was present for discussions about the new plan. According to Woodard, Masters stated that he disagreed with the proposed hit on Sgt. Burchfield. As a punishment, Woodard essentially ostracized Masters, and did not allow him any further involvement in the plan. He also indicated that Masters was stripped of responsibilities. Willis, Rhinehart, Masters and one or two others were present when this occurred. (4 RT 222-224.) After Masters indicated that he did not wish to be involved, Woodard told him that he could not be involved in any discussions, or he would be answerable to Woodard. (4 RT 228.) Woodard imposed punishment in the form of running laps, doing exercises, and possibly "an essay about why you did what you did and why you won't do it again." (4 RT 233.)

Woodard and Willis were the ones assigning responsibilities for various aspects of the hit. (4 RT 224-225.) Woodard and Masters were housed on fourth tier of C-section at the time. The bed brace that was sharpened to make the weapon came from the second tier. Andre Johnson was chosen to carry out the hit. (4 RT 225-226, 233.) Woodard stated that all handling of the weapon took place on second tier, and it would not have been passed up to the fourth tier due to security issues. (4 RT 234.) Woodard stated that he had meetings with inmates on the second tier regarding the plan. Those meetings included Carruthers, Johnson, Daily, and possibly Richardson. (4 RT 227.)

Woodard stated that, at the time of trial, he exerted influence on Masters and Johnson not to testify or discuss the incident. (4 RT 229.) Those orders extended to counsel representing the defendants, including indicating that certain witnesses should not be called. (4 RT 230-231.) Woodard did not testify at trial regarding the planning and execution of the hit on Sgt. Burchfield. (4 RT 230.)

On cross-examination at the reference hearing, Woodard admitted that if a BGF member disobeyed orders, they could be assaulted, including stabbing. When asked about beatings as discipline, Woodard stated that if an assault was warranted, the goal would be to kill, or at least injure sufficiently to ensure that the victim did not have an opportunity to retaliate. (4 RT 239-240.) Woodard denied the existence of any backup plan to murder Sgt. Burchfield. (4 RT 242.)

Woodard acknowledged that Masters had served in the position of Usalama – Chief of Security – for C-section, but claimed that he was demoted prior to Masters's refusal to participate in the Burchfield murder. (4 RT 243.) He also admitted that Masters continued to be defiant and insubordinate after his demotion, although he denied being mad about that, claiming that it only "irritated" him. (4 RT 243.)

Woodard claimed that Masters was not good at making weapons. He denied any requirement of BGF membership that a person commit an assault or murder. (4 RT 244-246.) When Woodard was sent to the AC following the murder, Masters was still out of favor with him and Woodard let others in the hierarchy know of that. (4 RT 248.)

Woodard acknowledged stating in his 2004 declaration given to petitioner's defense team, that at least one of the two kites written by Masters was a "transparent attempt" by Masters to get back into the good graces of Woodard, Willis and the BGF hierarchy. (4 RT 253.) His declaration also stated that Masters would have had to have copied the kite because he would not have been privy to the information contained therein. (4 RT 255.) According to Woodard, the "Oh we to change codes" kite had nothing to do with the Burchfield murder. (4 RT 255.)

Woodard admitted that he was still a member of the BGF. (4 RT 256.)

**E. Michael Rhinehart**

Michael Rhinehart was another BGF member housed in C-section at San Quentin at the time of Sgt. Burchfield's murder. In May and June 1985 Rhinehart was housed on the second tier of C-section. He was a member of the BGF, but did not consider himself to have any position other than "soldier," although he claimed he was "probably second in command of the section." (5 RT 312-314.) In May of 1985 Masters was part of security and Rufus Willis was in charge of intelligence in C-section. (5 RT 314-315.) Although there was another BGF hierarchy outside of C-section, Rhinehart did not know who they were. (5 RT 316.)

In May 1985, Rhinehart was aware of a plan to assault a prison guard. He learned of this from Woodard and Willis. According to Rhinehart a vote was taken regarding the plan and he voted against it along with Masters. (5 RT 318-319.) Woodard and Willis were the only two inmates to vote in favor of the hit on Sgt. Burchfield. (5 RT 324.) Despite voting

against the plan, however, Rhinehart participated in the assault by passing along copies of kites and "stuff like that." (5 RT 319.) According to Rhinehart, after Masters voiced his opposition, Rhinehart did not think he had much to do with the plan. (5 RT 320.) He also noted that Woodard became "very hostile" towards Masters after his opposition. (5 RT 324.) Rhinehart made no mention of being subjected to punishment for his negative vote.

Rhinehart denied any participation in passing the weapon from anyone to Andre Johnson. He did state that he knew how the weapon had been passed, however. According to him, Carruthers, who was in the cell next to Rhinehart, made the weapon stock and then others sharpened it, made the spear and passed it to Johnson. All of this occurred on the same tier. Johnson was six to eight cells away from Rhinehart. (5 RT 320-322.) Rhinehart also admitted to ordering Carruthers to make a spear for the assault. (6 RT 331.) Passing weapons, particularly metal, was difficult because other individuals, such as rival gang members would want to grab it. (5 RT 323.) After the hit, Willis asked Rhinehart to write a kite about what happened. (6 RT 332.)

On cross-examination, Rhinehart confirmed that he was not involved in making or passing the weapon for the Burchfield murder. (6 RT 339.) He acknowledged, however, that he was housed in cell 10. The brace was cut by Carruthers in cell 8, on one side of Rhinehart, and passed to Ingram and Vaughn in cells 12 and 16, on the other side of Rhinehart, for sharpening and assembly, then passed back down the tier beyond Carruthers cell to Johnson in cell 2. (6 RT 340.) Rhinehart identified Vaughn as the alternate to make the hit if Johnson was unable to do so. Rhinehart believed that Vaughn had a second spear for this purpose. (6 RT 341-342.)

### F. Welvie Johnson

Welvie Johnson was a high-ranking member of the BGF at the time of the Burchfield murder, achieving the rank of Inside General and Chief Enforcer. (7 RT 359, 362.) He testified regarding the background of the BGF, including the process called "blood in, blood out," which means that to get in to the organization you assault an enemy element and to get out you die or are killed. (7 RT 357.)

In 1985, Welvie Johnson was a part of the commission or governing body of the BGF. The other members of the commission were Kenneth Carter, Lorenzo Benton and Warren Jordan. (7 RT 363-364.) Johnson did not know Masters prior to the time of the murder. (7 RT 364.)

According to Johnson, the hit on Sgt. Burchfield was not sanctioned by the BGF leadership. After it happened, members of the commission tried to find out what occurred. (7 RT 366-367.) Woodard was a sector leader, in charge of C-section as to education, security and communications. He had no authority to sanction a hit. (7 RT 368-369.)

Johnson stated that, based on his investigation Redmond had no involvement in the hit, nor did he have any information that Masters was involved. (7 RT 369.) Johnson denied that Rufus Willis had any position within the BGF at the time due to his background. (7 RT 371.) Johnson stated that after a hit such as the Burchfield murder, the commission, including the supreme commander, would debrief those in charge of the sector who authorized the action. (7 RT 372.) Johnson also stated that Andre Johnson would not normally be the type of person assigned to carry out a hit because he was a short-timer, who would be of more use on the outside when he got parole. (7 RT 375.)

Welvie Johnson stated that, in 1985, Bobby Evans was in charge of the "flea cadre," that incorporated all members who were being paroled. He was not a part of the commission. (7 RT 376.)

Johnson stated that it would be a breach of security to pass a weapon up or down between tiers because it would go past "enemy elements."[9] (7 RT 378.) No member of the Crips would have been involved in passing the weapon. (7 RT 400.) He also testified that every member of the BGF housed on the second tier would have the ability to sharpen weapons. (7 RT 378.)

On cross-examination, Johnson denied telling prison authorities that Woodard ordered Andre Johnson and Masters to spear Burchfield during his debrief in 1991. (7 RT 395.) He also stated that he did not recall telling them that Masters was involved in the murder of an inmate named Jackson in 1984. (7 RT 393.)

Johnson affirmed that he had no personal knowledge regarding Burchfield's murder, and that he did not talk to everyone involved. (7 RT 395-396.) He did admit that he received information that someone said the weapon had been sent up to Masters, "[a]nd we wanted to know, well, what was the logical sense of sending the weapon to him when he on the fourth tier." (7 RT 396-397.) He was unaware of any backup plan. (7 RT 397.)

**G. Dr. Robert Leonard**

Petitioner called Robert Leonard, Ph.D., a forensic linguist, to offer an opinion regarding the authorship of the two kites attributed to Masters at the trial. This testimony was offered in support of Willis's statement in his 2001 declaration that the kites written by Masters were simply copied by him from Willis's documents supplied for that purpose. Although

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[9] Respondent notes that, at the time of trial, it was established that an inmate named Ephraim, who was a member of the Crips gang, was housed in cell 2-C-4, between Andre Johnson in 2-C-4 and the BGF members who purportedly made and passed the weapon. (ORT 11514-11515, 15763.) According to Rhinehart's description, therefore, if the weapon never left tier two, it had to have been passed directly across Ephraim's cell in direct violation of BGF procedure.

respondent filed a motion to preclude this testimony under *People v. Kelly* (1976) 17 Cal.3d 24 (Respondent's Motion filed Feb. 18, 2011), the referee denied the motion without a hearing, finding that *Kelly* was not applicable to this field. (Stipulation and Order re: Preliminary Ruling on the Pleadings, March 21, 2011, p. 2) Respondent submits, as discussed in section III below, that this ruling was in error and Dr. Leonard's testimony should not have been allowed.

Dr. Leonard testified regarding his education and training in linguistics. He is currently a professor in the linguistics program at Hofstra University. (18 RT 971- 972.) He stated that the field is one that has "been practiced quite a bit, but it's just been reified."[10] (18 RT 973.)

For authorship analysis, Dr. Leonard stated that the analyst looks at known and questioned documents seeking patterns. (18 RT 976.) He has "never opined that a document was written by any specific individual. What [Dr. Leonard does] is to look for comparison patterns of language use and point that out to the trier of fact." (18 RT 977.) Conclusions are stated in the form of which of two competing hypotheses are "superior" in their ability to account for nonrandom distribution of the data selected. (18 RT 978.)

In this case, Dr. Leonard was asked by petitioner to compare the two kites written by petitioner[11] and used as evidence in his trial (Q documents), with 14 documents written by petitioner and selected by his counsel (K documents). The K documents consisted of official prison forms and

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[10] According to Wikipedia, the term "reification" as it relates to linguistics means "in natural language processing, where a natural language statement is transformed so actions and events in it become quantifiable variables." http://en.wikipedia.org/wiki/Reification.

[11] The fact that petitioner actually wrote these kites was established at trial through handwriting experts. Petitioner's expert did not dispute the government expert's findings.

personal letters. (PE 72, attachments.) No kites or other BGF writings were included in the K documents. Dr. Leonard was not given any documents written by Willis, Woodard, Andre Johnson, or any other BGF member for the purposes of this analysis. (18 RT 1071-1072.) Although, following cross-examination, he did review a selection of documents attributed to other BGF members, this was done solely to counter questions of similarities between Q and K documents. Dr. Leonard was apparently not asked, nor did he make any effort to analyze authorship of those documents either among themselves, or in relation to the Q documents. (PE 73; 19 RT 1167-1172.)

Dr. Leonard stated that he was asked to point out patterns of similarities and differences to test two hypotheses: common authorship of Q and K documents versus differing authorship of Q and K documents. (18 RT 978.) His report listed seven areas of dissimilarities between the two sets of documents, although at the time of the hearing he acknowledged that, given the disparity in the relative size of the documents being compared, he should not have relied on the "type/token" analysis. (18 RT 990-992.) When confronted with various similarities between the two sets of documents and asked why they were not included in his report, Dr. Leonard asserted that any similarities were insignificant, citing, for example, that both sets of documents were in English, and specifically Black English vernacular. (18 RT 1071-1072.) He also stated that they could be explained by the similar age, ethnic group and gang membership of the various possible authors. (19 RT 1148-1156.)

According to Dr. Leonard, when conducting a forensic linguistic analysis, the first step is the strip out things not authored by the subject and look at the average words per sentence and other computational methodology, as well as reading the documents in detail to look for

discernible patterns that will or will not match to "expected" patterns in the other documents. (18 RT 985-986.)

After eliminating type/token analysis, Dr. Leonard discussed his findings regarding the average words per sentence in the two sets of documents. He noted that, by his count, the Q documents consistently had much shorter sentences than the K documents – 15 words per sentence compared to 23. He also stated that the K documents were more complex, with many of the sentences containing four or more grammatical clauses. According to Dr. Leonard, when there is a significant variation between the words per sentence, the question – assuming single authorship – becomes, "why does that person abandon longer sentences, abandon four-plus clauses, abandon prepositional phrases, when he or she writes the other Q documents?" (18 RT 992-994.) He did agree that audience and context were important, and stated that he was unaware of the contraband nature of the kites, assuming, because he was told that Willis kept a large box of them under his bed, that they were like personal correspondence. (18 RT 1080-1084.)

On cross-examination, Dr. Leonard acknowledged that his colleague, Dr. Roger Shuy, had obtained a significantly different word count for the two Q documents when he did his analysis in 1998.[12] Dr. Shuy's report, which was attached to Dr. Leonard's report states that the two Q documents – identified as "Usalama" and "T-Bone" – contain a total of 669 words in 51 sentences. (PE 72, Attachment 1, p. 1.) Dr. Leonard's report, on the

[12] Dr. Shuy was provided with the same two Q documents – the Masters kites from the trial – although he appears to have been given different K documents. His report was dated 1998. Apparently, when petitioner sought to follow up with him in August 2010, for the purposes of this hearing, he had retired thus necessitating petitioner's retention of Dr. Leonard in September 2010.

other hand, listed either 806 or 813 words[13] and 58 sentences. (PE 72, p. 7.) When asked about the discrepancy between his count and Dr. Shuy's for the same documents, Dr. Leonard said:

> I have no knowledge of what Roger counted and what he didn't. But I know that we had difficulties sometimes reading the Q documents and that may have – you can decide whether you'll only count that which you can read, or partial, and that may account for that. But I have no idea.

(18 RT 1092-1093.) When asked how he counted sentences, Dr. Leonard stated:

> Well, there is a lot of consistent punctuation, but it's lacking, as well. I did it according to what I know about the English language and what sentence – how sentences are constructed, let's say where I would put a period.

(18 RT 1093.) He acknowledged being familiar with the concept of run-on sentences and agreed that people may change their usage regarding sentence length. He stated his opinion that run-on sentences are usually signaled by conjunctions, but that he could not recall if he counted such occurrences as one sentence or more. He did state that he would have been consistent throughout once he made a choice. (18 RT 1093-1094.) Dr. Leonard did not discuss the impact introducing his own sentence construction into the author's writing would have on a comparative analysis.

The next area of discussed by Dr. Leonard was word frequency, with particular focus on the use of "I" and "the." According to Dr. Leonard, "the" is almost always the most common word in a document, with "I" being much lower. While the Q documents follow that, the Ks do not with

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[13] The number of tokens, defined as "the raw number of words used in a text," is listed as 806 for the type/token ratio, but the number of words is listed as 813 for the words per sentence ratio. (PE 72, p. 7.)

"I" being the most common and "the" as third. This is also different from the general population. As with all of Dr. Leonard's findings, he analyzed the documents collectively, as if he had one Q document and one K document rather than 16 individual documents of varying lengths and purposes. (18 RT 994-995; PE 72, p. 7.) A review of the documents individually showed significant variation. (RE SS.) When asked about this, Dr. Leonard cited as an example, document K-5, where petitioner was filling out a form. According to Dr. Leonard, "This is not his normal speech. This is an attempt at a different genre. And the one thing – one effect that we do find on it is that we don't have a lot of 'I's."[14] (18 RT 1098.) When asked why his report did not address documents individually, he stated that it was simply "[b]ecause we were given to believe that all of the documents were authored by Masters." (18 RT 1098.)

Dr. Leonard also discussed the frequency of "the" and "I" under the heading of "key words," which he defined as "words which will appear with statistically unusual frequency in a text or corpus of texts." (18 RT 996.) In attempting to determine whether the frequency of "I" was unusual, considering that many of the K documents were letters, Dr. Leonard consulted the on-line data-base of Project Gutenberg (http://www.gutenberg.org/wiki/Main_Page), which contains documents that are within the public domain. According to Dr. Leonard, he used three books that fell under the general category of personal correspondence for comparison with the K documents: *Letters of a Soldier*,[15] *Diary of a*

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[14] Respondent notes that, of the K documents reviewed, K1 through K5 and K7 were all prison forms.

[15] According to Project Gutenberg, this is a collection of letters, author unknown, written between 1914 and 1915, and apparently translated from French. The introduction notes, "[t]hey are, as we should have said before the war, very French, that is to say, very unlike what an Englishman

(continued...)

*Nursing Sister on the Western Front,*[16] and *A Hilltop on the Marne.*[17] According to his count, those documents also reflect a lower percentage of the word "I" than is found in the collective K documents. Based on this review, he concluded, "By definition – if you don't match both a general database and a database of the specific type of writing that we're doing, by definition it's uncommon." (18 RT 998-999) Dr. Leonard also relied on the Contemporaneous American English Corpus, although it is not broken down into African-American vernacular, nor does it include gang language. (18 RT 1099-1101.) He did not have a corpus of BGF documents available to him, nor is he aware of the existence of any such collection. (18 RT 1087.) He did not seek out BGF writings such as *Soledad Brother,*[18] which is a collection of letters written by George Jackson, founder of the BGF, while he was in prison from 1964 to 1970. (18 RT 1099-1101.)

The next category considered by Dr. Leonard was the use of the deontic "must," which implies an obligation – "you must do your homework," as opposed to "it must be Joe at the door." He acknowledged that this portion of the analysis was hampered by the limited number of words and therefore sought to norm the findings by ascertaining the number

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(...continued)
would write to his mother, or indeed to any one."
http://www.gutenberg.org/files/17316/17316-h/17316-h.htm.

[16] These letters, author unknown, were also written between 1914 and 1915. http://www.gutenberg.org/files/18910/18910-h/18910-h.htm#I.

[17] This is a collection of letters written by Mildred Aldrich, an American teacher and journalist, from June to September 1914. http://www.gutenberg.org/files/11011/11011-h/11011-h.htm; http://en.wikipedia.org/wiki/Mildred_Aldrich.

[18] *Soledad Brother* can be found on line at http://historyisaweapon.com/defcon1/soledadbro.html.

of occurrences per 1000 words.[19] Using these figures, Dr. Leonard stated that the deontic must is used approximately twice as often in the K documents as in the Q's. (PE 72, pp. 8-10.) According to his report, this is notable because "[t]he epistemic use is more common, at least in colloquial speech." (PE 72, p. 9.) On cross-examination, however, he agreed that this statement relates to speech, and that his review dealt only with documents. He also acknowledged that "must" was used only two times in the Q documents, therefore "it is not the strongest claim that we could make." (18 RT 1088-1089.)

Dr. Leonard's next comparison involved the use of "I'am" as a form of "I am." Noting that this was extremely uncommon, he pointed out that the K documents contained 36 instances of the variation but that there were none in the Q documents. Although he acknowledged that several of the individual K documents – K1, K2, and K8 - did not contain the "I'am" variation, despite the opportunity to use it, and that Masters also used the more standard "I'm" and "I am," he stated that those were not significant because it was like saying both sets of documents were in English. His report also noted the use of the non-standard "Im" in the K documents and its absence in the Q documents.[20] (PE 72, pp. 10-12; 18 RT 1002-1005.)

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[19] As previously noted, even according to Dr. Leonard's count, the Q documents contained between 806 and 814 words.

[20] Respondent notes that a review of various Willis documents in the record shows that he virtually always uses the non-standard "Im," with the only alternative form being extremely limited usage of "I am." (See, e.g., PE 66; PE 7 RE T; RE U; RE V; RE W; RE Z; RE EE; RE Z.) As Dr. Leonard did not conduct an authorship analysis of any Willis documents in comparison with the Q documents, the failure of the Q's to include Willis's consistent non-standard usage, as it impacts on petitioner's theory that he was simply copying materials written by Willis was not addressed by Leonard.

Dr. Leonard also acknowledged that the determination that "I'am" was used, and its frequency, was dependent upon the viewer's interpretation of marks on what are often poor quality copies. For example, he agreed that in RE UU, which was an enlargement, Masters was inconsistent in the use of upper and lower case letters, and that it was possible that the small mark above a capital "I" without the cross bars could be the "dot" on an "i" or it could be an apostrophe depending upon the interpretation. In other instances, however, the apostrophe appeared to be clearly marked. (18 RT 1104-1105.) Another example could be seen in RE VV, which was a copy of K2. There, the document contains what could be "i am," or "I'am", and the typed version attached to his report lists it as "I a'm," demonstrating variations in interpretation. Dr. Leonard stated that he did not count that instance in compiling his statistics. (18 RT 1107-1108.)

Dr. Leonard also looked at the use of the articles "a" and "an" in the two sets of documents. As he noted, correct usage depends upon whether a vowel follows the article. The Q documents had no instances of "an" being used, even where it would have been appropriate, but the K documents did have instances of "an," some of which were correct and some of which were not. According to Dr. Leonard, "the important thing is that the Q here is a different grammar, so to speak. We have – just as if we saw a document in French and a document in English and the person A did not speak the other language, we would have pretty strong – pretty strong evidence of dissimilar authorship." (18 RT 1005-1006.) Although in the K documents Dr. Leonard reviewed, petitioner used "an" appropriately more than he did inappropriately, Dr. Leonard agreed that, according to Dr. Shuy's report, a different set of K documents showed a greater instance of inappropriate use. (18 RT 1110-1111.) He also acknowledged that there were only two places in the Q documents where the use "an" should have been used. According to Dr. Leonard, the significance, however, is that the

K author (petitioner) has "an" as a part of his grammar while the Q author never uses it.[21] (18 RT 1006.)

Another grammatical usage that Dr. Leonard felt was significant was the use of "was" and "were." This comparison was not contained in his report, as the thought arose out of discussions with a colleague. He did not prepare a supplemental report including these specific findings. (18 RT 1113-1115.) Dr. Leonard noted a variety of uses and considered the possibility that the differences were one author with two different facets of his language, or different registers – formal and informal – depending on the audience. He ultimately decided against the single author explanation, however, because in conjunction with the use of "a" and "an," if the Q author was simply choosing the vernacular in using "a" then one would expect that he would also choose the vernacular "was." However, according to Dr. Leonard, "In Q we never have anything but correct examples of 'was' and 'were'." He went on to add:

> Before, remember, we only had "a" and not "an" in the Q, which was not consistent with standard English. So now we have Q not consistent with "a" and "an" but Q totally consistent with "was" and "were." And now the K, there are 25 percent of the "was"s are incorrect, they should have been "were"s.
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> [I]t really belies the hypothesis that this is simply two reflexes of one person's style because it would be very against everything we know about language style of formality and informality.

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[21] Respondent notes that in at least one document written by Willis, he uses "an" correctly, although in the limited documents available in this record, he more often appears to use "a." (RE Z.) As with "Im," Dr. Leonard was not asked to include any Willis documents in his authorship analysis of the Q documents, so there is no information in the record as to the impact of Willis's ability to use "an" on petitioner's theory that he was simply copying documents prepared by Willis.

(18 RT 1008-1010.)

Although Dr. Leonard asserted that the Q documents contained no errors in the use of "was" and "were," this does not, in fact, appear to be the case. Q-1, the Usalama report, contains the following:

- Both personel was being prepare by U-1, A-1 and L-9, and was brief by said commission members.
- A lost of one 8 inch "HS" and a 4 inch "HS" was behind a cell search's when assignments by all Usalama personel was working on cutting, making, and sharpening weaponry.

(See Q-1 document attached to PE 73.) The word "personnel," although misspelled in the kite, means either a body of persons, usually in an employment context, or the plural of "persons,"[22] which would normally require the use of "were."[23] In the first example, "personnel" is preceded by the word "both," clearly indicating the plural, yet is followed by the singular "was." The second sentence uses "all" preceding "personnel" which likewise indicates a plural, but it further appears that the subject in that instance is actually the word "assignments," another plural, yet it too is followed by the singular "was."

Finally, Dr. Leonard made note of the use of "and/or," which he observed in the K documents but not in the Q's. (PE 72, p. 13; (18 RT 1014.) He characterized it as "an apparent and idiosyncratic language pattern. I have not seen it before. ... [I]t's almost semantically gratuitous. It seems to be more a conscious marker of formality than actually a way of organizing the information that is being written about." (18 RT 1014.) When challenged as to his statement that he had "not seen it before," Dr. Leonard stated that it was a "rarer occurrence, than say the letter – that the

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[22] http://www.merriam-webster.com/dictionary/personnel.

[23] The example given with the definition is: "Over 10,000 military personnel were stationed in the country."

word "the" or "a" or – using the English language. ... Not using the slash, but using the slash in that way and so idiosyncratically." (18 RT 1111.) As to the use of a "/" between other words in what would appear from reading to be an attempt at indicating an alternative, Dr. Leonard made no note of those and, when questioned, simply stated, "I don't know why there's a slash there, but it's not 'and/or.'" (RE WWW; 18 RT 1112.)

On the basis of the above distinctions, Dr. Leonard opined that the hypothesis that the Q and K documents had different authors – i.e. that the Q documents were written by someone else and copied by petitioner – was superior to the hypothesis that petitioner not only wrote but composed both the Q and K documents. Dr. Leonard stated that he was unable to quantify the percentage of superiority of the hypothesis, given the nature of forensic linguistics. (18 RT 1048-1051.) When asked to give some level of certainty to his conclusion he stated:

> I have no idea to a scientific certainty, or any other kind of certainty, whether the defendant wrote the kites or not. All I can tell you, as a scientist, is that there are certain patterns in the K , and there are certain patterns in the Q, and there are two hypotheses that are competing to explain those patterns and their distribution and the substance of those patterns.
>
> And the hypothesis that says that they were not authored by the same person explains the data better than the hypothesis that says they were authored by the same person.

(18 RT. 1070-1071.) Dr. Leonard cannot and will not opine that petitioner, or any other specific individual, wrote any specific document – "I don't attribute things to authors." (18 RT 1053.)

## III. EVIDENCE RELATING TO JOHNNY HOZE

When Johnny Hoze was brought to court to testify during the reference hearing, he indicated that he wanted to have an attorney appointed to him prior to his testimony. The parties met in chambers and

agreed that the basis of the proposed examination of Mr. Hoze was simply to present the various statements and recantations he had made to various persons and agencies over the years. It was agreed by the parties that the documents establishing the various statements would be admitted in lieu of Hoze's testimony.

The documentary evidence included:

- The hearing transcript and ruling from petitioner's first habeas petition filed in the superior court in November 1990 alleging that Hoze lied at trial. (RE C & K.)

- Petition and ruling from petitioner's second habeas petition filed in the superior court in 1992, alleging that Hoze lied at trial. (RE L.)

- Exhibit 51, consisting of various interviews and letters dating from April 1986 to March 2004.

These documents reflected a pattern of claims by Hoze that he lied at trial followed by claims that he was truthful and recanted only because he was upset with authorities for varying reasons. (13 RT 702-705.) Excerpts from several of these documents are set forth at pages 20 through 25 in the referee's Summary of Evidence and Findings of Fact. A list of the documents by date follows:

- April 29, 1986 – Interview of Hoze by Sgt. Woodford - Hoze states that Masters told him, "he hit the guy with the boxing gloves on."

- May 7, 1986 – Interview of Hoze by LT Thomas - Hoze states that Masters admitted killing Jackson

- August 9, 1987 – Letter from Hoze to DA - Hoze says they have the right people for the Burchfield murder and that Masters killed an inmate on North Block

- October 4, 1987 – Letter from Hoze to DA – Hoze indicates fear of retaliation by BGF

- Undated transcript of interview of Hoze by DA - Hoze discusses Masters's murder of Jackson

- October 8, 1990 – Letter from Hoze to DA – Hoze discusses Leroy Patton and affirms truth of testimony at trial

- December 20, 1990 – Declaration of Hoze affirming trial testimony

- November 18, 1991 – Letter from Hoze to Warden Perez - Hoze states that he lied at trial

- December 10, 1991 – Interview of Hoze by L. Santos - Hoze states that letter to Perez was not true

- April 3, 1992 – Interview of Hoze by L. Santos - Hoze states that letter sent to Warden Perez was false, and was written to get Perez's attention; reaffirms trial testimony

- April 6, 1992 – Letter from Hoze to DA - Hoze explains that letter to Perez was sent because he was upset about a program and the letter was not true

- May 29, 1994 – Letter from Hoze to DA - Hoze states that he lied at trial

- June 28, 1995 – Letter from Hoze "To the Public" - Hoze states that he lied at trial

- May 27, 1997 – Letter from Hoze to Chief Justice George - Hoze states that he lied at trial

- November 19, 2002 – Letter from Hoze "To Whom It May Concern" - Hoze states that he lied at trial

- March 15, 2004 – Letter from DDA Shakely to SDAG Engler – Reporting that Hoze admitted in parole hearing that he wrote the letter recanting due to the DDA's argument against him receiving parole

The exhibit also contains letters from, or on behalf of, Hoze seeking assistance from the District Attorney's Office. These were written in 1992

and 1993. In August 1993, the DA sent a letter stating that Hoze testified, but declining to argue in favor of his release on parole.

## ARGUMENT

### I. STANDARD OF REVIEW

Petitioner seeks to overturn a final judgment on collateral attack. All presumptions favor the truth, accuracy, and fairness of the conviction and sentence, and petitioner bears the burden of overcoming them. (*In re Roberts* (2003) 29 Cal.4th 726, 740-741; *In re Avena* (1996) 12 Cal.4th 694, 710.) Generally, a petitioner must establish his claim by a preponderance of the evidence. (See, e.g., *In re Lawley* (2008) 42 Cal.4th 1231, 1239; *In re Sassounian* (1995) 9 Cal.4th 535, 546.)

Where an evidentiary hearing is conducted by a referee and findings of fact made, "'[t]he 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.]" (*In re Roberts, supra,* 29 Cal.4th at p. 741.)

Where a claim is based on the use of false testimony to obtain a conviction, relief may be granted only if the false evidence is "substantially material or probative," i.e., "if there is a 'reasonable probability' that, had it not been introduced, the result would have been different. [citation]" (*In re Roberts, supra,* 29 Cal.4th at pp. 741-742.) In this case, petitioner's claims rely heavily on purported recantations by three witnesses – Rufus Willis, Bobby Evans and Johnny Hoze. This Court has long recognized that offers to recant trial testimony must be viewed with suspicion. (*In re Roberts, supra*, 29 Cal.4th at p. 742; *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...."].) As this Court has held, although it may be clear from conflicting declarations that a witness has lied at some point, where it is not clear that the lie was in the trial testimony, this Court "will not disturb the jury's verdict based upon a recantation that must be viewed with suspicion and was subsequently disavowed." (*In re Roberts, supra,* 29 Cal.4th at p. 743.)

Claims asserting actual innocence based on newly discovered evidence are subject to an even higher burden of proof – i.e., it must "point unerringly to innocence or reduced culpability." (*In re Bell* (2007) 42 Cal.4th 630, 637.) As this Court has long held:

> Under principles dating back to *In re Lindley* (1947) 29 Cal.2d 709, 177 P.2d 918, "[a] criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts 'fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability. [citations] '[N]ewly discovered evidence does not warrant relief unless it is of such character "as will completely undermine the entire structure of the case upon which the prosecution was based."' [citations] If "a reasonable jury could have rejected" the evidence presented, a petitioner has not satisfied his burden. [citation]

(*In re Lawley, supra*, 42 Cal.4th at p. 1239.) Where, as here, the claims cover both new evidence supporting actual innocence and assertions of perjured testimony or withheld evidence, the higher standard applies to the actual innocence claim and the preponderance standard applies to the other claims. (See, e.g., *In re Lawley, supra*, 42 Cal.4th at p. 1240, and cases cited therein.)

## II. THE REFEREE'S FINDINGS AND ANSWERS TO THE QUESTIONS POSED BY THIS COURT ARE AMPLY SUPPORTED BY THE RECORD

### A. Was False Evidence Regarding Petitioner's Role in the Charged Offenses Admitted at the Guilt Phase of Petitioner's Trial? If So, What Was That Evidence?

According to petitioner, the allegedly false evidence admitted during the guilt phase of trial was the testimony of Willis and Evans regarding petitioner's involvement in the conspiracy to murder and murder of Sgt. Howell Burchfield. In order to obtain relief on this claim, petitioner must demonstrate by a preponderance of the evidence both that false evidence was introduced against him and that such evidence was material or probative, such that there is a reasonable probability of a different outcome had it not been admitted. He failed to do this.

#### 1. Referee's Findings

The referee initially made some general findings relating to the testimony offered by various inmates – Evans, Woodard, Welvie Johnson, Rhinehart and Willis – at the reference hearing:

> All are, or were, members of the BGF. Every one of them has demonstrably lied, either at the 1990 trial or the 2011 Habeas hearing or both. Each witness gave inconsistent accounts while under oath at a hearing, or in sworn declarations, or in prison debriefings, or in other written statements. All of them, as members of the same prison gang, have a motive now to give testimony favorable to Masters.

(Final Report, p. 6.) The referee also noted that there was significant disagreement among the inmates regarding even the most basic aspects of the planning and commission of the murder. (Final Report, pp. 7-8.)

Based upon the record, the referee found Willis lacking in credibility, manipulative and unreliable. She also found that his credibility was "fully addressed by defense counsel at trial and was argued extensively to the jury,

who had the opportunity to observe [him] on the witness stand for days." (Final Report, pp. 8-9.) Specifically as to the 2001 declaration recanting his trial testimony, the referee found:

> In 2001, Willis recanted his trial testimony and executed a declaration exonerating petitioner. His declaration formed the basis of the within Habeas Corpus proceeding. However, just one year later, Willis recanted his recantation. In a letter to the Department of Corrections, Willis reconfirmed his trial testimony and stated that the Masters' investigators had pressured him into making the statement. "I never lied during trial," he wrote. (Ex. E; dated 1/30/02)
>
> The court heard from the investigators who took the statement from Willis in 2001 and finds no basis for Willis' claim that the statement he gave them was coerced. ... In the intervening years – up to and including the time of the hearing in this case – Willis has vacillated between recanting then standing by his trial testimony. Every time he changes his position, he claims he was coerced. ...
>
> Willis has been looking for a way out of prison long before the Burchfield murder occurred. He hoped that his giving testimony in the Burchfield case would be his ticket to freedom. It was not. He has complained long and hard over the years about his continued imprisonment, and he would and will say anything if he thinks it will get him attention and will gain him release from prison. The Referee does not find that Willis was in any way coerced in the underlying trial, just as he was in no way coerced by Masters' investigators to recant his trial testimony.
>
> The jury saw Willis testify. They knew of his murder conviction. They knew he was given immunity. They heard about his disappointment in not being released from prison in exchange for giving State's evidence. The jury was in the very best position to evaluate him as a witness. There is no good reason to credit his subsequent recantation.

(Final Report, pp. 9-10.)

As for Evans, the referee "found him to be spectacularly unreliable." She specifically noted that his stated reason for recanting – to try to get himself right – was "wholly incredible," and his claim that Hahn coerced

him into giving false testimony was "likewise unbelievable." (Final Report, pp. 10-11.

In addition to her own credibility determinations, the referee noted that "petitioner's trial lawyer staged an unsparing attack on Evans. During closing argument, the lawyer blasted Evans' character and credibility. He talked about his extensive criminal background and his work as a snitch. He talked about secret deals with law enforcement." (Final Report, p. 12.) She also noted that, "[i]f Evans lied when he testified that Masters had told him that he had participated in the Burchfield murder, petitioner's lawyer was aware of that lie and argued it in closing." (Final Report, p. 12.) In addition, the referee pointed to inconsistencies within Evans's deposition testimony. (Final Report, pp. 13-14.)

Finally, she concluded, "Evans' recantation is not worthy of belief, much less worthy of usurping the jury's verdict." (Final Report, p. 14.) This conclusion, being based upon credibility determinations arising from live testimony, is entitled to great deference and should be adopted.

**2. The referee's findings are amply supported by the record.**

There was no question that Willis and Evans were out to get whatever they could in exchange for their testimony. There is also no question that the jury was well aware of that fact. It was developed at trial and argued in closing.

Although Willis's testimony at the reference hearing was extremely limited, the referee was able to see him on the stand, and was made aware of his manipulative behavior in the form of the note sent out asking to testify after first refusing. She was also able to review his trial testimony and several statements made by him over the years, including the 2001 recantation, and various letters seeking reduced time or parole based upon his testimony at the Masters trial. She was also able to listen to the 2010

interview with respondent's counsel reaffirming Masters's involvement in the conspiracy (RE HH), as well as to the testimony of defense investigators regarding their interactions with him regarding his 2001 declaration.

Evans admitted during his deposition that he played games with the authorities and would lie to obtain benefits. He readily admitted to lying under oath, although he claimed that this was at the trial rather than during the deposition.

As for the other inmates,[24] their testimony conflicted regarding such significant matters as the identity of the BGF leadership, who instigated the plot to kill Sgt. Burchfield, and how things were handled.

Woodard testified that he was the BGF leader in C-section after Redmond was sent to the AC. Willis and Masters were also part of the leadership on the unit until Masters was demoted by Woodard. The plan to kill Sgt. Burchfield originated with Redmond and Woodard. Masters was disciplined for refusing to go along with the plan.

Rhinehart testified that the C-section leadership – after Redmond's departure – included himself, Woodard, Masters, and Willis, although Rhinehart also denied having any position in the BGF. According to Rhinehart both he and Masters voted against the hit on Sgt. Burchfield, but

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[24] Respondent also notes that petitioner failed to call Andre Johnson or Charles Drume, although declarations from the two were attached as exhibits to the petition. Andre Johnson's declaration (Ex. 3 to the Petition) stated that he thought Masters was a Crip and that he was unaware of any involvement by Masters in the plot. Drume's declaration (Ex. 4 to the Petition) stated that he knew Masters was not involved because he, Drume, was a participant. Interestingly, none of the inmates called by petitioner mentioned Drume's involvement. Petitioner also failed to call Harold Richardson, although an interview attached as Ex. 8 to the petition indicated that he was involved in the planning. Respondent notes that Richardson refused to speak with counsel out of court.

Rhinehart suffered no discipline as a result and continued to be involved in meetings and passing notes. Rhinehart also denied any handling of the murder weapon although according to him it was passed across his cell at least twice in the manufacturing process.

Welvie Johnson, a BGF general, stated that there was no actual governing body in the individual sections, stating only that Woodard had "some power" in C-section. He was not involved in any of the planning, nor was he aware of any discipline imposed on Masters as a result of his refusal to agree to the plan. Welvie Johnson denied any involvement on the part of Redmond in authorizing the hit, and stated that Andre Johnson should not have been selected to carry out the hit given his pending release date.

Evans stated that Woodard was the one to bring up Masters's name in connection with the hit when they discussed it at the AC, and that Woodard indicated Masters was unable to sharpen the weapon. Evans also stated that Woodard told the Commission that he and Redmond ordered the hit. Andre Johnson admitted to Evans that he was the one who stabbed Sgt. Burchfield.

Considering the referee's ability to observe the demeanor of the inmates during their testimony, and given the various contradictions and admissions of past lies, her finding that they lacked credibility is entitled to great deference.

In addition to the inmate testimony, petitioner offered the testimony of Graham McGruer who reviewed prison records and determined that Masters was not at the Adjustment Center in August when Bobby Evans stated their conversation took place. This evidence, although not in the same format, was presented at trial and argued to the jury as a reason to doubt Evans's testimony.

Finally, petitioner offered the testimony of Robert Leonard, Ph.D., regarding his assessment of the two kites written by Masters. Presumably

this evidence was intended to support the statement in Willis's 2001 declaration that Masters simply copied the information in the kites. Even assuming that Dr. Leonard's testimony should have been admitted, the referee correctly found that it did not establish petitioner's innocence.

Dr. Leonard stated that,

> I have no idea to a scientific certainty, or any other kind of certainty, whether the defendant wrote the kites or not. All I can tell you, as a scientist, is that there are certain patterns in the K , and there are certain patterns in the Q, ... And the hypothesis that says that they were not authored by the same person explains the data better than the hypothesis that says they were authored by the same person.

(18 RT. 1070-1071.) Not only could he attach no level of certainty to his conclusion, but he failed – or was not instructed – to conduct any analysis on documents written by Woodard or Willis to confirm Willis's claim. Moreover, Dr. Leonard's analysis offered no evidence regarding Masters's intent in writing the kites, even assuming that he was simply copying something. As the referee noted, "[t]he fact that Masters wrote a [sic] BGF kites about the murder – whether in his own words or those of a higher-ranking member – tends to implicate him in the conspiracy. At a minimum, it shows that he was willing to take orders from superiors and pass messages." (Final Report, p. 15.)

### 3. Conclusion

The dynamics of the BGF gang member testimony and recantation in this case is eerily reminiscent of that which this Court confronted in *Roberts*. Even the explanations and justifications used are similar.

In *Roberts* it was alleged that the prosecution team told witnesses what to say and specifically named Roberts as a target of the

investigation.[25] (*In re Roberts, supra,* 29 Cal.4th at pp. 735, 737.) Here, Evans claimed that he was told the prosecution had to have all three co-defendants, including Masters.[26] (Evans Depo., p. 65 & correction p. 134.)

In *Roberts*, Long was purportedly promised money, a new identity and release from prison, and other inmates were promised money or unspecified "assistance." (*In re Roberts, supra,* 29 Cal.4th at pp. 735-737.) Here, Willis and Evans both claimed that they were promised release from prison.

In *Roberts*, Long allegedly lied in his declaration because petitioner's counsel gave him the impression that Roberts had been removed from death row and Long believed his life was in danger. (*In re Roberts, supra,* 29 Cal.4th at p. 735-736.) Here, Willis told authorities that he signed the 2001 declaration because Masters knew his location and the investigators made it clear that it was in Willis's best interest to cooperate. (RE EE.)

In *Roberts,* Long claimed that he was recanting because, "I have lived with this shame for 15 years and I am happy to get this off my chest." (*In re Roberts, supra,* 29 Cal.4th at p. 735.) Here, Willis and Evans both gave

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[25] "The prosecution's investigators ... made it clear to me that Roberts and Menefield were their targets. ..." (29 Cal.4th at p. 735.)

"Horton was encouraging me to lie about having see Larry Roberts run up the stair. ..." (29 Cal.4th at p. 737.)

"Mr. Kirk tried to get me to testify that I saw Roberts running up the stairs." (29 Cal.4th at p. 737.)

[26] "And they was basically telling me, you know, like what to say basically." ..."[T]hey kept on saying that they needed all three of them on the case 'cause that's the way the DA – Gasser kept on tellin me, 'We've got these three individuals and we gotta charge with this and we need all three of them.'" (Evans Depo., p. 65 & correction p. 134.)

a similar need to clear their consciences as a basis for recanting.[27] (PE 26, p. 12; Evans Depo., p. 122.)

Long recanted his recantation. (*In re Roberts, supra,* 29 Cal.4th at p. 738.) Willis likewise recanted his recantation. (RE FF, HH.)

Long invoked his Fifth Amendment right not to testify at the reference hearing. (*In re Roberts, supra,* 29 Cal.4th at p. 738.) Willis invoked his Fifth Amendment right not to testify at the reference hearing. (9 RT, pp. 490-496.)

Both cases involved extensive challenges to the credibility of the prosecution witnesses at trial, and the juries in both cases found the defendants guilty.

In addressing this question, the referee stated:

> The short answer is, although it is likely that some false (but not coerced) testimony was offered at trial, the prosecution did not knowingly present any, and the trial jurors were in the best position to evaluate the believability of the testimony of the witnesses. Although the key trial witnesses, Willis and Evans, have since recanted their trial testimony, the court has scant ability to discern whether they are lying now or whether they were lying then; or whether, as Evans now claims, some of what was said a trial was true and some of it was false. [footnote omitted] The Referee can only find that Willis and Evans are both liars with highly unreliable and selective memories. Since petitioner has the burden of proof in the habeas action, the Referee cannot state that petitioner's evidence as the present trustworthiness of these two witnesses preponderates.

(Final Report, p. 6.)

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[27] Willis stated, "I do not want to die with the fact that I sent Jarvis Masters to death row on my conscience." (PE 26, p. 12.)

Evans said, "Well, I've been kind of like going over a lot of things in my life and I've been like – a lot of things has been bothering me. ...So I feel it's time to try to get myself right now, you know, and tell the truth about certain things that need to be told the truth about, you know." (Evans Depo., p. 122.)

The referee has essentially "concluded that [the inmate witnesses], like the boy who cried wolf, could not be deemed reliable, or at a minimum that a reasonable jury could have rejected [their] testimony." (*In re Lawley, supra*, 42 Cal.4th at p. 1246.) The referee's finding that, absent a credible recantation, "[t]he jury was in the very best position to evaluate him as a witness" (Final Report, p. 10), equates to this Court's holding in *Roberts*, that it "will not disturb the jury's verdict upon a recantation that must be viewed with suspicion." (*In re Roberts, supra*, 29 Cal.4th at p. 743.) In light of the record and this Court's prior holdings, the referee's findings and recommendation as to this question should be adopted.

### B. Is There Newly Discovered, Credible Evidence Indicative of Petitioner's Not Having Been a Participant in the Charged Offenses? If So, What Is That Evidence?

This question is addressed to petitioner's claim of actual innocence, and, as such, is subject to the higher standard of proof. In the context of an actual innocence claim, "'"newly discovered evidence" is evidence that could not have been discovered with reasonable diligence prior to judgment."' (§ 1473.6, subd. (b).)" (*In re Hardy* (2007) 41 Cal.4th 977, 1016.) As previously noted, such evidence will "'not warrant habeas relief unless it is of such character "as will completely undermine the entire structure of the case upon which the prosecution was based."'" (*Id.*)

In this case, the "new" evidence consists of the testimony of other inmates regarding Masters's lack of involvement and that the weapon was made and passed entirely on the second tier of C-section, contrary to Willis's testimony that Masters was involved in making it. Masters also presented the testimony of Dr. Robert Leonard that, in his opinion, various differences in the two kites in Masters's handwriting and other documents known to be written by him, were best explained by the hypothesis that Masters was simply copying words written by someone else. The referee

specifically found that Dr. Leonard's testimony would not qualify as "new" evidence in the context of a habeas petition noting that, "[a]t trial, petitioner denied authorship of the kites and a handwriting expert was offered. Had petitioner so chosen, he could have offered expert linguistic testimony at trial, but instead chose a different strategy." (Final Report, p. 15 n.9.)

**1. The referee's findings**

The referee answered this Court's question in the negative. Petitioner's claim in this regard relied on testimony from several inmates that the weapon was "passed down the line" rather than dropped from the fourth tier to the second. In rejecting the claim, the referee found:

> The court is not convinced by the testimony of the prisoners. As noted above, all prisoners lied in one or more aspects of their testimony. Merely because a prisoner testifies that dropping a murder weapon down from a tier is riskier and more dangerous than passing it down the line does not compel the conclusion that the prisoners in fact chose the low-risk method of passing the weapon.

(Final Report, p. 14.) In an accompanying footnote, the referee noted that if, in fact, a back-up plan was in place, such a plan "would have required inmates on both the upper and lower tiers to have a spearing weapon available to do the deed." (Final Report, p. 14, n.8.)

Although, as noted, the referee found that Dr. Leonard's testimony did not qualify as "new" evidence, she went on to find that it also failed to exonerate petitioner, holding:

> Dr. Leonard's testimony does not exonerate petitioner. It may suggest that Masters was not a planner or leader of the conspiracy, but Masters was not tried as the planner or leader of the conspiracy; he was tried as the knife-sharpener and messenger. The fact that Masters wrote a BGF kites about the murder – whether in his own words or those of a higher-ranking member – tends to implicate him in the conspiracy. At a minimum, it shows that he was willing to take orders from superiors and pass messages.

(Final Report, p. 15.)

### 2. The referee's findings are amply supported by the record

Record support for the referee's credibility findings is discussed above. In addition, the testimony regarding the handling of the weapon further calls into question the inmates' veracity.

The inmates testified that the all of the work on the weapon used was done on the second tier. According to them, this was the only way that it would be done due to security concerns over noise and the opportunity for it to be seized if it were passed up and down between tiers. Given Rhinehart's description of the process, however, the claim of security concerns rings false.

As discussed previously, according to Rhinehart, the weapon began life as a bed brace in cell 8, occupied by Carruthers. It was then passed along the tier (past Rhinehart's cell) in one direction to Vaughn and Ingram in cells 12 and 14, where the pieces were sharpened and one was attached to a pole. The finished spear, which was several feet long, was then passed back down the tier (again crossing Rhinehart's cell) all the way to Andre Johnson in cell 2. This was done despite the fact that all members of the BGF in general, and all those on tier 2, were trained and capable of sharpening metal into weapons. Moreover, despite Welvie Johnson's statement that a weapon would never be passed by a member of a rival gang, keeping it on tier two required that it pass by cell 4, which was occupied by a Crip named Ephriam. (ORT 11514-11515, 15763.)

The disingenuousness of the claimed security needs support the referee's findings regarding the inmates' lack of credibility as well as her finding that simply being a less risky choice – assuming that it was – does not guarantee that it was the alternative used. Moreover, as she correctly

noted, if a back-up plan was in place, there had to be a weapon (or weapons) on the higher tiers as well.

As to Dr. Leonard's report, while the referee described his testimony as "convincing," she correctly found that it did not exonerate petitioner. Respondent submits that, for the reasons set forth in section III, Dr. Leonard should not have been allowed to testify in the absence of a *Kelly/Frye* hearing to determine the admissibility of his process of forensic linguistics. Nonetheless, his testimony does nothing to refute the referee's findings.

Dr. Leonard was asked to consider the "authorship" – the composer – of the two kites attributed to petitioner, as opposed to the "draftsmanship" – physical handwriting. Dr. Leonard does not opine that a particular document was written by a specific individual, he only points out patterns that he observes to the trier of fact. (18 RT 977.) Although Dr. Leonard maintained that the hypothesis of different authors was "superior to" the single-author hypothesis, thereby purporting to support Masters's claim that he merely copied what Willis gave him, he also stated that, "I have no idea to a scientific certainty, or any other kind of certainty, whether the defendant wrote the kites or not." (18 RT 1070-1071.) He provided no information regarding petitioner's intent in writing the documents based upon his review.

Further detracting from the impact of this evidence is that Willis's copying theory would appear to be in direct conflict with Woodard's testimony at the hearing. According to Woodard, who by all accounts outranked Willis[28] in the BGF hierarchy, he had ordered Masters to have no

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[28] According to some testimony, Willis's loyalty was suspect prior to his coming to C-section and therefore any authority given him would have been limited at best.

involvement in the plot to kill Sgt. Burchfield. In light of such orders, and considering the alleged "discipline" imposed against him by Woodard, a claim that Masters felt taking credit for involvement would somehow ingratiate him with Woodard is, at best, suspect. Similarly, if Woodard had ordered Masters out of the conspiracy and disciplined him, it also seems unlikely that Willis would risk punishment by involving Masters. As to a possible motivation of threats against Masters, it seems likely that Woodard's orders would outrank Willis's and result in Masters refusing to cooperate.

Based upon the record and her ability to observe the various witnesses, the referee correctly found that petitioner's new evidence does not satisfy the higher standard required under *Lawley*. The inmate testimony regarding the weapon, although new, is not credible, and Dr. Leonard's testimony – assuming it is even admissible – is neither "new," nor does it exonerate petitioner. Most certainly, "'a reasonable jury could have rejected' the evidence presented," thus petitioner has not satisfied his burden. (*In re Lawley, supra*, 42 Cal.4th at p. 1239.) The referee's findings should be adopted by this Court.

**C. What, If Any, Promises or Threats Were Made to Guilt Phase Prosecution Witness Rufus Willis by District Attorney Investigator Charles Numark or Deputy District Attorneys Edward Berberian or Paula Kamena? Was Willis's Trial Testimony Affected by Any Such Promises or Threats, and, If So, How?**

As the referee correctly found:

> There is no evidence of undisclosed promises or threats made to Rufus Willis by Numark, Berberian or Kamena. As stated above, Willis has been trying to find a way out of prison since his commitment. He hoped that the Burchfield case would provide him a way out. But the Marin prosecution team would not go along with Willis' demand and did not promise Willis anything more than immunity for his involvement in the Burchfield murder. The jury was told of the immunity

> agreement. Willis told the jury of his disappointment in not getting a better deal. If Willis indeed believed, as he said in his statement to Masters' investigators that, "I felt I had no choice but to testify and to say what Numark and Berberian wanted: to implicate Masters along with the others," Willis made the choice to testify because it was the one the [sic] most benefited him, not because he was threatened or coerced.

(Final Report, pp. 15-16.) The referee also noted that, based upon her review of the record and contact with Willis, she found him to be manipulative and untrustworthy, further detracting from the credibility of any claims of undisclosed promises or threats. (Final Report, p. 16.)

As discussed above, the record amply supports the referee's findings regarding Willis's lack of credibility even given the limited nature of his appearance at the hearing. Moreover, the referee did hear testimony from David Gasser and Edward Berberian and therefore had the ability to judge their credibility. Her findings should be adopted by this Court.

**D. Were There Promises, Threats or Facts Concerning Guilt Phase Prosecution Witness Bobby Evans's Relationship with Law Enforcement Agencies of Which Deputy District Attorneys Berberian and Kamena Were, or Should Have Been, Aware, but That Were Not Disclosed to the Defense? If So, What Are Those Promises, Threats or Facts?**

The referee correctly found that "Evans got from law enforcement exactly what the jury was told he had been promised: protection." (Final Report, p. 16.) The evidence demonstrated that, although Evans had more contact with James Hahn than he admitted to at trial, Hahn did not work in Marin, nor did he disclose the extent of his relationship with Evans to the prosecution team. Deputy District Attorneys Berberian and Kamena had no way of knowing the extent of Evans's contact with Hahn. (Final Report, p. 16.)

The referee correctly concluded that the evidence of the additional contact between Hahn and Evans was not substantially material. At trial, the jury heard that Evans had served as a police informant; that he had entered a plea in an Alameda County case where sentencing was pending; and that he had committed numerous offenses, including 13 to 15 shootings (albeit no murders) for which he did not expect to be prosecuted by either federal or state authorities. (Final Report, pp. 16-17.)

The record amply supports the referee's finding that Bobby Evans was not credible and that he was promised nothing more than protection in exchange for his testimony. These findings should be adopted.

**E. Did Deputy District Attorneys Berberian and Kamena Knowingly Present False Testimony by Bobby Evans? If So, What Was That Testimony?**

At the outset of the hearing, petitioner conceded that there was no evidence to support a finding that Deputy District Attorneys Berberian and Kamena knowingly presented false testimony by Bobby Evans. (1 RT 25.) This was reaffirmed by petitioner in his closing argument. (16 RT 851.) Based upon this concession, the referee correctly answered this question in the negative. (Final Report, p. 17.)

**F. What, If Any, Promises or Threats Were Made to Bobby Evans by District Attorney Investigator Numark, Department of Corrections Investigator James Hahn, or Deputy District Attorneys Berberian and Kamena? Was Evans's Trial Testimony Affected by Any Such Promises or Threats, and, If So, How?**

Petitioner likewise conceded that there was no evidence of promises or threats made to Bobby Evans by Deputy District Attorneys Berberian and Kamena, or District Attorney Investigator Numark. (16 RT 851.) As the referee noted, Mr. Berberian testified not only that he made no promises, but that he specifically sent a letter to that effect to Evans's counsel. (Final Report, p. 17; 3 RT 157.)

Petitioner's case on this question rested on promises and threats allegedly made by Investigator James Hahn – primarily relating to Evans's status as a suspect in the murder of James Beasley, Sr., in San Francisco in 1989. The referee correctly found that this claim was not substantiated by the evidence. (Final Report, p. 17.)

The referee found Evans to be "spectacularly unreliable," and "[h]is story that Hahn coerced him into giving testimony against Masters is likewise unbelievable." (Final Report, pp. 10-11.) As to the Beasley murder, she found that Evans was "only an uncharged suspect and no one, not Evans or anyone else, was ever charged in connection with the [] case." (Final Report, p. 11.) She also noted that Evans, during his deposition, denied any involvement in the murder. (Final Report, p. 11; PE 58, p. 113.) As for James Hahn, the referee correctly found that he did not work in San Francisco, nor did he have a role in the Beasley murder investigation. (Final Report. P. 11 n7.) Although the testimony was unclear as to when Mr. Hahn may have been made aware of Evans's status as a possible suspect in the Beasley case, Hahn, testified that he was told that San Francisco had "nothing solid" to go on. (8 RT 474-475.)

The referee correctly found that the evidence did not substantiate this claim and that finding is supported by the record.

### G. Did Penalty Phase Prosecution Witness Johnny Hoze Provide False Testimony Regarding Petitioner's Involvement in the Murder of Inmate David Jackson? If So, What Was That False Testimony?

#### 1. This claim should be denied on the basis that it was previously adjudicated in prior habeas petitions.

This is petitioner's third habeas petition alleging claims related to recantations by Johnny Hoze. The first petition, filed in the Marin Superior Court in 1990, included an evidentiary hearing where Hoze and another

inmate, Leroy Patton, testified regarding Hoze's alleged statements to Patton that he lied during Masters's trial. The court denied relief on that petition. (RE C & K; Final Report, pp. 18-19.) The second petition was likewise filed in Marin Superior Court in 1992. It again alleged that Hoze had lied during his testimony, this time relying upon a letter sent to the prison warden. That petition was denied without a hearing. (RE L; 12 RT 692; Final Report, pp. 18-19.) In the current petition, the documents relied upon include the letter to the warden from the second petition as well as a string of letters written after that one.

Immediately prior to petitioner's calling of Johnny Hoze, respondent raised an objection based upon the prior habeas rulings relating to allegations that Hoze's trial testimony was false. (12 RT 691-692.) As respondent noted, given Hoze's history of claiming that he lied and then disavowing such statements, by allowing this claim to proceed, the potential exists for an unending stream of habeas petitions attacking Hoze's testimony. Although the referee indicated that she would address the question as it was contained in this Court's order (12 RT 693), respondent nonetheless submits that this Court should refuse to address this claim as it has been previously decided. (See, e.g., *In re Miller* (1941) 17 Cal.2d 734, 735, 112 P.2d 10 [barring repetitive habeas corpus claims previously denied on the merits in a prior habeas corpus proceeding].)

While this Court has recognized that the reliance upon additional evidence may suffice to overcome the procedural bar, in this case, the evidence offered was simply "more of the same," and did not significantly alter petitioner's claim, particularly as Hoze recanted his recantations with equal regularity. (See, *In re Martin* (1987) 44 Cal.3d 1, 27 n.3 ["It is, of course, the rule that a petition for habeas corpus based on the same grounds as those of a previously denied petition will itself be denied when there has been no change in the facts or law substantially affecting the rights of the

petitioner."].) As the Referee noted in her Final Report, "[t]he Hoze claim has been fully and repeatedly litigated before the instant Habeas proceeding and no new or reliable evidence has arisen since." (Final Report, p. 25.)

Petitioner asserted in the current petition that the prior habeas decisions should not serve as a bar in this instance as the first petition[29] predated the decisions in *McCleskey v. Zant* (1991) 499 U.S. 467 and *In re Clark* (1993) 5 Cal.4th 750, asserting that it was not until those cases were decided that the standards and limits on successive petitions were announced. (Petition for Writ of Habeas Corpus, p. 8.) Although *Clark* did consider the impact of the Court's prior discretionary consideration of claims in some instances that might otherwise be deemed barred, the opinion clearly states that, "[i]t has long been the rule that absent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark, supra*, 5 Cal.4th at 767.) Respondent submits that, in light of the prior decisions relating to the alleged recantations of Johnny Hoze, this claim should be denied. In any event, this Court should make clear to petitioner that further claims tied to similar statements by Hoze will not be considered.

**2. The referee correctly found that petitioner failed to carry his burden of proof as to this question.**

As noted above, by agreement of the parties, PE 51 was admitted in lieu of live testimony by Johnny Hoze. In addition, respondent submitted the transcript from the first evidentiary hearing at which Hoze did testify. (RE C & K.) Respondent also submitted the petition and ruling from the second habeas petition, which was decided without a hearing. (RE L.)

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[29] The second petition was filed and decided after *McCleskey* but before *Clark*.

In her Final Report, the referee answered question 7 in the negative. (Final Report, p. 18.) Although the referee recognized that, as her decision was based only upon documentary evidence, she was in no better position than this Court to judge Hoze's believability, she also noted that Judge Savitt, who did hear Hoze testify at both the trial and in the first habeas proceeding,[30] was in a good position to evaluate Hoze's credibility. (Final Report, p. 25.) Here, the referee, after summarizing portions of the documentary evidence submitted, accurately concluded:

> These extracts show that not only does Hoze recant and un-recant with alarming frequency, but that he admits he has a motive to do so – whether he is dissatisfied with his housing or with the outcome of hearings at the Board of Prison Terms. His recantations are not believable. He seems to take great pride in the fact that he helped the judge and jury reach the decision to impose the death penalty and that he can cause a flurry of activity by recanting his testimony. The jury was in the very best position to evaluate his believability as a witness. Judge Savitt had the opportunity to evaluate him as a witness at trial and again in the previous habeas corpus proceedings before her. The Hoze claim has been fully and repeatedly litigated before the instant Habeas proceeding and no new or reliable evidence has arisen since. The Referee finds no basis for believing that Hoze provided false testimony regarding petitioner's involvement in the murder of inmate David Jackson.

(Final Report, pp. 25-26.) The referee's conclusions are fully supported by the documentary evidence submitted as well as the prior habeas denials, and should be adopted by this Court.

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[30]Judge Savitt heard testimony from both Hoze and Leroy Patton, to whom Hoze purportedly recanted. She found that Patton's testimony was unbelievable. (RE K, p. 4.)

## III. THE REFEREE ERRED IN DENYING RESPONDENT'S MOTION FOR A HEARING UNDER *PEOPLE V. KELLY* (1976) 17 CAL.3D 24, TO DETERMINE THE ADMISSIBILITY OF FORENSIC LINGUISTICS EVIDENCE

In support of a statement made in Rufus Willis's 2001 declaration that petitioner merely copied the information contained in the two kites admitted against him, petitioner offered the testimony of a forensic linguist, Dr. Robert Leonard. Prior to his testimony, respondent filed a motion to preclude the evidence as the method of analysis used by Dr. Leonard does not satisfy the requirements of *Kelly*. (Motion) The referee denied the motion finding that the *Kelly* test does not apply to this type of evidence. (Stipulation and Order re: Preliminary Ruling on the Pleadings, March 21, 2011, p. 2.) Respondent submits that this ruling was in error and Dr. Leonard's testimony should have been excluded.

### A. The *Kelly* Test

*People v. Kelly* established a three-prong test that governs the admissibility of scientific evidence in California:

> [A]dmissibility of expert testimony based upon the application of a new scientific technique traditionally involves a two-step process: (1) the *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]

(*Kelly*, *supra,* 17 Cal.3d at p. 30 [emphasis in original].) "Kelly was designed to insulate the [factfinder] from expert testimony premised on methods that 'carry [a] misleading aura of scientific infallibility.'" (*People v. Eubanks* (2011) 53 Cal.4th 110, 141.)

"Reliability," for *Kelly* admissibility purposes, means that a particular scientific technique "'must be *sufficiently established to have gained*

*general acceptance in the particular field in which it belongs*'" in order to be admissible. (*People v. Reilly* (1987) 196 Cal.App.3d 1127, 1013, 1014, [emphasis in original]; *People v. Venegas* (1998) 18 Cal.4th 47, 76.)

A *Kelly* hearing is required before the admission of any expert testimony using a "new" scientific technique – i.e., "a technique, process, or theory which is *new* to science and, even more so, the law." (*People v. Leahy* (1994) 8 Cal.4th 587, 605, quoting *People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) A technique is "new" for *Kelly* purposes if "its courtroom use cannot fairly be characterized as 'routine' or settled in law," or when the technique "has been repeatedly challenged in court, with varying degrees of success." (*People v. Leahy* (1994) 8 Cal.4th 587, 606.)

"A technique may be deemed 'scientific' for purposes of [*Kelly*] if the 'unproven technique or procedure appears *in both name and description* to provide some definitive truth which the expert need only accurately recognize and relay to the jury.'" (*Leahy, supra,* 8 Cal.4th at p. 606, quoting *Stoll, supra*, 49 Cal.3d at p. 1156.) Although many of the cases applying the *Kelly* test deal with testimony that relies upon the use of new machines to process or create data, nothing in *Kelly* limits its application to such situations. In fact, this Court rejected such a narrow reading of *Kelly* in *People v. Shirley* (1982) 31 Cal.3d 18, where the prosecution argued that the *Kelly* test was not applicable to the admissibility of post-hypnotic testimony. In finding that the use of such testimony was inadmissible, the Court stated that the "techniques" referred to in *Kelly* are not techniques "limited to manipulation of physical evidence: we do not doubt that if testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the *Frye* standard of admissibility." (*People v. Shirley*, *supra*, at p. 53.)

Respondent does not take issue with Dr. Leonard's use of a computer to count words. Respondent does, however, submit that his reliance on linguistic tools such as type/token ratio, word to sentence ratio, various word distributions and idiosyncratic contractions to ascertain likely authorship outside the academic setting and with no testing to determine the accuracy of these tools, is a new technique whose "courtroom use cannot fairly be characterized as 'routine' or settled in law." As discussed below, Dr. Leonard's assertions that the data selects the features to be relied upon (18 RT 1056), coupled with the claim that it takes a linguist – someone with "a doctorate and 30 years experience" (18 RT 1027) – to be able to determine whether the use of something like "and/or" is unusual, creates exactly the type of "misleading aura of scientific infallibility" that *Kelly* was designed to guard against.

### B. There Is No General Consensus Either within the Scientific Community or the Courts Regarding the Use of Forensic Linguistics in Author Identification Generally, or of Dr. Leonard's System Specifically.

Forensic linguistics is a part of applied linguistics which covers a broad range of techniques and applications. This includes such things as the use of specific words or phrases in patent and trademark law, voice identification, interpretation of language and interview techniques. Shuy, Roger, *Linguistics in the Courtroom*, Oxford University Press (2006), Chapter 1 (Exh. A). In this case, the proffered testimony is in the more narrow field of forensic stylistics, which relies upon the existence of "stylistic markers" within a given writing and involves a comparison of those markers to markers found (or missing) in known writings in an effort to identify or exclude a person as the author of the questioned document. (*United States v. Van Wyk* (D.N.J. 2000) 83 F.Supp.2d 515, 521.)

### 1. Within the scientific community

Petitioner has not established the general acceptance of the use of forensic linguistics to determine authorship within the relevant scientific community. Although Dr. Leonard stated that linguistics has been in use for some time, he specifically stated that, "it's just been reified," and only recently have forensic linguists organized into associations and published their own journals. (18 RT 973.) There are currently no board certifications for forensic linguistics, nor do the existing associations require any type of testing for admission. (18 RT 1019-1021.) When asked about his knowledge of Dr. Roger Shuy's opinion on the need to create standards, Dr. Leonard responded, "Roger is famous for saying, 'When people ask me how to become a forensic linguist,' he says, 'I have a simple answer, get a doctorate and 30 years experience.'" (18 RT 1027.)

In fact, there is dispute within that community over the reliability of such its use for authorship identification, particularly with regard to the reliance on stylistic markers as in this case. Through attachments to the motion and on cross-examination, respondent introduced articles by various linguists indicating concerns over the reliability of linguistics to accurately identify authors and the need to develop standards in the field. Although Dr. Leonard acknowledged the identity of the various authors as being fellow linguists, he, for the most part simply denied familiarity with the articles in question, and asserted that he could not comment.

Dr. Carole E. Chaski, a well-known forensic linguist and Executive Director of the Institute for Linguistic Evidence, conducted an empirical evaluation of various methods of author identification that was published in 2001.[31] (RE PP; hereinafter "Chaski Study.") Her study involved the use

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[31] Chaski, Carole E., "Empirical Evaluations of language-based author identification techniques," *Forensic Linguistics* 8(1) (2001). This (continued...)

of known documents and a randomly selected questioned document, and required the testers to distinguish the documents written by the various authors as well as to identify the questioned document with its author using various linguistic methods and measuring the resulting error rates. Based upon her study, she concluded:

> [T]echniques which derive from handwriting identification and prescriptive grammar – known as forensic stylistics – fail because they rest on erroneous assumptions about individuality in linguistic performance. Further, these techniques are pernicious to the development of forensic linguistics because they seem so simple to explain to a jury that they bolster the jury's own mistakes.

(RE 44, Chaski Study, at p. 41.) Dr. Chaski also presented her findings at the National Conference on Science and the Law sponsored by the U.S. Department of Justice in 1999.[32] Dr. Leonard acknowledged familiarity with Dr. Chaski's study, and agreed that some measures are "useful and some are probably not," depending on the case. (18 RT 1041.) He indicated, however, that the findings of her study did not concern him because they tested the reliability of various criteria individually, rather than cumulatively. (18 RT 1044.) Chaski's results for specific style markers can be combined, with an accuracy result of 51%. Further, Chaski points out that two independent research teams, one from Swarthmore College and another from Bar Han University, replicated Chaski's work, and using combinations of style markers, found the stylistics method had no better than 51% or 67% accuracy, respectively. (Chaski, Carole E.,

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(...continued)
publication is now called the *International Journal of Speech, Language and Law: Forensic Linguistics*.

[32] Her presentation, "Linguistic Authentication and Reliability," is part of the report from the conference which may be found at, http://www.ojp.usdoj.gov/nij/pubs-sum/17930.htm.

*Linguistics as a Forensic Science: the Case of Author Identification, Behrens and Parker* in Language in the Real World (Behrens & Parker, edits., 2010) p. 180)

In 1998, Dr. Joseph Rudman, of Carnegie Mellon University, wrote that there was "no consensus on results, no consensus as to accepted or correct methodology, and no consensus as to accepted or correct techniques. An even stronger indication of problems is disagreement over many of the underlying assumptions – in our case in the 'core' fields of statistics and stylistics – assumptions such as the consciousness or unconsciousness of style or the randomness of world selection." Rudman, Joseph, "The State of Authorship Attribution Studies: Some Problems and Solutions," Computers and the Humanities 31: 351-365, 1998, Kluwer Academic Publishers (Exh. D to Respondent's Motion to Preclude the Testimony of Dr. Robert Leonard, filed Feb. 18, 2011.) Dr. Leonard was uncertain as to the identity of Dr. Rudman without having a middle initial, nor was he familiar with Dr. Rudman's paper. (18 RT 1052-1053.)

David Crystal, a British linguist, wrote a review[33] in 1995 of *Forensic Stylistics*, by Gerald R. McMenamin. McMenamin, like Leonard, compares known and questioned documents for similarities and differences, relying on such structural categories as characteristic words and phrases, and various syntactic choices. In reviewing McMenamin's book, David Crystal observed:

> Without any arguments in support of the chosen methodology, one is left wondering why certain criteria have been used and not others, and what some of the criteria could possibly mean.

(Reviews, *Language,* Vol. 71, No. 2 (1995), p. 381.) After taking note of the analytic criteria selected by McMenamin, Crystal says, "We are asked

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[33] www.**davidcrystal**.com/DC_articles/Linguistics21.pdf.

to take on trust that such criteria are well-motivated," and notes the failure to follow up with any demonstration of the existence of a "coherent analytic framework." (*Id.*, at p. 382.) Noting that McMenamin couches his findings in terms of "near equivalence" and "used very frequently," Crystal observes that "[t]here isn't a single test of statistical significance in the book, and the whole of the opening chapter, which is the central illustration of the approach, is based on impressionistic statements of varying levels of vagueness." (*Id.*) Dr. Leonard was familiar with both David Crystal and Gerald McMenamin, as well as McMenamin's book, although he was not aware of Crystal's review. (18 RT 1053-1054.)

In *United States v. Van Wyk,* the district court noted that Dr. McMenamin's article, relied upon in support of the expert evidence indicated that "there is not one generally accepted technique of stylistic analysis; the decision depends largely on the data presented." (*United States v. Van Wyk* (D.N.J. 2000) 83 F.Supp.2d 515, 521.) The court went on to observe:

> The following quote from the McMenamin article does little to instill confidence in the reliability of [Agent Fitzgerald's] opinion as to authorship:
>
> There is strong practical and theoretical motivation to combine available methodologies in the analysis of style. From the researcher's perspective, the obligation to explain his or her method and findings leads to conclusions that are "*not so much objective as they are 'intersubjective.*'" (Ross 1973:3). With respect to the linguistic data itself, the study of stylistic variation mediates (in a relation of complementarity) between the non-measurable (qualitative) and linguistic variables, which are the rules of language, and the measurable (quantifiable) frequencies of occurrence of units exemplifying the values of those linguistic variables (Itkonen 1980:363) (emphasis added)
>
> McMenamin article, at 170.

(*United States v. Van Wyk, supra,* 83 F.Supp.2d at p. 521 fn.10.)

Dr. Leonard was familiar with John Olsson, another linguist, but he had not read Dr. Olsson's book, *Word Crime*, although he described it as "a popular book about authorship analysis." (18 RT 1057.) Dr. Leonard did not know what Dr. Olsson meant by the term "idiomatic markedness," nor was he aware that Dr. Olsson relied on Dr. Chaski's work in selecting the markers that he uses in conducting his analysis. (18 RT 1058-1059.)

Malcolm Coulthard, another well-known linguist, wrote that "no one has even begun to speculate about how much and what kind of data would be needed to uniquely characterize an idiolect, nor how that data once collected would be stored and analyzed." (Coulthard, Malcolm, "Author Identification, Idiolect and Linguistic Uniqueness," p. 2 (2004) [Attachment A].[34]) He also wrote that the "Holy grail in authorship studies is to find valid and reliable markers which consistently distinguish authors." (Coulthard, Malcolm, "... and then ... Language Description and Author Attribution," p. 17 (2006) [Attachment B].) Dr. Leonard was unfamiliar with these statements and could not say what Coulthard had in mind. (18 RT 1055-1061.)

Although Dr. Leonard stated that he was aware of a study by Tim Grant testing various markers, he was not sufficiently familiar to be able to comment upon Grant's conclusion that, after testing over 170 stylistic markers, Grant found the vast majority "wanting." Leonard did agree, however, that the common meaning of the term "found wanting" means that something is less than helpful. (18 RT 1063.)

Respondent also presented excerpts from the "Language Log," a linguistics blog, submitted by Roger Shuy. (RE NN, QQ, RR.) In one of

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[34] This article and the next one written by Malcolm Coulthard are available on line at http://www1.aston.ac.uk/lss/staff/couthardm/.

those excerpts, Dr. Shuy noted that the focus in authorship identification seems to be on small units of language asserting that,

> It's tempting to think that such language features can actually identify authors with as much validity and precision as the way DNA analysis helps law enforcement identify suspects. Personally, I have some reservations about what I see linguists doing as they try to help the police and the courts determine issues of innocence or guilt.

( RE QQ, p. 1.) In that same entry he also states:

> Okay, I have to admit that in the past I too have tried to help law enforcement agencies narrow down their suspect lists by examining the evidence of letters, threat messages, emails, and other documents. Sometimes this produces a few language clues and insights for the police to use in further interrogations of their suspects, but I've never found enough of these to cause me to have any degree of certainty about their authorship
>
> ***
>
> It's also not clear that anything like idiolect really exists in written language and, even if it does exist, we don't know the kinds and frequency of features needed to identify the text as the idiolect of a given writer.
>
> Third, I don't know whether the suspicious-looking diagnostic language features I find are actually diagnostic of specific individuals as opposed to different individuals. Until we have an established and relatively large corpus of a given writer's texts, we can't identify with certainty that individual's predictable usage. In fact, we don't even know how large such a corpus needs to be.

(RE QQ, pp. 1-2.)

> A second entry included the following comments by Dr. Shuy:
>
> [E]ven if we can determine what "enough data" might mean, we need to have adequate samples of documents for comparison. And not just any old comparison samples will do. For example, it can be fruitless to compare the register of a threat message with the register of a business letter.

> If that isn't enough to discourage us from determining the writers' identity ..., we also have to be concerned about individual language variation.
>
> ***
>
> Sociolinguistic research has accomplished a lot, but we're only beginning to scratch the surface of all the kinds, rates, and comparative ratios in English use .... That is, we need to know whether this feature is a diagnostically significant identity marker at all.
>
> Even if we have a good research base telling us that the feature in question is potentially diagnostic, we need to have a large enough corpus of the target's language from which we can determine that person's variable use of that particular feature. Two or three paragraphs are usually not enough.

(RE RR, pp. 1-2.) He concluded, "It has some usefulness as an investigative tool, but it can be very troublesome to present such evidence in court." (RE RR, p. 2.)

Dr. Leonard attempted to minimize the impact of this critique by asserting that Dr. Shuy's comments were made in the context of author "identification" – attempting to affirmatively name a specific person as the author of a specific document – rather than authorship "analysis" which results only in the "superior hypothesis" finding. (18 RT 1064-1065.) Respondent submits, however, that the areas of concern noted – i.e. unknown sample size needed for accuracy and lack of research on statistical significance of various features – are similar to the reliability concerns noted by other linguists and apply whether identifying a specific person or simply narrowing a suspect pool. Moreover, Dr. Shuy preceded a portion of his discussion with an admission that he had attempted to help police "narrow down" a suspect pool but that he lacked any degree of certainty in the results. (RE QQ, p. 1.)

As this Court has held, in determining general acceptance, a court may look to published writings, and "if a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose [the technique] as unreliable, the court may safely conclude there is no such consensus at the present time." (*In re Leahy*, *supra*, 8 Cal.4th at p. 611 (quoting *People v. Shirley, supra,* 31 Cal.3d at p. 56).) In light of the above articles, and given Dr. Leonard's stated lack of familiarity with the research and writing that has been done in the field to test reliability, there certainly appears to be no general consensus as to the reliability and acceptance of this method, at least in this context.

**2. Case law.**

Respondent is unaware of any California appellate decisions holding that forensic linguistics is admissible for the purpose of author identification. In the capital trial of *People v. Michael Flinner*, Case No. S123813,[35] which was tried in San Diego, the prosecution sought to offer the testimony of Dr. Gerald McMenamin, a noted forensic linguist. Dr. McMenamin testified during the grand jury proceedings regarding the authorship of certain threatening letters, linking them to the defendant on the basis of several stylistic markers. Although the trial court initially ruled that Dr. McMenamin could testify in a limited manner pursuant to the holding in *United States v. Van Wyk, supra,* 83 F.Supp.2d at p. 523 [holding that forensic linguist could state similarities but could not provide

[35] Judgment of death was entered in 2004. This case is currently on direct review in this Court – Case No. S123813. No briefs have yet been filed. A petition for writ of habeas corpus has also been filed – *In re Flinner*, No. S193256.

opinion on authorship due to questionable reliability],[36] on a defense motion for reconsideration, the court stated:

> The Court has been made aware of no criminal case in California that has allowed the introduction of evidence of forensic linguistics or stylistics. Such evidence, including the testimony of Dr. McMenamin, will not be admitted at this trial without first passing muster consistent with the requirements of the *Kelly* and *Leahy* case. To date, the requisite showing of reliability has not been made.
>
> Further, the court invokes evidence code section 352 as a bar to this evidence. Its probative value is substantially outweighed by the probability that the admission will necessitate an undue consumption of time.

(Exh. E – Excerpt from Trial Record, *People v. Michael Flinner*, at p. 21.)[37] This type of evidence was also precluded by the United States District Court in *United States v. Hearst* (N.D.Cal. 1976) 412 F.Supp. 893.[38]

In *Van Wyk,* the district court allowed testimony, but the expert, Mr. Fitzgerald, was limited solely to pointing out observed similarities and differences between the documents. He was not allowed to state a conclusion regarding authorship. In so holding, the court specifically noted that:

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[36] Because *Van Wyk* was a federal case, the court applied the test enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579.

[37] Exh. E includes pages 18-22 of the record of trial which deals with the request for reconsideration by the defense.

[38] Respondent notes that, in an unpublished order, the United States District Court for the Eastern District of California did reference the submission of declarations from forensic linguists opining on authorship as part of a motion to exclude evidence. The Court ultimately held, however, that the plaintiff had failed to properly authenticate the letter in question. (*McConnell v. Lassen County,* California (E.D. Cal., 2009) 2009 WL 3365912 [Attachment C].)

> The reliability of text analysis, much like handwriting analysis, is questionable because, as discussed supra, there is no known rate of error, no recognized standard, no meaningful peer review, and no system of accrediting an individual as an expert in the field. Consequently, the existing data for forensic stylistics cannot definitively establish, as can DNA data, that a particular person is "the" author of a particular writing.

(*United States v. Van Wyk, supra*, 83 F.Supp.2d at p. 523.) Fitzgerald's testimony was similarly limited in *United States v. Zajac*, (D.Utah 2010) 748 F.Supp.2d 1340.

The United States District Court for the Western District of Texas rejected the proffered testimony of a computational linguist due to a lack of general acceptance and failure to establish reliability. In so doing, the court observed:

> In an article that Baldridge cites in his report and recognizes as authoritative, "Author Identification in American Courts," Baldridge Report at 2, 26, the authors examine different methods in the field and conclude that there are "serious questions about the admissibility of expert testimony on authorship, given the current state of the art" and that linguistic methods require further testing and improvement to be accepted in American courts. Lawrence Solan & Peter Tiersma, Author Identification in American Courts, 25 Applied Linguistics 448, 463 (2004).

(*United States ex rel. Gonzalez v. Fresenius Medical Care North America* (W.D.Tex. 2010) 2010 WL 1645970, *8; see also *Passlogix, Inc. v. 2FA Technology, LLC* (S.D.N.Y. 2010) 708 F.Supp.2d 378, 405 n9 [applying *Daubert* to exclude testimony of Dr. Alan Perlman, linguist, regarding authorship of e-mails].)

While forensic linguistic testimony has certainly been accepted in some courts, there appear to be few published opinions discussing it,[39] and

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[39] For example, in *Kelling v. Bridgestone/Firestone, Inc.* (D.Kan. 1994) 1994 WL 723958, *6, testimony was offered regarding the

(continued...)

respondent was unable to find information concerning how often hearings have been held under either *Kelly/Frye* or *Daubert*. It is apparent from the above, however, that courts are not unanimous in their acceptance of its admissibility.

### C. Dr. Leonard Provided Insufficient Information for the Court to Determine Whether Appropriate Scientific Methods Were Used in This Case.

#### 1. Selection of markers

Although Dr. Leonard has identified the various "markers" that he used for comparison of the questioned and known documents in this case, he did not identify the methodology used for this selection, nor has he identified the nature of the method used for determining the relative uniqueness of any given attributes. When asked what sources were available to determine the criteria, he responded, "[t]he theory of linguistics." (18 RT 1054.) He stated that, "[A]ll linguists use linguistic patterns. Some of us use different ones than others." (18 RT 1038.) According to Dr. Leonard, the data selects the features. (18 RT 1056.) Because you never know what is going to be in a given text, you cannot pre-select any features for comparison. When asked if there are generic types of features that could be looked at, Dr. Leonard indicated that there are things which are "obvious on its face" – such as the "I'am" form – and things that can be gleaned from a database – frequency of "I" and "the." (18 RT 1057.) Additionally, one can find matters of geographic variation – standing "on line" versus "in line" – for which it is helpful to have a linguistics background. (18 RT 1057.)

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(...continued)
authorship of disputed documents. The court in that case observed, it "found the professor's testimony very interesting," but the court did not need to make a ruling on authorship to resolve the matter.

Dr. Leonard asserted that various aspects of word usage in the documents were idiosyncratic. For example, he testified that the use of "and/or" was something he had not seen before and that it was idiosyncratic in that it seemed to be "almost semantically gratuitous." (18 RT 1005-1006.) And later he again stated that it was "idiosyncratic, a rarer occurrence, than say the letter – than the word "the" or "a" or – using the English language." (18 RT 1111.) Despite this very broad definition, in other instances, Dr. Leonard failed to either establish the rarity of a usage or to at least explain his authority for such a determination.

For example, when asked about the use of quotation marks around various words, Dr. Leonard indicated that there are many possible motivations for using them, but that in this case he "probably thought that they were in the realm of normal usage, *or normal nonstandard usage* – and therefore not idiosyncratic." (18 RT 1123-1124, emphasis added.) No explanation was given for why a "normal nonstandard usage" is not idiosyncratic, but something merely rarer "than the word 'the' or 'a'" or "using the English language" would be. Simlarly, when asked about the use of parentheses for plurals or occasional words, Dr. Leonard agreed that the documents contained examples of such use with no standard rule of English that would require it, yet he failed to explain why this did not qualify as idiosyncratic. (18 RT 1122-1123.)

As to the use of "'ed" for word endings (RE FFF), Dr. Leonard initially assumed that it was a standard greeting within the BGF although he lacked any corpus of BGF materials for comparison. (18 RT 1087.) When confronted with the fact that a number of words other than greetings in both sets of documents used the "'ed" ending, he admitted making no effort to determine how unusual such an ending was, concluding simply that, "*It made sense to me, though*, that this setting off of past tense, which is an issue in orthographys of AAVE, African American – sorry, UE, Urban

English, or vernacular English, *that it was not a necessarily idiosyncratic thing*." (18 RT 1131-1132 , emphasis added.) While the term "orthography" relates to the standardized usage of letters in writing words,[40] Dr. Leonard's acknowledged lack of effort to determine whether this feature was actually a part of the orthography raises questions as to the selection methods he used and would seem to support the reliability concerns raised by others in the field.

On redirect, petitioner offered some additional BGF documents, purportedly written by people other than petitioner (PE 73), that contained the same usage. These documents were still limited in number, and Dr. Leonard did not indicate any efforts to determine the existence of a gang corpus, stating only that he did not find such features significant as all of the possible authors were similar in age, ethnic group, and other things that shape linguistic behavior. He also noted that BGF members spend a lot of time copying writings. (19 RT 1153-1158.)

**2. Lack of standards**

As noted above, various linguists have indicated a lack of reliable evidence regarding the existence of an identifiable idiolect sufficient to distinguish between authors. When asked about the "idiolect," in reference to such concerns, Dr. Leonard called it a "straw man," stating:

> If I brought in 20 Linguistics 101 textbooks it would all talk about dialects and then it would all say that idiolects exist. Because it's obvious that we all have our own habits of doing anything, whether it's walking, or throwing a baseball, or using speech. But there's no reason that this needs to be reified as a theoretical concept.
>
> ***

[40]http://www.merriam-webster.com/dictionary/orthography?show=0&t=1320173469

> So I know that in the Maguire suitcase murders Carole [Chaski] got up on the stand in New Jersey and said people have been looking for the idiolect for 20 years and nobody has ever found it, in trying to impeach Jim Fitzgerald's testimony over whether the defendant had written this letter. And that was a straw man. Nobody ever looked for the idiolect. People weren't interested in the idiolect ...

(18 RT 1066-1067.) Such a dismissal would, however, seem to contradict Dr. Leonard's basis for his analysis.

"Idiolect" is "the language or speech pattern of one individual at a particular period of life."[41] It is "[t]he distinctive speech of an individual, considered as a linguistic pattern unique among speakers of his or her language or dialect."[42] "In linguistics, an idiolect is a variety of a language unique to an individual. It is manifested by patterns of vocabulary or idiom selection (the individual's lexicon), grammar, or pronunciations that are unique to the individual. Every individual's language production is in some sense unique."[43] Dr. Leonard himself defined it as "your individual dialect." (18 RT 1066.) Given that his conclusions are based upon aspects of petitioner's written language that are unique to him and absent in the documents that Leonard attributes to the purported other author of the Q documents (and vice versa), it seems rather disingenuous to claim straw man status for statements that question the ability of linguists to reliably identify an individual idiolect.

Even assuming that the broader-based notion of an idiolect is not relevant to an analysis of the type attempted here, Dr. Leonard failed to demonstrate any method for determining an error rate for his analysis. In fact, he affirmatively argued that the calculation of an error rate was not

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[41] http://www.merriam-webster.com/dictionary/idiolect?show=0&t=1320087354

[42] http://grammar.about.com/od/il/g/idiolecterm.htm

[43] http://en.wikipedia.org/wiki/Idiolect

even possible. (18 RT 979-980.) After giving the example of a lab experiment to determine the amount of chlorine in a water sample, and noting that it could be tested to determine a set rate, Dr. Leonard said:

> But every single instance of human language is a novel event. We like to say, as in many other instances, you don't step into the same stream twice. Even if you repeat the exact words that you just said, you now are repeating them in a different context, that is that you're repeating them.

(18 RT 979.) He later stated that "if you deal with the actual speech that comes out of people's mouths, ... you can not have error rates, quote, unquote, because it's comparative science." (18 RT 1050.)

On cross-examination, respondent proposed a hypothetical scenario in which a group of linguists would review the same documents and come up with different opinions regarding the possible authors. Dr. Leonard shrugged the question off as "so hypothetical," claiming that respondent was "trying to use their outcome, that doesn't exist, against me." (18 RT 1051.) When counsel for respondent suggested, however, that if all ten linguists were to come up with the same answer that might indicate their method was quite accurate, Dr. Leonard responded, "What if they're wrong?" (18 RT 1051.) Where Dr. Leonard posits that 10 linguists, using the same method and obtaining the same result, could all be wrong, there can be no confidence in the method used.

This lack of any ability to determine an error rate for methods, particularly given the concerns with subjective variations in reviewing the data discussed below, should be of particular concern given the added inability or unwillingness of Dr. Leonard to quantify the confidence level of his own conclusion. When asked to do so, he said that, "Galileo didn't say it was 51 percent more likely. He said that this is a hypothesis that explains the data." (18 RT 1051.) As to petitioner's authorship, he stated that, "I have no idea to a scientific certainty, or any other kind of certainty, whether

the defendant wrote the kites or not." (18 RT 1070.) Dr. Leonard appears to feel that this utter lack of certainty is not problematic because he is not attempting to affirmatively identify petitioner as the author of the documents but is purportedly limiting his opinion to petitioner's possible membership in an unknown group of authors who may have written the Q documents. Such lack of an ability under his system to quantify his conclusion should, in and of itself, render his testimony inadmissible.

### 3. Accuracy of identification

The potential impact of the lack of standards becomes readily apparent when Dr. Leonard's report is looked at in detail. According to Dr. Leonard, his system is transparent, meaning anyone can see what he did. (18 RT 1047.) While this may be true for certain of the factors – e.g. the use of the articles "a" and "an" or the frequency of use of words such as "the" and "I" – it does not hold true for all factors. A prime example of this is the word count. As noted previously, Dr. Leonard's word count for the Q documents[44] – either 806 or 814 – differed considerably from Dr. Shuy's count of the same documents – 669.[45] When asked to explain the discrepancy, Dr. Leonard stated that word count could vary depending upon the legibility since individuals might elect not to count a word they could not read. He admitted that he had no idea how Dr. Shuy conducted his count. (18 RT 1092-1094.) The lack of standards for determining what constitutes a word could have significant impact upon comparisons of word count between questioned and known documents. Additionally, although

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[44] Comparison of the counts for the K documents is not possible utilizing the reports as Dr. Shuy clearly had fewer and different K documents, and copies of those were not provided.

[45] Counsel for respondent, using Microsoft Word ™, obtained a total of 758 words for the two Q documents, slightly more than the average of the figures obtained by the experts.

Dr. Leonard subsequently rejected his reliance upon type/token analysis in this particular case, variance in word count could significantly impact that as well.

While not as dramatic, Dr. Leonard and Dr. Shuy also differed in their count of sentences in the Q documents. Dr. Leonard reported 58 sentences, while Dr. Shuy counted only 51. On the stand, Dr. Leonard acknowledged that the punctuation in the documents was sporadic and therefore he "did it according to what I know about the English language and what sentences – how sentences are constructed, let's say where I would put a period." (18 RT 1093.) When asked about run-on sentences, he could not recall how he determined those in the Q and K documents, but stated that he would have used the same method throughout. (18 RT 1094.) He provided no authority, however, to support the use of his own grammatical standards - those of a person holding a doctorate in linguistics - to determine the grammatical structure of documents written in the Black vernacular by an African-American member of a prison gang who lacks a college education. This failure would seem particularly significant when, as noted above, Leonard dismissed the significance of certain writing features because the possible authors all were similar in age, education, and ethnic group. (19 RT 1156.) Further, even assuming that such a comparison would be an appropriate method for determining the sentence count, when the comparison being done against known documents is the average number of words per sentence ("wps"), variation in the count could alter the outcome.[46] Where the count seems to be entirely dependent upon the

[46] Calculating the words per sentence using the various counts provided by Drs. Leonard and Shuy give a potential range of 11.5 wps (669 words in 58 sentences) to 15.9 wps (814 words in 51 sentences).

personal sentence writing practices of a given expert, the margin for error could be significant.

Even those variables that may seem more readily susceptible to replication in counting, however, are subject to individual interpretation. An example of this is the reliance on the variants of "I am" used in the documents. Dr. Leonard's report noted the use of "I am," "I'm," "Im," and "I'am" or I' am." On cross-examination, he acknowledged that the assessment of this factor would depend, to some extent, on an individual determination whether a mark in the area above the words "I am" was actually meant to be an apostrophe, or whether it was possibly a stray mark resulting from poor copy quality.[47] (18 RT 1101-1110; RE TT, UU, VV.)

In looking at RE UU, for example, Dr. Leonard agreed that the apostrophe in the word "I've" seemed to be a definite apostrophe, while a mark in the word "I'm" could also be the dot of an oversized "i," which would make the abbreviation "Im." (18 RT 1105-1106.) An example of possible misinterpretation was also seen in RE VV, where the copy of the handwritten document could be either "iam" or "I'am" but was typed as "I a'm." (18 RT 1107-1109; compare RE VV and re-typed version of K-2 attached to Leonard's report.) Dr. Leonard stated that this instance was not counted among the idiosyncratic nonstandard contractions of I'am. (18 RT 1108; PE 72, p. 10.)

When Dr. Leonard, on re-direct, was asked for the first time to look at BGF documents attributed to other BGF members, in an effort to find things consistent with similarities pointed out by respondent, he made no mention of the use of "I'am" in a document with Michael Rhinehart's name on it. When confronted with the presence of the critical contraction, he stated that perhaps it was the same, but "[i]t could be the tail of the 'you'

[47] Dr. Leonard did not use original documents.

right above it." Although the two words in question appear distinctly different in their darkness in the copy available, Dr. Leonard asserted that, "it's very difficult to tell" whether the apostrophe is a separate mark. (19 RT 1172; PE 73, p. 42.) As Dr. Leonard's report did not include copies of the handwritten K documents, a similar review of those documents cannot be done, therefore any "transparency" as to Dr. Leonard's determinations of specific marks does not exist with regard to this apparently critical feature of petitioner's writing.

**4. Combining of documents**

Dr. Leonard grouped the 2 Q documents and the 14 Ks treating them as only 2 documents rather than 16. Even a cursory review of the documents, however, demonstrates that individual documents are very different in length, especially among the Ks, as well as being created for a variety of purposes. For example, Q1 is approximately twice as long as Q2, using Dr. Shuy's word count, while the K documents range from fewer than 50 words on a prison form (K1 and K7) to three or more (typed) pages in personal letters (K10 and K14). Despite this wide variation in word count per individual document, Dr. Leonard stated that he "normed" the two sets of documents to occurrences per 1000 words for several of his comparisons. This was done despite the fact that the combined Q documents, even under Dr. Leonard's most generous count, contained well under 1000 words and, as noted above, some individual K documents are well under 100 words.

When asked about the decision to group the documents rather than to consider them individually, Dr. Leonard seemed to be saying that grouping was acceptable as all of the K documents were presented as having been written by petitioner. Although he claimed to have analyzed the various documents individually, nothing in his report or his testimony takes into account any variations between the individual K documents as it relates to

the various factors relied upon to reach his conclusion.[48] (18 RT 1073-1074.)

Although Dr. Leonard stated that context and audience were important considerations when analyzing writing, by grouping the two sets of documents, they were all treated equally, regardless of these factors. For example, a 35-word notice of appeal written on a government form was analyzed in conjunction with multi-page letters to his defense team investigator, a personal letter of introduction to a woman, and a lengthy letter to his brother. This disparate grouping was then compared to two prison kites between gang members (Q documents).

According to Dr. Leonard, comparison of the kites to the appeal forms was not problematic as they were similar in nature because they were "not like musings, you know, in a diary. They – someone else is more or less his equals. He is sharing personal information in all of them, the writer of both the Qs and the Ks, and he is often requesting response. So these are some earmarks that suggests to me that it is reasonable to treat them as the same genre." (18 RT 1082.) That having been said, however, a short time later, when asked to address the difference in the use of "the" and "I" between the individual K documents (RE SS), he stated that K5 was simply filling in a form. "This is not his normal speech. This is an attempt at a different genre." (18 RT 1097-1098.) He also stated that in some of the K documents Masters seemed to be quoting something more formulaic. (18 RT 1097.) The documents identified as K1 through K5 and K7, are all documents that are government forms submitting requests of some type to the prison hierarchy, and at least some of them, according to Dr. Leonard

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[48] See, e.g., RE SS, noting significant variation in the frequency of use of "the" and "I" when considered by individual documents rather than grouping as a single Q and K; RE TT, noting the lack of "I'am" in several of the K documents, even where other "I am" variations are used.

are not in petitioner's "normal speech," yet no effort was made to analyze them separately from the remaining K documents which consist of personal letters and correspondence regarding his case.

In addition to the very different audiences for the various documents under review, Dr. Leonard was unaware of the contraband nature of the Q documents as compared to the K documents. Despite the fact that the Q documents discussed the possession of weapons and the details of a murder, he considered them to be like personal correspondence. (18 RT 1083-1087.) While he agreed that someone might write more quickly if something was contraband, and they might change how they do some things, Dr. Leonard maintained that they would not change their grammar, stating "I mean, I don't start speaking Chinese because I'm in a hurry." (18 RT 1077-1078.) He admitted that he was not aware of any studies that had been done comparing the way people write things such as gang kites versus the way they might write a letter. (18 RT 1078-1079.)

**5. Data used for comparative purposes**

As noted previously, Dr. Leonard dismissed the significance of certain similarities between the Q and K documents as being part of the Black vernacular, or simply due to the similar age, education and ethnicity of the various possible authors as well as their common membership in a particular gang. In those instances where he did actually seek some basis of comparison to assert a difference, however, Dr. Leonard chose not to rely on a corpus of BGF materials, or even a data base of African-American vernacular. (1100-1101.) Instead, he used his own grammatical knowledge, the British National Corpus and the Corpus of Contemporary American English. (18 RT 1099-1101.)

As discussed in the summary of his testimony, Dr. Leonard also relied upon Project Gutenberg, an internet collection of various books that are in the public domain. He identified the Project Gutenberg works as all being

in Modern English, which would cover the last 200 years. (18 RT 1099-1101.) Although he was not familiar with the publication dates of the works he chose for comparison to petitioner's personal letters, the site reveals that they were three collections of letters written in 1914 and 1915, during World War I. Two of the authors were anonymous, although one, according to the introduction, was French, and the other was a Nursing Sister. The third author was an American teacher and journalist living in France at the time. Dr. Leonard made no effort to seek out documents from writers more similarly situated to petitioner than those on Project Gutenberg, such as *Soledad Brother*, which is a collection of letters written by George Jackson, BGF founder, while incarcerated. Dr. Leonard likewise made no comment on the impact, if any, from comparing published writings, which may have undergone an editing process, to unpublished documents meant to be shared only between a few individuals.

**6. Conclusion**

Dr. Leonard's conclusion was stated in the form of a "superior hypothesis." In the context of this case, respondent submits that such a conclusion, which appears to be the only form available under Dr. Leonard's theories, is of extremely limited value in this case, and, in the absence of any quantifiable confidence level, becomes irrelevant.

Dr. Leonard was asked to compare only two hypotheses – A-that the Q and K documents were written by the same author, and B-that they were written by different authors. While to some extent, this addresses petitioner's theory, his actual claim, based upon the petition and Willis's declaration, is that Willis is the author of the Q documents and petitioner only copied them. Respondent submits that, in the absence of an analysis of Willis documents with the Q documents, the strength of his conclusion suffers as a result of this hole in the data.

When the failure to include hypothesis C – Willis is the author – is added to the inability to quantify the level of confidence in the conclusion, and the various factors noted above that call into question the reliability of the analysis done, particularly when considering the literature in the field, respondent submits that Dr. Leonard's testimony cannot pass muster under the *Kelly* test. The referee erred in denying respondent's request for a hearing, and Dr. Leonard's testimony should be excluded.

## CONCLUSION

For the reasons set forth above, the findings of the referee should be adopted, except as to the admissibility of Dr. Leonard's testimony, and the petition for writ of habeas corpus should be dismissed.

Dated: March 16, 2012

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S EXCEPTIONS TO REFEREE'S REPORT AND BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 25,513 words.

Dated: March 16, 2012

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**Author Identification, Idiolect and Linguistic Uniqueness**

Malcolm Coulthard

Abstract

For forty years linguists have talked about idiolect and the uniqueness of individual utterances. This article explores how far these two concepts can be used to answer certain questions about the authorship of written documents – for instance how similar can two student essays be before one begins to suspect plagiarism? The article examines two ways of measuring similarity: the proportion of shared vocabulary and the number and length of shared phrases, and illustrates with examples drawn from both actual criminal court cases and incidents of student plagiarism. The article ends by engaging with Solan and Tiersma's contribution to this volume and considering whether such forensic linguistic evidence would be acceptable in American courts as well as how it might successfully be presented to a lay audience.

## Introduction

It is now over thirty-five years since Jan Svartvik published *The Evans Statements: A Case For Forensic Linguistics* in which he demonstrated that incriminating parts of a set of four linked statements – purportedly dictated to police officers by Timothy Evans and incriminating him in the killing of his wife and baby daughter – had a grammatical style measurably different from that of uncontested parts of the statements. It was later discovered that both victims had actually been murdered by Evans' landlord, John Christie. This marked the birth of a new discipline – the linguistic investigation of authorship for forensic purposes. Little more happened for a quarter of a century, with the notable exception of work by Roger Shuy in the United States (1993, 1998), but during the past ten years there has been a rapid growth in the frequency with which lawyers and courts in a number of countries have called upon the expertise of linguists in cases of disputed authorship. The texts examined range from questioned suicide notes, through anonymous letters, mobile phone text messages and contemporaneous police records of both interviews and confession statements, to the essays of students suspected of plagiarism.

## Idiolect and uniqueness of encoding

The linguist approaches the problem of questioned authorship from the theoretical position that every native speaker has their own distinct and individual version of the language they speak and write, their own *idiolect*, and the assumption that this *idiolect* will manifest itself through distinctive and idiosyncratic choices in texts (see Halliday et al 1964:75, Abercrombie 1969). Every speaker has a very large active vocabulary built up over many years, which will differ from the vocabularies others have similarly built up not only in terms of actual items but also in preferences for selecting certain items rather than others. Thus, whereas in principle any speaker/writer can use any word at any time, speakers in fact tend to make typical and individuating co-selections of preferred words. This implies that it should be possible to devise a method of *linguistic fingerprinting* – in other words that the linguistic 'impressions' created by a given

speaker/writer should be usable, just like a signature, to identify them. So far, however, practice is a long way behind theory and no one has even begun to speculate about how much and what kind of data would be needed to uniquely characterise an *idiolect,* nor how the data, once collected, would be analysed and stored; indeed work on the very much simpler task of identifying the linguistic characteristics or 'fingerprints' of whole *genres* is still in its infancy (Biber 1988, 1995, Stubbs 1996).

In reality, the concept of the linguistic fingerprint is an unhelpful, if not actually misleading metaphor, at least when used in the context of forensic investigations of authorship, because it leads us to imagine the creation of massive databanks consisting of representative linguistic samples (or summary analyses) of millions of idiolects, against which a given text could be matched and tested. In fact such an enterprise is, and for the foreseeable future will continue to be, impractical if not impossible. The value of the physical fingerprint is that every sample is both identical and exhaustive, that is, it contains all the necessary information for identification of an individual, whereas, by contrast, any linguistic sample, even a very large one, provides only very partial information about its creator's idiolect. This situation is compounded by the fact that many of the texts which the forensic linguist is asked to examine are very short indeed – most suicide notes and threatening letters, for example, are well under 200 words long and many consist of fewer than 100 words.

Nevertheless, the situation is not as bad as it might at first seem, because such texts are usually accompanied by information or clues which massively restrict the number of possible authors. Thus, the task of the linguistic detective is never one of identifying an author from millions of candidates on the basis of the linguistic evidence alone, but rather of selecting (or of course *de*selecting) one author from a very small number of candidates, usually fewer than a dozen and in many cases only two (Coulthard 1992, 1993, 1994a, b, 1995, 1997, Eagleson, 1994).

An early and persuasive example of the forensic significance of idiolectal co-selection was the Unabomber case. Between 1978 and 1995, someone living in the United States, who referred to himself as FC, sent a series of bombs, on average once a year, through the post. At first there seemed to be no pattern, but after several years the FBI noticed that the victims seemed to be people working in **Un**iversities and **A**irlines and so named the unknown individual the **Una**bomber. In 1995 six national publications received a 35,000 manuscript, entitled *Industrial Society and its Future*, from someone claiming to be the Unabomber, along with an offer to stop sending bombs if the manuscript were published[1].

In August 1995, the *Washington Post* published the manuscript as a supplement and three months later a man contacted the FBI with the observation that the document sounded as if it had been written by his brother, whom he had not seen for some ten years. He cited in particular the use of the phrase "cool-headed logician" as being his brother's terminology, or in our terms an idiolectal preference, which he had noticed and remembered. The FBI traced and arrested the brother, who was living in a wooden cabin in Montana. They found a series of documents there and performed a linguistic analysis – one of the documents was a 300-word newspaper article on the same topic written a

decade earlier. The FBI analysts claimed major linguistic similarities between the 35,000 and the 300 word documents: they shared a series of lexical and grammatical words and fixed phrases, which, the FBI argued, provided linguistic evidence of common authorship.

The defence contracted a linguist, who counter-argued that one could attach no significance to these shared items on the grounds that anyone can use any word at any time and therefore shared vocabulary can have no diagnostic significance. The linguist singled out twelve words and phrases for particular criticism, on the grounds that they were items that would be expected to occur in any text that was arguing a case – *at any rate; clearly; gotten; in practice; moreover; more or less; on the other hand; presumably; propaganda; thereabouts;* and words derived from the roots *argu* and propos**. The FBI searched the internet, which in those days was a fraction of the size it is today, but even so they discovered some 3 million documents which included one or more of the twelve items. However, when they narrowed the search to documents which included instances of all the twelve items they found a mere 69 and, on closer inspection, every single one of these documents proved to be an internet version of the 35,000 word manifesto. This was a massive rejection of the defence expert's view of text creation as purely open choice, as well as a powerful example of the idiolectal habit of co-selection and an illustration of the consequent forensic possibilities that idiolectal co-selection affords for authorship attribution. The first example will be taken from the area of plagiarism detection.

**On defining and detecting plagiarism**

At its simplest, plagiarism, or more accurately the type of plagiarism we as linguists are competent to deal with, is the theft, or unacknowledged use, of text created by another. As my own university's website expresses it:

> Plagiarism is a form of cheating in which the student tries to pass off someone else's work as his or her own. ..... Typically, substantial passages are "lifted" verbatim from a particular source without proper attribution having been made.
>
> http://artsweb.bham.ac.uk/arthistory/declaration_of_aship.htm

Any investigation of plagiarism is based consciously or unconsciously on a notion of *idiolect*. In other words it is expected that any two writers writing on the same topic, even if intending to express very similar meanings, will choose an overlapping, but by no means identical, set of lexico-grammatical items to do so. Indeed, and more importantly for some cases I will treat below, linguists from all persuasions subscribe to some version of the 'uniqueness of utterance' principle (Chomsky 1965, Halliday 1975) and so would expect that even the same person speaking/writing on the same topic on different occasions would make a different set of lexico-grammatical choices. It follows from this that, in any comparison of two texts, the more similar the set of items chosen, the greater the likelihood that one of the texts was derived, at least in part, from the other (or, of course, that both were derived from a third text), rather than composed independently.

In most cases involving students there is little doubt about guilt, as these two examples of essay openings from Johnson (1997: 214) demonstrate – all items which student B 'shares' with student A are highlighted in bold:

> **A.** It is essential for all teachers to understand the history of Britain as a multi-racial, multi-cultural nation. Teachers, like anyone else, can be influenced by age old myths and beliefs. However, it is only by having an understanding of the past that we can begin to comprehend the present.
>
> **B.** In order for **teachers** to competently acknowledge the ethnic minority, **it is essential to understand the history of Britain as a multi-racial, multi-cultural nation. Teachers** are prone to believe popular **myths and beliefs; however, it is only by understanding** and appreciating **past** theories **that we can begin to** anticipate **the present.**

Even these short extracts provide enough evidence of shared items to question the originality of at least one of the essays, or both, of course, if a third text later proves to be the common source. When this level of sharing is also instanced in other parts of the same texts there is no room for doubt or dispute. The case of essay C, however, is not as clear-cut (items which C shares with one or both of essays A and B are highlighted):

> **C.** It is very important for us as educators to realise that **Britain as a nation** has become both **multi-racial** and **multi-cultural.** Clearly it is vital for **teachers** and associate teachers to ensure that **popular myths and** stereotypes held by the wider community do not **influence** their teaching. By examining British history this will assist our **understanding** and in that way be better equipped to deal with **the present** and the future.

Even though there is still quite a lot of shared lexical material here, it is evident that the largest identical sequences are a mere three running words long. Even so, one would still want to categorise this degree of lexical overlap, if instanced in other parts of the text, as unacknowledged, though more sophisticated borrowing and therefore as plagiarism, even if it doesn't fit easily within the Birmingham observation that 'Typically, substantial passages are "lifted" ....'. I will not discuss here the important question of whether a significant proportion of student written texts, which technically fall within the textual definition of plagiarism, are not the results of deliberate attempts to deceive at all, but rather a consequence of what is coming to be known as 'patchwriting', that is genuine but flawed attempts by students, who have somehow failed to acquire the academic rules for acknowledging textual borrowing, to incorporate the work of others into their own texts (see Pecorari 2002, Howard 1999).

Johnson's (op cit) solution to the detection of this kind of student plagiarism or *collusion*, was to move away from using strings or sequences of items as diagnostic features and to focus instead on the percentage of shared individual lexical types and tokens as a better measure of derivativeness[2]. Intensive testing has shown that this measure of lexical overlap successfully separates those essays which share common vocabulary simply

because they are writing on the same topic, from those which share much more vocabulary because one or more of them is derivative (see Woolls and Coulthard, 1998). For example, in Johnson's study, whereas essays A, B and C shared 72 different lexical types in their first 500 words, a set of three other essays from the same batch, whose authors had not colluded, shared only 13 lexical types, most of which were central to the topic under discussion. Further work (Woolls 2003) has shown that the most significant evidence is not the mere quantity of shared lexis, but rather the fact that, in the case of some shared items, both texts have both selected them and then only used them once. As such, 'once-only' items are, by definition, not central to the main concern of the text, otherwise they would have been used more frequently. The chances of two writers independently choosing several of the same words for single use are so remote as to be discountable.

If proof were needed of the distinctiveness and diagnostic power of words used once-only – *hapaxes* as they are technically labelled – it comes from successful internet searches in cases of suspected plagiarism. Experience confirms that the most economical method to use when checking the internet for suspected plagiarised text is to search using distinctive collocates whose individual items occur only once in the text in question. I will exemplify with the opening of a story written by an 11-year old girl:

> **The Soldiers** (all spelling as in the original)
>
> Down in the country side an old couple husband and wife Brooklyn and Susan. When in one afternoon they were having tea they heard a drumming sound that was coming from down the lane. Brooklyn asks,
> "What is that glorious sound which so thrills the ear?" when Susan replied in her o sweat voice
> "Only the scarlet soldiers, dear,"
> The soldiers are coming, The soldiers are coming. Brooklyn is confused he doesn't no what is happening.
> Mr and Mrs Waters were still having their afternoon tea when suddenly a bright light was shinning trough the window.
> "What is that bright light I see flashing so clear over the distance so brightly?" said Brooklyn sounding so amazed but Susan soon reassured him when she replied .....

The first paragraph is unremarkable, but the second shifts dramatically, *"What is that glorious sound which so thrills the ear?"*. The story then moves back to the opening style, before shifting again to *"What is that bright light I see flashing so clear over the distance so brightly.* It is hard to believe that the same author could write in both styles and raises the question of whether the other borrowed text(s) might be available on the internet.

If one takes as search terms three pairs of collocated *hapaxes* 'thrills – ear', 'flashing – clear' and 'distance – brightly' one again sees the distinctiveness of idiolectal co-selection; the single pairing 'flashing – clear' yields over half a million hits on Google, but the three pairings together a mere 360 hits, of which the first thirteen are all from W.H. Auden's poem 'O What is that sound'. The poem's first line reads 'O what is that sound which so **thrills** the **ear**' while the beginning of the second verse is 'O what is that light I see **flashing** so **clear** Over the **distance brightly**, brightly?'. If one adds a seventh word and looks for the phrase 'flashing so clear' all of the hits return Auden's poem.

**Do people repeat themselves?**

Whereas (occasional) identical strings in two texts which are supposed to have different authors can be indicative of 'borrowing' or theft, it is harder to argue the case when the texts are (supposedly) produced by the same author but on different occasions – even when there is no suggestion that the author had sight of the first text when s/he was producing the second. The example I want to use is from a famous English murder case, dating from 1978, where one piece of strongly contested evidence was a record of a police interview with a suspect.

In this case, four men were accused, and subsequently convicted, of killing a 13-year old newspaper delivery boy, Carl Bridgewater, solely on the basis of the confession of one of them, Patrick Molloy – there was no corroborating forensic evidence and Molloy retracted his confession, but to no avail. He admitted that he did actually say (most of) the words recorded in his confession, but insisted that he was being told what to say, while he was dictating the confession, by a policeman who was standing behind him. He also claimed that he had only made the confession after being physically and verbally abused for some considerable time.

The police, however, as support for the reliability of the confession, produced a contemporaneous handwritten written record of an interview which they claimed had taken place immediately before the confession and which contained substantially the same information expressed in the same language as the confession statement. Molloy denied that the interview had ever taken place – in his version of events he was being subjected to abuse at that time – and counter-claimed that the interview record had been made up later on the basis of the then pre-existing confession. As is evident from a cursory glance at the two extracts below taken, respectively, from the statement which Molloy admitted making and the interview record which he claimed was falsified, the similarities are enormous; I have highlighted them in bold. Most linguists would agree, on the basis of such similarities, that either one of the two documents was derived from the other or that both had been derived from a third. However, at the time of the original trial, no linguist was called to give evidence – in fact there were no forensic linguists practising in Britain at the time – so it was left to the lawyers to evaluate the linguistic significance of the interview and confession. As a result, the same phenomenon, massive identity in phrasing and lexical choice, was argued by the defence to be evidence of falsification, and by the prosecution to be evidence of the authenticity and reliability of

both texts, on the grounds that here was an example of the accused recounting the same events, in essentially the same linguistic encoding, on two separate occasions.

**Extract from Molloy's Statement**

(17) **I had been drinking and cannot remember the exact time I was there but whilst I was upstairs I heard someone downstairs say be careful someone is coming.** (18) **I hid for a while and** *after a while* **I heard** *a* **bang** *come from downstairs*. (19) **I knew that it was a gun being fired.** (20) I went downstairs and **the three of them were still in the room.** (21) **They all looked shocked and were shouting at each other.** (22) **I heard Jimmy say, "It went off by accident".** (23) I looked and **on the settee** I saw the *body of the boy*. (24) **He had been shot in the head.** (25) **I was appalled and felt sick.**

**Extract from Disputed Interview with Molloy**

P. How long were you in there Pat?
(18) **I had been drinking and cannot remember the exact time that I was there, but whilst I was upstairs I heard someone downstairs say 'be careful someone is coming'.**
P. Did you hide?
(19) Yes **I hid for a while** and then **I heard** the **bang** I have told you about.
P. Carry on Pat?
(19a) I ran out.
P. What were the others doing?
(20) **The three of them were still in the room.**
P. What were they doing?
(21) **They all looked shocked and were shouting at each other.**
P. Who said what?
(22) **I heard Jimmy say 'it went off by accident'.**
P Pat, I know this is upsetting but you appreciate that we must get to the bottom of this. Did you *see the boy's body*?
(Molloy hesitated, looked at me intently, and after a pause said,)
(23) Yes sir, he was **on the settee.**
P Did you see any injury to him?
(Molloy stared at me again and said)
(24) Yes sir, **he had been shot in the head.**
P What happened then?
(25) **I was appalled and felt sick.**

Both the prosecution assertion that identity of formulation in two separate texts is indicative of reliability and the apparent willingness of the lay jury to accept this assertion, depend on two commonly held mistaken beliefs: firstly, that people can and do say the same thing in the same words on different occasions and secondly, that people

can remember and reproduce verbatim what they and others have said on some earlier occasion. The former belief can be demonstrated to be false either by recording a person attempting to recount the same set of events on two separate occasions, or by simply asking a witness to repeat word for word what s/he has just said. The second belief used to have some empirical support, at least for short stretches of speech, (see Keenan et al 1977 and Bates et al 1980), but was seriously questioned by Hjelmquist (1984), who demonstrated that, even after only a short delay, people could remember at best 25 percent of the gist and 5 percent of the actual wording of what had been said in a five minute two-party conversation in which they had participated. Confirmatory evidence about the inability to remember even quite short single utterances verbatim was specially commissioned from Professor Brian Clifford and presented at the 2003 'Glasgow Ice Cream Wars' Appeal. This was used to challenge successfully the claim of police officers that they had independently remembered, some of them for over an hour, verbatim and identically, utterances made by the accused at the time of arrest. Clifford's experiment tested the ability to remember a short, 24-word utterance and found that most people were able to recall verbatim no more than 30 to 40 percent of what they had heard[3].

By the time of the Bridgewater Appeal in 1997 it was possible to provide extra supporting evidence of two kinds. Firstly, as a direct result of Johnson's (op cit) work on plagiarism discussed above, which demonstrated the significance of vocabulary overlap, an analysis was done of the shared vocabulary in the two Molloy texts; it became evident that the highlighting in the two Molloy extracts presented above actually understates the similarities between the two texts – a closer examination revealed that there was in fact not one single word in Molloy's statement, neither lexical nor grammatical, which did not also occur in the interview record. I have only seen that degree of overlap on one other occasion, when two students had in fact submitted identical essays for assessment. Ironically, the computer analysis showed the degree of similarity to be only 97 percent – the 3 percent of different words made up of spelling errors produced by one of the two students.

In the Bridgewater case there also was secondary, supporting linguistic evidence, of a different kind, to support the claim that the interview record was both falsified and based on the statement. If we assume that the police officers had indeed, as Molloy claimed, set out to create a dialogue based on the monologue statement, they would have faced the major problem of what questions to invent in order to link forward and apparently elicit the pre-existing candidate answers which they had derived from the statement. In this scenario one would expect there to be occasions when a question did not fit successfully into the text into which it had been embedded – and indeed there are.

In a developing interview, a police question usually links backwards lexically, repeating word(s) from the previous answer. However, in creating a question to fit a pre-existing answer, there is always the danger that the question will only link forward. I will give two examples. The original statement has a two-sentence sequence – (21) "They all looked shocked and were shouting at each other." (22) "I heard Jimmy say 'it went off by accident'" – which appears word for word in the interview record, except that the two

sentences are separated by the inserted question "Who said what?". However, in this context the word "said", although it is cataphorically unremarkable – *said* links with *say* – is anaphorically odd because the men have just been described as "shouting". One would therefore have expected an anaphorically cohesive follow-up question to be either 'What/Why were they *shouting*?" or "Who was *shouting* (what)?"; one would certainly not predict "who *said* what?". The choice of "said" is a most unexpected choice – except of course for someone who knows that the next utterance will be "I heard Jimmy *say*..." – then it has an evident logic.

An example of a *grammatical* misfit is where the statement version "on the settee I saw the **body** of the **boy**. **He** had..." is transformed into "Q. Did you see **the boy's body**? Yes sir, **he** was on the settee". The statement version correctly uses the pronoun "He" because the referent is the "boy" in "the body of the boy", but the reformulated version in the police interview, "the boy's **body**", would be more likely to have elicited "**it**" as a referent. We also find examples of process misfit: in the exchange reproduced below, the question "what happened" requires a report of an action or an event, but in fact the response is a description of two states:

P What **happened** then?
M I **was appalled** and **felt sick.**

Had the reply been "I vomited", it would, of course, have been cohesive. Similar process misfits are:

P What were the others **doing**?
M The three of them **were** still in the room.
P What were they **doing**?
M They all **looked shocked**

It is possible to continue in this vein, but I think these examples are sufficient to show that textual oddities like these support the claim, which was based on the identity of expression, that the interview record was created from the pre-existing statement. Sadly, it was not possible to test the acceptability and persuasiveness of these arguments in court, as the Crown conceded the appeal shortly before the due date, when compelling new evidence from document and handwriting analysts emerged to convince the judges of the unsafeness of the conviction.

**The evidential value of single identical strings**

In the Bridgewater Four case there was a whole series of identical strings of words to support the claim that the interview record was derived from the statement, but for anyone unconvinced by the assertion that the identities were due to borrowing rather than identical encoding on two separate occasions, the claim of fabrication was supported by other linguistic evidence of a different and independent kind. The final questions I will address in this article are how much weight can one place on a single identical string and how significant is the length of a string when assessing its evidential significance? These questions go to the heart of current thinking about uniqueness in language production.

As Sinclair (1991) pointed out, there are two complementary assembly principles in the creation of utterances/sentences; one is the long accepted principle that sequences are generated word by word on an 'open choice' basis. When strings are created in this way, there is for each successive syntagmatic slot a large number of possible, grammatically acceptable, paradigmatic fillers and thus one can easily, if not effortlessly, generate memorable but meaningless sequences like 'colorless green ideas sleep furiously'. The other assembly principle proposed much more recently as a result of corpus work (Sinclair op cit), is the 'idiom principle', according to which pre-assembled chunks made up of frequent collocations and colligations are linked together to create larger units. In practice, both principles work side by side, which means that any given short string might be produced by either principle and therefore might be either an idiosyncratic combination or a frequently occurring fixed phrase. Nevertheless, the longer a sequence is, the more likely it is that at least some of its components have been created by the open choice principle and consequently, the less likely that the occurrence of this identical sequence in two different texts is a consequence of two speaker/writers coincidentally selecting the same chunk(s) by chance.

The data I will use for exemplificatory purposes come from the Appeal of Robert Brown in 2003. As in the Bridgewater Four case, here too there was a disputed statement and a disputed interview record; the difference was that Brown claimed that the statement was in reality a dialogue which had been represented as a monologue. He claimed that a police officer had asked questions to which Brown said he simply replied "Yes" (Judge's Summing – up, p 95 section E), and that, although the interview did occur, the record of it was made up afterwards – "no police officer took any notes" (Judge's Summing – up, p 93 section E).

Below are two sentences from the statement matched with items occurring in the (invented) interview record:

| | |
|---|---|
| i) Statement | I asked her if I could carry her bags she said "Yes" |
| Interview | I asked her if I could carry her bags and she said "yes" |
| ii) Statement | I picked something up like an ornament |
| Interview | I picked something up like an ornament |

In what follows I have used examples from Google, rather than from a corpus such as the Bank of English or the British National Corpus, on the grounds that Google is accessible to the layperson for whom the argument is designed. While the above utterances/ sentences may not seem remarkable in themselves, neither of them occurs even once in the hundreds of millions of texts that Google searches and even the component sequences quickly become rare occurrences:

| **String** | **Instances** |
|---|---|
| I picked | 1,060,000 |
| I picked something | 780 |

| | |
|---|---|
| I picked something up | 362 |
| I picked something up like | 1 |
| I picked something up like an | 0 |

| | |
|---|---|
| an ornament | 73,700 |
| like an ornament | 896 |
| something like an ornament | 2 |

| | |
|---|---|
| I asked | 2,170,000 |
| I asked her | 284,000 |
| I asked her if | 86,000 |
| I asked her if I | 10,400 |
| I asked her if I could | 7,770 |
| I asked her if I could carry | 7 |
| I asked her if I could carry her | 4 |
| I asked her if I could carry her bags | 0 |

| | |
|---|---|
| if I could | 2,370,000 |
| if I could carry | 1,600 |

It is evident that "if I could" and perhaps "I asked her" have the characteristics of pre-assembled idioms, but even then their co-selection in sequence is rare, at 7,770 occurrences. The moment one adds a 7th word, "carry", the odds against it occurring become enormous, with a Google search yielding only 7 instances. Indeed rarity scores like these begin to look like the probability scores DNA experts proudly present in court. However, unlike the DNA expert, the linguist/expert has the disadvantage that everyone in the courtroom considers themself to be a language expert and, among other things, 'knows' that they can remember what they and indeed others said in past conversations and feels confident that they can 'repeat' what was said verbatim at a later date. It will never be enough for the linguist to simply assert the uniqueness of encoding, it will need to be demonstrated in an accessible way.

**An attempt at court persuasion**

When faced with the problem of having to convince the Appeal Court judges in open court in the *R v Robert Brown* Appeal, I prepared the following presentation, which I hoped would both interest and persuade the three judges of the evidentiary strength of the identical formulations discussed above. I should say that, as in the Bridgewater case, this was not the only linguistic evidence to support Brown's claims about the unreliability of the police records.

As a first step I used Google to find out something about other cases involving Lord Justice Rose, who was to preside. The first three citations for the words 'Lord Justice

Rose Appeal' were about an appeal against conviction for perjury by a famous British politician, Lord Archer. The first hit was:

> Guardian Unlimited | Special reports | Archer loses **appeal** bid
>
> ... was not present at today's hearing, had his application for permission to **appeal** against the conviction rejected within hours. **Lord Justice Rose**, sitting with ... www.guardian.co.uk/archer/article/ 0,2763,759829,00.html – 30k

I accessed this citation, part of which is reproduced below as 'Guardian Extract', and from it selected the first phrase quoted from Lord Rose – "For reasons we will give later in the day" – which I have highlighted in bold. Given the nature of Appeal Court judgements, which are often released after the decision has been announced, this seemed an unremarkable phrase and yet a Google search returned only 7 occurrences of the phrase – all of which, on closer examination, proved not only to be attributed to Lord Rose, but were all in fact different reportings of the same uttering at the end of the Archer appeal. Even reducing the phrase to the apparently less specific 6-word utterance "For reasons we will give later" only produced two more examples, this time not uttered by Lord Rose. Thus, here was an example of the uniqueness of an apparently ordinary utterance by Lord Rose himself.

> **Guardian Extract**
> **Archer loses appeal bid**
>
> Lord Justice Rose, sitting with Mr Justice Colman and Mr Justice Stanley Burnton in London, told Archer's QC Nicholas Purnell: "**For reasons we will give later in the day** we are against you in relation to conviction."
> At the start of the hearing Nicholas Purnell QC, outlining the grounds of appeal, said: "The submission that we make on behalf of Lord Archer is that **the first and fundamental ground** which interconnects with all the other grounds of appeal was that the learned trial judge wrongly exercised his discretion not to sever the trial of Edward Francis."
> Mr Purnell said the decision of the judge, Mr Justice Potts, not to sever the trial of Francis had an "**unbalancing effect on the equilibrium**" of the trial.
> Counsel argued that Mr Francis was "in a position effectively as **a substitute prosecution witness** and a substitute prosecutor".

I then took three shorter phrases quoted in the same article, this time from Nicholas Purnell, Lord Archer's QC, each of them seeming, at least to this lay reader, to be equally unremarkable phrases for a lawyer to utter, *the first and fundamental ground, unbalancing effect on the equilibrium* and *a substitute prosecution witness*. For these phrases I found 7, 10 and 4 instances respectively, but again for every phrase all the instances were reports of the same single occasion of uttering by Mr Purnell.

Armed with these examples, taken from an audience-relevant text, I hoped to convince the judges that uniqueness of utterance was a demonstrable fact. Sadly, at a pre-trial case

conference, the defence barrister who had chosen to call me as an expert witness smiled indulgently and described my intended presentation as *whimsical* and decided not to use it. Fortunately, my other linguistic evidence was presented to the judges and accepted and the appeal was granted.

**Author identification in American courts**

While the analytical techniques and arguments and the derived opinions reported above would be and in some cases already have been accepted in British courts, the situation is less clear in the United States. In a recent article entitled 'The linguist on the witness stand: forensic linguistics in American courts', Tiersma and Solan (2002) noted that:

> although the [American] legal system has often welcomed linguistic expertise, there are a number of areas in which they are more hesitant to do so. One example is the use of linguistics to identify authors (229).

Tiersma and Solan cited the rigorous demands of the American legal system's Daubert criteria, which, in their opinion, many authorship identification methods fail to meet. The Daubert criteria were created in a Supreme Court ruling at the end of an appeal in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (509 U.S. 579 (1993)). Essentially the argument was over whether expert evidence could be rejected on the grounds that the experts involved had not published their work. In their ruling the Supreme Court observed that 'the adjective "scientific" implies a grounding in the methods and procedures of science' and then went on to propose four criteria with which to evaluate the 'scientific-ness' of a method:

1. whether the theory offered has been tested;
2. whether it has been subjected to peer review and publication;
3. the known rate of error; and
4. whether the theory is generally accepted in the scientific community.

(509 U.S. at 593) quoted in Tiersma and Solan (op cit).

There is an extensive and lucid discussion of the Daubert criteria as applied to linguistic evidence in the article by Solan and Tiersma in this issue (ms pp 4-9).

In one sense Tiersma and Solan are raising purely American problems, because in the British and Australian legal systems it is the expert rather than the method that is recognised, so these courts can and do allow opinion evidence from anyone considered to have:

> specialised knowledge based on ... training, study or experience [provided that the opinion is] wholly or substantially based on that knowledge.
> (Evidence Act 1995 Sec 79)

However, knowing that their evidence would also satisfy the Daubert criteria gives extra confidence to British linguist/experts and it is quite conceivable that similar criteria might be introduced into British Courts at some point in the future, even if only piecemeal, as the result of individual judgements. A court in Northern Ireland, for example, has

recently ruled that forensic phonetic evidence based solely on auditory analysis, that is with no acoustic support, is no longer permitted.

Although I await the views of lawyer-linguists Solan and Tiersma with interest if not with some trepidation, I would argue that the methods of author attribution discussed above do meet the four Daubert criteria:

*1. Whether the theory offered has been tested;*
Work by many people on a large number of cases has shown that there is no longer any dispute that the occurrence of shared identical items is conclusive evidence that two texts have not been independently created; what remains to be agreed is how few shared identical items are necessary to support a decision.

*2. Whether [the theory] has been subjected to peer review and publication;*
Publications like this one and those by Johnson (1997), Woolls and Coulthard (1998) and Woolls (2003) have been subjected to peer review, there have been many presentations on this kind of authorship assignment at international conferences and to peer audiences in Universities worldwide. In addition, the Copycatch Gold collusion detection program is in use internationally in over 50 Universities, including the British Open University.

*3. The known rate of error;*
This is perhaps the most difficult criterion – in cases of plagiarism it is traditional to err on the side of caution, and so I know of no cases of error. However, in this article, in the final section, I have taken the extreme position that a single and relatively short string can be conclusive evidence; this in itself is a challenge to the academic community to test the error rate and at the same time to fix an acceptable statistical equivalent for 'beyond reasonable doubt'.

4. *Whether the theory is generally accepted in the scientific community.*
There is no doubt that the basic tenets of idiolectal variation and the uniqueness of utterance are generally accepted across the whole linguistic community; the disagreements are over how far certainty of assignment depends on the amount and kind of shared vocabulary and on the length of individual sequences and their composition in terms of idiomatic and open choice items.

**Conclusion**
The evidence discussed above suggests that the concepts of idiolect and uniqueness of utterance are robust and provide a basis for answering certain questions about authorship with a high degree of confidence. As demonstrated we can use the concepts to help us search when we suspect plagiarism and to categorise and classify when we already have texts of various kinds whose authorship is suspect or disputed. There are still many author identification problems where the methodology is less developed and reliable and where Solan and Tiersma's cautions are well heeded, but the future for author identification is encouraging.

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[1] For an accessible version of events, from someone who wrote a report on the language of the manuscript, see Foster (2001). The full text of the Unabomber manuscript is available at: http://www.panix.com/~clays/Una/).

[2] (An automated version of this analytic method, produced by Woolls (2002), is now available as the computer program *Copycatch Gold*.)

[3] http://news.bbc.co.uk/1/hi/scotland/3494401.stm

# ... and then ...

# Language Description and Author Attribution

> At the highest stratum of all there is the inter-penetration of minds. Each individual constructs his private linguistic universe, and through his utterances gives hints as to its nature.
> *Towards an Analysis of Discourse page 130*

## Introduction

Since the mid-1980s I have been involved with forensic applications of authorship attribution, working to develop and refine a methodology. In what follows I will give examples from cases where it was possible to exploit techniques for the description of interaction, grammar and lexis that were developed in Birmingham by John Sinclair, his colleagues and his students.

Over the years many people have asked me which bits of *Towards an Analysis of Discourse* were written by me and which by John. I would often reply flippantly that mine were the bits that were easy to understand. When I came to prepare this lecture, I thought it would be interesting to end it with a comparison of John's style with my own – the results surprised me. In the Appendix are two longish extracts from the book; you might like to read them before proceeding any further and try to decide which is by John and which by me.

## 1. Idiolect and uniqueness of encoding

The linguist approaches the problem of questioned authorship from the theoretical position that every native speaker has their own distinct and individual version of the language they speak and write, their own *idiolect*, and the assumption that this *idiolect* will manifest itself through distinctive and idiosyncratic choices in texts (see Bloch 1948, Halliday et al 1964, Abercrombie 1969). Every speaker has a very large active vocabulary built up over many years, which will differ from the vocabularies others have similarly built up, not only in terms of actual items but also in preferences for selecting certain items rather than others. Thus, whereas in principle any speaker/writer can use any word at any time, in fact they tend to make typical and individuating co-selections of preferred words. This implies that it should be possible to devise a method of *linguistic fingerprinting* – in other words that the linguistic 'impressions' created by a given speaker/writer should be usable, just like a signature, to identify them. So far, however, practice is a long way behind theory. No one has

even begun to speculate about how much and what kind of data would be needed to uniquely characterise an *idiolect,* nor how the data, once collected, would be stored and analysed. Indeed work on the very much simpler task of identifying the linguistic characteristics or 'fingerprints' of whole *genres* is still in its infancy (Biber 1988, 1995, Stubbs 1996).

In reality, the concept of the linguistic fingerprint is an unhelpful, if not actually misleading metaphor, at least when used in the context of forensic investigations of authorship, because it leads us to imagine the creation of massive databanks consisting of representative linguistic samples (or summary analyses) of millions of idiolects, against which a given text could be matched and tested. In fact such an enterprise is, and for the foreseeable future will continue to be, impractical if not impossible. The value of the physical fingerprint is that every sample is both identical and exhaustive, that is, it contains all the necessary information for identification of an individual, whereas, by contrast, any linguistic sample, even a very large one, provides only very partial information about its creator's idiolect. This situation is compounded by the fact that many of the texts which the forensic linguist is asked to examine are very short indeed – most suicide notes and threatening letters, for example, are under 200 words long and many contain fewer than 100 words.

Nevertheless, the situation is not as bad as it might at first seem, because such texts are usually accompanied by information which massively restricts the number of possible authors. Thus, the task of the linguistic detective is never one of identifying an author from millions of candidates on the basis of the linguistic evidence alone, but rather of selecting (and, of course, sometimes *de*selecting) one author from a very small number of candidates, usually fewer than a dozen and in many cases only two (Coulthard 1992, 1993, 1994a, b, 1995, 1997, Eagleson, 1994).

An early and persuasive example of the forensic significance of idiolectal co-selection was the case of the Unabomber. Between 1978 and 1995, someone living in the United States, who referred to himself as FC, sent a series of bombs, on average once a year, through the post. At first there seemed to be no pattern, but after several years the FBI noticed that the victims seemed to be people working for **Un**iversities and **A**irlines and so named the unknown individual the **Una**bomber. In 1995 six national publications received a 35,000 manuscript, entitled *Industrial Society and its Future*, from someone claiming to be the Unabomber, along with an offer to stop sending bombs if the manuscript were published. (For an accessible account written by someone involved in the case see Foster 2001.)

In August 1995, the *Washington Post* published the manuscript as a supplement and three months later a man contacted the FBI with the observation that the document sounded as if it had been written by his brother, an ex-Berkeley University lecturer in mathematics, whom he had not seen for some ten years. He cited in particular the use

of the phrase "cool-headed logician" as being his brother's terminology, or in our terms an idiolectal preference, which he had noticed and remembered. The FBI traced and arrested the brother, who was living in a log cabin in Montana. They impounded a series of documents and performed a linguistic analysis – one of the documents was a 300-word newspaper article on the same topic as the manuscript, written a decade earlier. The FBI analysts claimed there were major linguistic similarities between the 35,000 and the 300 word documents: they noted that they shared a series of lexical and grammatical words and fixed phrases, which, they argued, provided linguistic evidence of common authorship.

The defence contracted a distinguished linguist, who counter-argued that one could attach no significance to these shared items because anyone can use any word at any time and therefore shared vocabulary can have no diagnostic significance. She singled out twelve words and phrases for particular criticism, on the grounds that they were items likely to occur in any text that was arguing a case:

> *at any rate; clearly; gotten; in practice; moreover; more or less; on the other hand; presumably; propaganda; thereabouts;* and words derived from the roots *argu* and propos**.

In response the FBI analysts searched the web, which in those days was only a fraction of its current size, but even so they discovered some 3 million documents which included one or more of the twelve items. However, when they narrowed the search to documents which included not one but all twelve of the items, they found a mere 69 and, on closer inspection, every single one of these proved to be a version of the 35,000 word manifesto. This was a massive rejection of the defence expert's view of text creation as purely free and open choice and a powerful illustration of the idiolectal habit of repeating co-selections. I will return to this topic in Section 4 below.

## 2. Hidden voices in monologue

In November 1952 two teenagers, Derek Bentley aged 19 and Chris Craig aged 16, were seen climbing up onto the roof of a London warehouse. The police surrounded the building and. three unarmed officers went up onto the roof to arrest them. Bentley immediately surrendered; Craig started shooting, wounding one policeman and killing a second. Bentley was jointly charged with his murder, even though he had been under arrest for some time when the officer was killed. The trial, which lasted only two days, took place five weeks later and both were found guilty. Craig, because he was legally a minor, was sentenced to life imprisonment; Bentley was sentenced to death and executed shortly afterwards. Bentley's family fought tenaciously to overturn the guilty verdict and were eventually successful 46 years later, in the summer of 1998. (The feature film *Let Him Have It, Chris,* released in 1991, gives a mainly accurate account.) The evidence which was the basis for both Bentley's conviction and the subsequent successful appeal was in large part linguistic.

In the original trial the problem for the Prosecution, in making the case against Bentley, was to demonstrate that he could indeed be guilty of murder despite being under arrest when the murder was committed. At this point it would be useful to read the statement which, it was claimed, Bentley dictated shortly after his arrest. It is presented in full below; the only changes I have introduced are the numbering of sentences for ease of reference and the highlighting, by underlining and bold, of items to which I will later refer.

**Derek Bentley's Statement**

(1) I have known Craig since I went to school. (2) We were stopped by our parents going out together, but we still continued going out with each other - I mean **we have not gone out** together until tonight. (3) I was watching television tonight (2 November 1952) and between 8 p.m. and 9 p.m. Craig called for me. (4) My mother answered the door and I heard her say that I was out. (5) I had been out earlier to the pictures and got home just after 7 p.m. (6) A little later Norman Parsley and Frank Fasey called. (7) **I did not answer the door or speak to them**. (8) My mother told me that they had called and I then ran out after them. (9) I walked up the road with them to the paper shop where I saw Craig standing. (10) We all talked together and then Norman Parsley and Frank Fazey left. (11) Chris Craig and I then caught a bus to Croydon. (12) We got off at West Croydon and then walked down the road where the toilets are - I think it is Tamworth Road.

(13) When we came to the place where you found me, Chris looked in the window. (14) There was a little iron gate at the side. (15) Chris then jumped over and I followed. (16) Chris then climbed up the drainpipe to the roof and I followed. (17) Up to then **Chris had not said anything.** (18) We both got out on to the flat roof at the top. (19) Then someone in a garden on the opposite side shone a torch up towards us. (20) Chris said: 'It's a copper, hide behind here.' (21) We hid behind a shelter arrangement on the roof. (22) We were there waiting for about ten minutes. (23) **I did not know** he was going to use the gun. (24) A plain clothes man climbed up the drainpipe and on to the roof. (25) The man said: 'I am a police officer - the place is surrounded.' (26) He caught hold of me and as we walked away Chris fired. (27) **There was nobody else** there at the time. (28) The policeman and I then went round a corner by a door. (29) A little later the door opened and a policeman in uniform came out. (30) Chris fired again then and this policeman fell down. (31) I could see that he was hurt as a lot of blood came from his forehead just above his nose. (32) The policeman dragged him round the corner behind the brickwork entrance to the door. (33) I remember I shouted something but I forgot what it was. (34) **I could not see** Chris when I shouted to him - he was behind a wall. (35) I heard some more policemen behind the door and the policeman with me said: **'I don't think** he has many more bullets left.' (36) Chris shouted 'Oh yes I have' and he fired again. (37) I think I heard him fire three times altogether. (38) The policeman then pushed me down the stairs and **I did not see** any more. (39) I knew we were going to break into the place. (40) **I did not know** what we were going to get - just anything that was going. (41) **I did not have** a gun and **I did not know** Chris had one until he shot. (42) I now know that the policeman in uniform that was shot is dead. (43) I should have mentioned that after the plain clothes policeman got up the drainpipe and arrested me, another policeman in uniform followed and I heard someone call him 'Mac'. (44) He was with us when the other policeman was killed.

Bentley's barrister spelled out for the jury the two necessary pre-conditions for them to convict: they must be "satisfied and sure",

> i) that [Bentley] knew Craig had a gun and
> ii) that he instigated or incited Craig to use it." (Trow p179)

The evidence adduced by the Prosecution to satisfy the jury on both points was linguistic. For point i) it was observed that in his statement, which purported to give his unaided account of the night's events, Bentley had said "I did not know he was going to use the gun", (sentence 23). In his summing up, the judge who, because of the importance of the case was the Lord Chief Justice, made great play with this sentence, telling the jury that its positioning in the narrative of events, before the time when there was a single policeman on the roof, combined with the choice of "*the* gun" (as opposed to "a gun") must imply that Bentley knew that Craig had a gun well before it was used. In other words "the gun", given its position in the statement, must be taken to mean "the gun I already knew that Craig had".

The evidence used to support point ii), that Bentley had instigated Craig to shoot, was from the police officers. In their written statements and in their verbal evidence in court, they asserted that Bentley had uttered the words "Let him have it, Chris" immediately before Craig had shot and killed the policeman. As the judge emphasised, the strength of the linguistic evidence depended essentially on the credibility of the police officers who had remembered it recorded it, written it down later and then sworn to its accuracy. When the case came to Appeal in 1998, one of the defence strategies was to challenge the reliability of Bentley's statement. If they could throw doubt on the veracity of the police, they could mitigate the incriminating force of both the statement and the phrase "Let him have it", which Bentley, supported by Craig, had vehemently denied uttering.

At the time of Bentley's arrest the police were allowed to collect verbal evidence from those accused of a crime in two ways: either *by interview*, when they were supposed to record contemporaneously, verbatim and in longhand, both their own questions and the replies they elicited, or *by statement,* when the accused was invited to write down, or, if s/he preferred, to dictate to a police officer, their version of events. During statement-taking the police officers were supposed not to ask substantive questions.

At trial three police officers swore on oath that Bentley's statement was the product of unaided monologue dictation, whereas Bentley asserted that it was, in part at least, the product of dialogue, and that police questions and his replies to them had been reported as monologue. There is no doubt that this procedure was sometimes used for producing statements. A senior police officer, involved in another murder case a year later, explained to the Court how he had himself elicited a statement from another accused in exactly this way:

I would say "Do you say on that Sunday you wore your shoes?" and he would say "Yes" and it would go down as "On that Sunday I wore my shoes" (Hannam 1953: 156)

There are many linguistic features which suggest that Bentley's statement is not, as claimed by the police, a verbatim record, see Coulthard (1993) for a detailed discussion; here we will focus only on evidence that the statement was indeed, at least in part, dialogue converted into monologue. Firstly, the final four sentences of the statement

> (39) I knew we were going to break into the place. (40) I did not know what we were going to get - just anything that was going. (41) I did not have a gun and I did not know Chris had one until he shot. (42) I now know that the policeman in uniform that was shot is dead.

form some kind of meta-narrative whose presence and form are most easily explained as the result of a series of clarificatory questions about Bentley's knowledge at particular points in the narrative. In searching for evidence of multiple voices elsewhere in the statement we must realise that there will always be some transformations of Q-A which will be indistinguishable from authentic dictated monologue. In the Hannam example quoted above, had we not been told that "On that Sunday I wore my shoes" was a reduction from a Q-A, we would have had some difficulty in deducing it, although the preposed adverbial 'On that Sunday' is certainly a little odd.

We can begin our search for clues with the initial observation that narratives, particularly narratives of murder, are essentially accounts of what happened and to a lesser extent what was known or perceived by the narrator and thus reports of what did **not** happen or was **not** known are rare and special. There is, after all, an infinite number of things that did not happen and thus the teller needs to have some special justification for reporting any of them to the listener, in other words there must be some evident or stated reason for them being newsworthy. It is interesting to remember in this context Halliday's work on the statistics of markedness, done while he was based at Cobuild in the early 90's, when he found that positive finite clauses were 8 times more likely to occur than negative clauses.

We can see typical examples of 'normal' usage of negative reports in the sentences below which are taken from a crucial confession statement in another famous case, that of the Bridgewater Four, which is discussed in more detail below:

> i) Micky dumped the property but **I didn't know where**.
> ii) Micky Hickey drove the van away, **I don't know where he went** to
> iii) **We didn't all go together**, me and Vinny walked down first.
>
> (Molloy's Statement)

In examples, i) and ii) the second negative clause functions as a *denial* of an inference which the listener could have reasonably derived from the first clause. Example iii) is similar, but this time it is a denial of an inference which the narrator guesses the listener might have made, as there is no textual basis for the inference. In other words

such negatives are an integral part of the ongoing narrative. We find examples of negatives being used in a similar way in Bentley's statement

(6) A little later Norman Parsley and Frank Fasey called.
(7) **I did not answer the door or speak to them**

When Bentley reported that his friends had called, the listener would reasonably expect him to have at least talked to them and therefore this is a very natural denial of a reasonable expectation.

However, there are some negatives in Bentley's statement which have no such narrative justification, like sentence (17) below:

(16) Chris then climbed up the drainpipe to the roof and I followed.
(17) Up to then **Chris had not said anything.**
(18) We both got out on to the flat roof at the top.

Chris is not reported as beginning to talk once they have got out onto the roof, nor is his silence contrasted with anyone else's talking, nor is it made significant in any other way later in the narrative. A similarly unwarranted negative is:

(26) He caught hold of me and as we walked away Chris fired.
(27) **There was nobody else** there at the time.
(28) The policeman and I then went round a corner by a door.

None of the possible inferences from this denial seem to make narrative sense here - i.e. that as a result of there being no one else there a) it must be the policeman that Craig was firing at, or b) that it must be Craig who was doing the firing, or c) that immediately afterwards there would be more people on the roof. So, the most reasonable explanation for the negatives in these two examples is that, at this point in the statement-taking process, a policeman asked a clarificatory question to which the answer was negative and the whole sequence was then recoded and recorded as a negative statement by Bentley. The fact that some of the statement may have been elicited in this way is of crucial importance in sentence (23):

(23) **I did not know** he was going to use the gun

This is the one singled out by the judge as incriminating. This sentence would only make narrative sense if it were linked backwards or forwards to the use of a gun - in other words if it has been placed immediately preceding or following the report of a shot. However, the actual context is:

(22) We were there waiting for about ten minutes.
(23) **I did not know** he was going to use the gun.
(24) A plain clothes man climbed up the drainpipe and on to the roof.

If it is accepted that there were question/answer sequences underlying Bentley's statement, it follows that the logic and the sequencing of the information were not under his direct control. Thus the placing of the reporting of some of the events must depend on a decision by the police questioner to ask his question at that point, rather than on Bentley's unaided reconstruction of the narrative sequence. Therefore, and crucially, this means that the inference drawn by the judge in his summing up about Bentley's prior knowledge of Craig's gun was totally unjustified - if the sentence is the product of a response to a question, with its placing determined by the interrogating police officers, there is no longer any conflict with Bentley's later denial "I did not know Chris had one [a gun] until he shot". Nor is there any significance either to be attached to Bentley saying "the gun". All interaction uses language loosely and co-operatively and so, if the policeman had asked Bentley about "the gun", Bentley would have assumed they both knew which gun they were talking about. In that context the sensible interpretation would be 'the gun that had been used earlier that evening' and not 'the gun that was going to be used later' in the sequence of events that made up Bentley's own narrative of the evening.

## 3. Using corpus evidence

One of the marked features of Derek Bentley's confession is the frequent use of the word "then" in its temporal meaning - 11 occurrences in 588 words. This may not, at first, seem at all remarkable given that Bentley is reporting a series of sequential events and that one of the obvious requirements of a witness statement is accuracy about time. However, a cursory glance at a series of other witness statements showed that Bentley's usage of "then" was at the very least atypical, and thus a potential intrusion of a specific feature of policeman register deriving from a professional concern with the accurate recording of temporal sequence.

Two small corpora were used to test this hypothesis, the first composed of three ordinary witness statements, one from a woman involved in the Bentley case itself and two from men involved in another unrelated case, totalling some 930 words of text, the second composed of statements by three police officers, two of whom were involved in the Bentley case, the third in another unrelated case, totalling some 2270 words. The comparative results were startling: whereas in the ordinary witness statements there is only one occurrence, "then" occurs 29 times in the police officers' statements, that is an average of once every 78 words. Thus, Bentley's usage of temporal "then", once every 53 words, groups his statement firmly with those produced by the police officers. In this case it was possible to check the findings from the 'ordinary witness' data against a reference corpus, the Corpus of Spoken English, a subset of the COBUILD Bank of English, which, at that time, consisted of some 1.5 million words. "Then" in all its meanings proved to occur a mere 3,164 times, that is only once every 500 words, which supported the representativeness of the witness data and the claimed specialness of the data from the police and Bentley, (cf Fox 1993).

What was perhaps even more striking about the Bentley statement was the frequent post-positioning of the "then"s, as can be seen in the two sample sentences below, selected from a total of 7:

> Chris **then** jumped over and I followed.
> Chris **then** climbed up the drainpipe to the roof and I followed.

The opening phrases have an odd feel, because not only do ordinary speakers use "then" much less frequently than policemen, they also use it in a structurally different way. For instance, in the COBUILD spoken data "then I" occurred ten times more frequently than "I then"; indeed the structure "I then" occurred a mere 9 times, in other words only once every 165,000 words. By contrast the phrase occurs 3 times in Bentley's short statement, once every 194 words, a frequency almost a thousand times greater. In addition, while the "I then" structure, as one might predict from the corpus data, did not occur at all in any of the three witness statements, there were 9 occurrences in one single 980 word police statement, as many as in the entire 1.5 million word spoken corpus. Thus, the structure "I then" does appear to be a feature of policeman's (written) register.

When we turn to look at yet another corpus, the shorthand verbatim record of the oral evidence given in court during the trial of Bentley and Craig, and choose one of the police officers at random, we find him using the structure twice in successive sentences, "shot him *then* between the eyes" and "he was *then* charged". In Bentley's oral evidence there are also two occurrences of "then", but this time the "then"s occur in the normal preposed position: "and *then* the other people moved off", "and *then* we came back up". Even Mr. Cassels, one of the defence barristers, who might conceivably have been influenced by police reporting style, says "*Then* you". Thus these examples, embedded in Bentley's statement, of the language of the police officers who had recorded it, added support to Bentley's claim that it was a jointly authored document and so both removed the incriminating significance of the phrase "I didn't know he was going to use the gun" and undermined the credibility of the police officers on whose word depended the evidential value of the claimed-to-be remembered utterance "Let him have it Chris".

In August 1998, 46 years after the event, the then Lord Chief Justice, sitting with two senior colleagues, criticised his predecessor's summing-up and allowed the Appeal against conviction.

## 4. Uniqueness of encoding, again

In 1979 four men were convicted of killing a 13-year old newspaper delivery boy, Carl Bridgewater, solely on the basis of the confession of one of them, Patrick Molloy – there was no corroborating forensic evidence and Molloy subsequently retracted his confession, but to no avail. He admitted that he did actually say the words recorded in the confession, but insisted that he was being told what to say, by a policeman, who

was standing behind him. He also claimed that he had only made the confession after being physically and verbally abused for some considerable time, immediately beforehand.

The police, however, as support for the reliability of Molloy's confession, produced a handwritten contemporaneous record of an interview which, they claimed, had occurred immediately before the confession. It contained substantially the same information, expressed in the same language, as the confession statement. Molloy denied that this interview had ever taken place – in his version of events he was being subjected to abuse at that time. He counter-claimed that the interview record had been made up later on the basis of the by-then pre-existing confession. As is evident from a cursory glance at the two extracts below, the first from the statement which Molloy admitted making and the second from the interview record which he claimed was falsified, the similarities are striking; I have added sentence numbers and highlighted identical shared items in **bold** and close paraphrases in *italic*.

**Extract from Molloy's Statement**

(17) **I had been drinking and cannot remember the exact time I was there but whilst I was upstairs I heard someone downstairs say be careful someone is coming.** (18) **I hid for a while and** *after a while* **I heard** *a* **bang** *come from downstairs*. (19) **I knew that it was a gun being fired.** (20) I went downstairs and **the three of them were still in the room.** (21) **They all looked shocked and were shouting at each other**. (22) **I heard Jimmy say, "It went off by accident".** (23) I looked and **on the settee** I saw the *body of the boy*. (24) **He had been shot in the head.** (25) **I was appalled and felt sick.**

**Extract from Disputed Interview with Molloy**

P. How long were you in there Pat?
(18) **I had been drinking and cannot remember the exact time that I was there, but whilst I was upstairs I heard someone downstairs say 'be careful someone is coming'.**
P. Did you hide?
(19) Yes **I hid for a while** and then **I heard** the **bang** I have told you about.
P. Carry on Pat?
(19a) I ran out.
P. What were the others doing?
(20) **The three of them were still in the room.**
P. What were they doing?
(21) **They all looked shocked and were shouting at each other.**
P. Who said what?
(22) **I heard Jimmy say 'it went off by accident'.**
P Pat, I know this is upsetting but you appreciate that we must get to the bottom of this. Did you *see the boy's body*?
(Molloy hesitated, looked at me intently, and after a pause said,)
(23) Yes sir, he was **on the settee.**
P Did you see any injury to him?
(Molloy stared at me again and said)
(24) Yes sir, **he had been shot in the head.**
P What happened then?
(25) **I was appalled and felt sick.**

Linguists of all persuasions subscribe to some version of the 'uniqueness of utterance' principle and so would expect that even the same person speaking/writing on the same topic on different occasions would make an overlapping but different set of lexico-grammatical choices. Most linguists would also agree, on the basis of the number and length of the identical shared strings, that either one of the two documents was derived from the other or that both had been derived from a third. However, at the time of the original trial, no linguist was called to give evidence – in fact there were no forensic linguists in Britain at the time – so it was left to the lawyers to evaluate the linguistic significance of the evident similarities between the interview and the confession. As a result, the same phenomenon, massive identity in phrasing and lexical choice, was argued by the defence to be evidence of falsification, and by the prosecution to be evidence of the authenticity and reliability of both texts, on the grounds that here was an example of the accused recounting the same events, in essentially the same linguistic encoding, on two separate occasions.

The prosecution assertion that identity of formulation in two separate texts is to be expected and indicative of reliability depends on two commonly held mistaken beliefs: firstly, that people can and do say the same thing in the same words on different occasions and secondly, that people can remember and reproduce verbatim what they and indeed others have said on some earlier occasion. The former belief can be demonstrated to be false simply by recording someone attempting to recount the same set of events on two separate occasions. The second belief used to have some empirical support, at least for short stretches of speech, (see Keenan et al 1977 and Bates et al 1980), but was seriously questioned by Hjelmquist (1984) and Hjelmquist and Gidlung (1985), who demonstrated that, even after only a short delay, people could remember at best 25 percent of the gist and 5 percent of the actual wording of what had been said in a five minute two-party conversation in which they had just participated.

Confirmatory evidence of the inability to remember even quite short single utterances verbatim was specially commissioned from Professor Brian Clifford and presented at the 2003 'Glasgow Ice Cream Wars' Appeal. This was used to challenge successfully the claim of police officers that they had independently remembered, some of them for over an hour, verbatim and identically, utterances made by the accused at the time of arrest. Clifford's experiment tested the ability to remember a short, 24-word utterance and found that, even when such a small stretch of language was involved, most people were able to recall verbatim no more than 30 to 40 percent of what they had heard. (for details see **http://news.bbc.co.uk/1/hi/scotland/3494401.stm)**
This confirmed that the only way in which these two Molloy extracts could have come to share so much vocabulary and phrasing would be if one had been derived from the other or both from a third text. Sadly, it was not possible for me to test the acceptability and persuasiveness of these arguments in court, as the Crown conceded the appeal shortly before the due date, when compelling new evidence from document

and handwriting analysts emerged to convince the judges of the unsafeness of the conviction.

## 5. Coherence and cohesion in discourse

In the same Bridgewater Four case there was secondary, supporting linguistic evidence of a different kind to reinforce the opinion that the interview record was falsified and to demonstrate that it was derived from the statement. If we assume that the police officers had indeed, as Molloy claimed, set out to create a dialogue based on the monologue statement, they would have faced the major problem of what questions to invent in order to link forward and apparently elicit the actually pre-existing answers, which they had extracted from the statement. In this scenario one would expect there to be occasions when a question did not fit successfully, coherently and/or cohesively, into the text into which it had been embedded – and indeed there are.

In a developing interview, a question usually links backwards lexically, often repeating word(s) from the previous answer. However, in creating a question to fit a pre-existing answer, there is always the danger that the question will only link forward. I will give two examples. The original statement has a two-sentence sequence

> (21) They all looked shocked and were shouting at each other. (22) I heard Jimmy say 'it went off by accident'

which appears word for word in the interview record, except that the two sentences are separated by the inserted question "Who said what?". However, in this context the word "said", although it is cohesive with the next utterance – "said" links with "say" in "I heard Jimmy say" – is odd in terms of coherence. The men have just been described as "shouting", so one would have expected a coherent follow-up question to be either 'What/Why were they *shouting*?" or "Who was *shouting* (what)?"; one would certainly not anticipate "who *said* what?". The choice of "said" is a most unexpected choice, except, of course, for someone who knows that the next utterance will be "I heard Jimmy *say*...", then "said" has an evident logic.

An example of a *grammatical* misfit is where the statement version "on the settee I saw the **body** of the **boy**. **He** had..." is transformed into "Did you see **the boy's body**? Yes sir, **he** was on the settee". The statement version correctly uses the pronoun "He" because the referent is the "boy" in "the body of the boy", but in the reformulated version in the police interview, "the boy's **body",** would be likely have elicited "**it**" as a referent.

We also find examples of *process* misfit: in the exchange reproduced below, the question "what happened" requires a report of an action or an event, but in fact the response is a description of two states:

P What **happened** then?
M I **was appalled** and **felt sick.**

Had the reply been "I vomited", it would, of course, have been cohesive. Similar process misfits are:

P What were the others **doing**?
M The three of them **were** still in the room.
P What were they **doing**?
M They all **looked shocked**

It is possible to continue in this vein, but these examples are sufficient to show that certain oddities of cohesion and coherence support the opinion that the interview record was falsified on the basis of the pre-existing statement.

## 6. Uniqueness of encoding yet again - the evidential value of single identical strings

At the time of this lecture, the University of Birmingham website carried the following observation on plagiarism:

> Plagiarism is a form of cheating in which the student tries to pass off someone else's work as his or her own. ..... Typically, substantial passages are "lifted" verbatim from a particular source without proper attribution having been made.
> *http://artsweb.bham.ac.uk/arthistory/declaration_of_aship.htm*

As is evident from the two extracts below, plagiarism may not be detectable if one is looking only for 'substantial passages'. The sophisticated plagiarist may not reproduce even a single sentence word for word, but no one would dispute that the extract from the Mackay biography is derived from the Wall biography. As before **bold** is used to indicate identical words, *italic* to indicate close paraphrases.

**Two Biographies of Andrew Carnegie**

**a.** With all of these problems it was little short of a miracle that the "stichting" board *was ready to lay* the *corner***stone** for the building *in* **the summer of 1907** at **the opening of the Second Hague International Conference**. It then **took six** *more* **years** before **the Palace** *was completed* during which time there *continued to be squabbles* **over details**, *modifications of architectural plans and lengthy discussions about furnishings... For ten years the Temple of* **Peace** was *a storm of* **controversy**, **but** *at last,* **on 28 August 1913, the** Grand **Opening ceremoni***es were held* . (J F Wall, *Andrew Carnegie)*

**b.** The *foundation* **stone** *was not laid until* **the summer of 1907**, *in nice time for* **the opening of the Second Hague International Conference**. Actual construction of the **palace took** *a further* **six years**, delayed and exacerbated by constant *bickering* **over details**, *specifications and materials. For an entire decade* the **Peace** *Palace* was *bedevilled by* **controversy, but** *finally*, **on 28 August 1913, the opening ceremony** *was performed.*
(J Mackay, *Little Boss: A Life of Andrew Carnegie)*

Plagiarism detection raises the question of how unique is encoding and how little identical text does one need to claim that it was copied and not created independently. In the Bridgewater Four case there was a whole series of identical strings of words to support the claim that the interview record was derived from the statement, and then

for anyone unconvinced by the assertion that the identities were due to borrowing rather than identical encoding on two separate occasions, the claim of fabrication was supported by other linguistic evidence of a different and independent kind. We must now ask how much weight can one place on a single identical string and how significant is the length of a string when assessing its evidential significance? These questions go to the heart of current thinking about uniqueness in language production.

As Sinclair (1991) pointed out, there are two complementary assembly principles in the creation of utterances/sentences; one is the long accepted principle that sequences are generated word by word on an 'open choice' basis. When strings are created in this way, there is, for each successive syntagmatic slot, a large number of possible, grammatically acceptable, paradigmatic fillers and thus one can easily, if not effortlessly, generate memorable but meaningless sequences like 'colorless green ideas sleep furiously'. The other assembly principle proposed much more recently as a result of corpus work, (Sinclair op cit), is the 'idiom principle', according to which pre-assembled chunks made up of frequent collocations and colligations are linked together to create larger units. In practice, both principles work side by side, which means that any given short string might have been produced by either principle and therefore might be either an idiosyncratic combination or a frequently occurring fixed phrase. Nevertheless, the longer a sequence is, the more likely it is that at least some of its components have been created by the open choice principle and, consequently, the less likely that the occurrence of this identical sequence in two different texts is a consequence of the same or two different speaker/writers coincidentally selecting the same chunk(s) by chance.

The data I will use for exemplificatory purposes come from the Appeal of Robert Brown in 2003. As in the Bridgewater Four case, here too there was a disputed statement and a disputed interview record; the only difference was that Brown claimed that, although the interview itself did occur, the record of it was made up afterwards – "no police officer took any notes" (Judge's Summing – up, p 93 section E).

Below are two sentences from the statement set beside sentences occurring in the (?invented) interview record:

| | |
|---|---|
| Statement | I asked her if I could carry her bags she said "Yes" |
| Interview | I asked her if I could carry her bags and she said "yes" |
| | |
| Statement | I picked something up like an ornament |
| Interview | I picked something up like an ornament |

In what follows I have used examples from Google, rather than from an academic corpus like the Bank of English or the British National Corpus, on the grounds that Google is easily accessible to the laypeople, like judges and jury members, for whom

the argument was designed. While the above utterances/sentences may not seem remarkable in themselves, neither of them occurred even once in the billions of texts that Google searches and even the component sequences quickly become rare occurrences:

| String | Instances |
|---|---|
| I picked | 1,060,000 |
| I picked something | 780 |
| I picked something up | 362 |
| I picked something up like | 1 |
| I picked something up like an | 0 |
| | |
| if I could | 2,370,000 |
| I asked | 2,170,000 |
| I asked her | 284,000 |
| I asked her if | 86,000 |
| I asked her if I | 10,400 |
| I asked her if I could | 7,770 |
| I asked her if I could carry | 7 |
| I asked her if I could carry her | 4 |
| I asked her if I could carry her bags | 0 |

Focussing on the second pair of sentences, it is evident that "if I could" and perhaps "I asked her" have the characteristics of pre-assembled idioms, but even then their co-selection in the same sequence is rare, at 7,770 occurrences. The moment one adds a 7th word, "carry", the odds against these 7 running words occurring become enormous, with the Google search yielding only 7 instances. Indeed rarity scores like these begin to look like the probability scores DNA experts proudly present in court. However, unlike the DNA expert, the expert linguist has the disadvantage that everyone in the courtroom considers themself to be a language expert. It will never be enough for the linguist to simply assert the uniqueness of encoding, it will always need to be demonstrated in an accessible and persuasive way.

When I came, in April 2006, to produce this written version of my 2005 lecture, I decided it would be prudent to check my claim about the uniqueness of "I asked her if I could carry her bags" and rest assured that there were indeed no instances. To my horror this time Google found two examples.

However, as we are often told, it is the exception that proves the rule. Since Robert Brown's successful appeal a website devoted to his case has been set up, (http://www.eamonnoneill.net/Candp.html), where text of the confession now appears. But what about the second embarrassing citation? It is in an article I myself wrote about the case and made available to my students on a website. So the 9-word string is still unique, it's just that it has now been reproduced twice.

## 7. Uniqueness and internet plagiarism

If proof were still needed of the diagnostic power of idiolect, we can show it through focussing on distinctive collocations and can demonstrate their importance in successful internet searches for suspected plagiarism. Experience confirms that the most economical method to use, when checking via the internet, is to search by using 3 pairs of collocates whose individual items occur only once in the text in question. I will exemplify with the opening of a story written by a 12-year old girl:

> **The Soldiers** (all spelling as in the original)
> Down in the country side an old couple husband and wife Brooklyn and Susan. When in one afternoon they were having tea they heard a drumming sound that was coming from down the lane. Brooklyn asks,
> "What is that glorious sound which so thrills the ear?" when Susan replied in her o sweat voice
> "Only the scarlet soldiers, dear,"
> The soldiers are coming, The soldiers are coming. Brooklyn is confused he doesn't no what is happening.
> Mr and Mrs Waters were still having their afternoon tea when suddenly a bright light was shinning trough the window.
> "What is that bright light I see flashing so clear over the distance so brightly?" said Brooklyn sounding so amazed but Susan soon reassured him when she replied .....

The first paragraph is unremarkable, but the style shifts dramatically in the second: *"What is that glorious sound which so thrills the ear?"*. The story then moves back to the style of the opening, before shifting again to *"What is that bright light I see flashing so clear over the distance so brightly.* The reader feels it is very unlikely that the same author could write in both styles and this raises the question of whether the other borrowed text(s) might be available on the internet.

If one takes as search terms three pairs of collocated *hapaxes* 'thrills-ear', 'flashing-clear' and 'distance-brightly', one immediately sees the forensic power of idiolectal co-selection. The single pairing 'flashing-clear' yields over half a million hits on Google, but the three pairings together yield a mere 360 hits, of which the first thirteen, when I first searched, were all from W.H. Auden's poem 'O What is that sound'. The poem's first line reads 'O **what is that sound which so thrills the ear**' while the beginning of the second verse is 'O **what is that light I see flashing so clear Over the distance brightly**, brightly?'. If one adds a seventh word and looks for the phrase 'flashing so clear' all of the hits are from Auden's poem.

## 8. And so, my dear Watson, which text was written by Sinclair?[1]

The Holy Grail in authorship studies is to find valid and reliable markers which consistently distinguish authors. So far there has been more searching than finding. Grant (2005) tested over 170 markers of authorship proposed by others and found the vast majority of them wanting. One marker which does seem to work, however, is sentence length, as Winter and Woolls found in a pilot investigation in 1996. They were responding to a challenge made by the then Head of the School of English, Kelsey Thornton, to distinguish between the individual styles of two authors, who had jointly written a late-Victorian novel. Winter and Woolls were provided with the first 1,000 running words from each of the first five, and the last six chapters, (28-33), of the novel and also, for comparative purposes, 2,500 words from the beginning of a single author novel, written by one of two authors.

Winter had suggested that the frequency of lexical items which were used only once (often called *hapaxes*) – in other words the degree of lexical novelty and variety - might provide a discriminatory measure. Research by Holmes (1991) appeared to support this view, although his findings were based on significantly longer text samples. The question in this case was whether such a measure, labelled *lexical richness,* could provide results when applied to much shorter text extracts. The lexical richness score is derived from the relative frequency of *hapaxes* expressed as a function of the length of the text. Thus a greater proportion of once-only usage, results in a higher lexical richness score. In their investigation Winter and Woolls focused on both lexical richness and average sentence length.

Using the two measures together allowed Winter and Woolls to locate each text in a two dimensional space, with sentence length plotted against lexical richness. The results for the 1000 word extracts showed a marked difference between the lexical richness scores and an evident, though lesser, difference between the average sentence lengths of the odd numbered chapters 1, 3 and 5 and the even numbered chapters 2 and 4. This suggested that the two measures were identifying a real stylistic difference between the two authors. When the results for the final six chapters were added, chapter 32 was found to have lexical richness and sentence length scores comparable with those of chapters 2 and 4, while the scores for chapter 33 placed it close to those for chapters 1, 3 and 5 – see Chart 1 on the next page.

The scores for the remaining chapters, 28-31, fell in between the two groupings and this led Winter and Woolls to suggest that the two authors may have collaborated on these chapters, a hypothesis later confirmed by Kelsey Thornton, after consulting a diary written by one of the authors. Winter and Woolls then divided the 2,500 word extract from the single-author novel into three consecutive 835-word samples and labelled them CTLA, CTLB and CTLC. The scores for all three extracts were remarkably similar to each other and to those for chapter 32. It was therefore, correctly as it turned out, argued that all had been written by the same author.

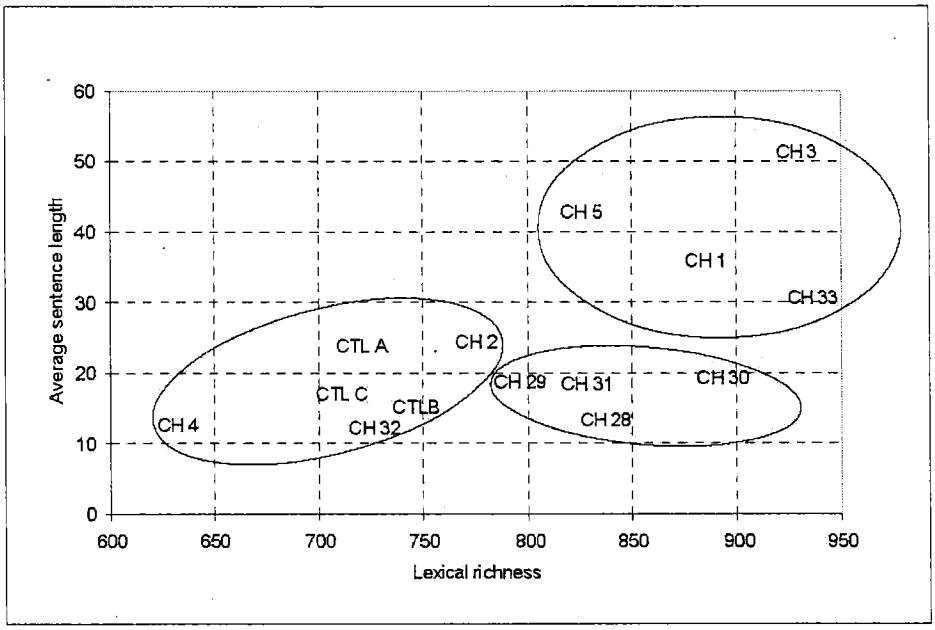


**Chart 1 Sentence Length and Lexical Richness Scores. For Novel Extracts**

We decided to test whether these two measures would correctly assign Texts A and B. We first we needed baseline scores for both authors on the two measures and to calculate them we used two publications from each author that had been written in the early 90's and then added for comparison two jointly authored texts written by Woolls, giving six texts in all. As is evident in Chart 2 below, Sinclair and Coulthard differed significantly in terms of sentence length, but not in terms of lexical richness:

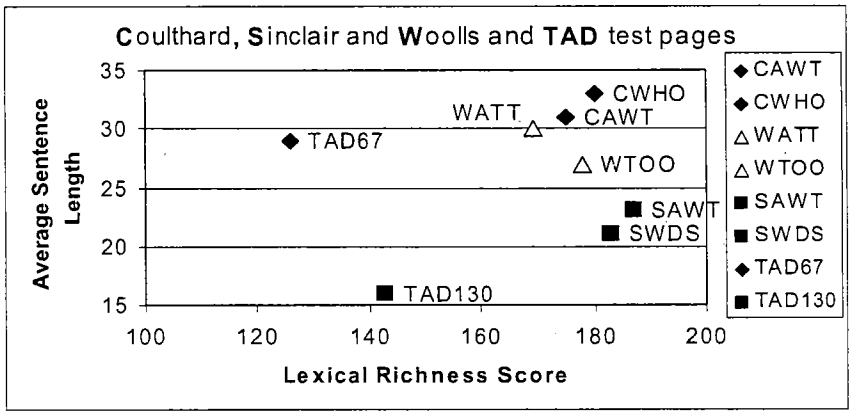


**Chart 2 Sentence Length and Lexical Richness Scores for Sinclair and Coulthard**

**Key to labels in chart**
CAWT is Coulthard 1994c; CWHO is Coulthard 2000a; WATT is Clemit and Woolls 2001; WTOO is Woolls and Coulthard 1998; SAWT is Sinclair 1992/1994; SWDS is Sinclair 1993

When the scores for Texts A and B were compared with those for the known texts, sentence length correctly grouped Text A with Sinclair and Text B with Coulthard, although the lexical richness score associated neither text with either author.

Although this analysis was undertaken in a light-hearted manner, it does raise serious and interesting questions. If Texts A and B are indeed representative of the styles of Sinclair and Coulthard in the early 70's, then, over a 20-year period, both have moved to writing longer and lexically richer sentences – although, of course, this trend may not continue. As I was writing and revising this text I became painfully aware of my own diagnostically significant long sentences and I must admit that I have consciously divided up any particularly long ones that I noticed at the revision stage.

In this spirit of adventure and academic curiosity we decided to apply a Woolls program called 'Citereader', (Woolls n.d.), to the two texts. This program was initially devised to identify acknowledged and unacknowledged citations in students' essays. It works on the assumption that there will normally be style differences between the embedded citation and the embedding text, as we saw in the Soldiers story discussed above, and that citations will have a less direct connection with the rest of the student's own writing and are likely to be more concise. Essentially the program allocates a score to each sentence based on the relationship of that sentence to the rest of the text and on the rarity and semantic complexity of the component words. This means that the same sentence, occurring in a different context, for instance as a citation, would almost certainly get a different rating. The score for any given sentence is a sum of the scores for each individual word. Grammatical words score lowest, then core lexical words, then lexical words which occur frequently in the text; infrequent and longer words are given a high rating, with the highest of all reserved for hapaxes. The scoring system is designed so that long sentences do not inevitably achieve higher scores, but only do so if they contain significant quantities of higher rated individual words. Short sentences with infrequent and complex vocabulary can also achieve a high score.

An unexpected finding from applying the Citereader program to a large number of texts was that the Citereader scores for different individual authors proved to be quite consistent across a range of texts. On reflection this is not so surprising because, following the Winter and Woolls findings for the jointly authored novel, one would expect authors to display individual style features fairly consistently, So, when a series of texts is put through the program, they tend to be grouped by author. Some authors have consistently more sentences with low scores, some have a significant grouping in the mid range, while yet others have a greater proportion of high scoring sentences. For that reason we decided to see what, if anything, Citereader would say about the Sinclair and Coulthard extracts, when compared with an analysis of the known texts.

The program is designed to assign all analysed sentences to one of 8 levels of complexity and, as we can see in Table 1 below, the styles of the three authors under consideration are clearly separated, particularly by the proportion of sentences falling

into the three lowest categories, 1-3, which have been grouped together, for exemplificatory purposes, in Table 1 below:

| File | Words | % Levels 1 - 3 | L1 | L2 | L3 | L4 | L5 | L6 | L7 | L8 |
|---|---|---|---|---|---|---|---|---|---|---|
| CAWT | 4085 | 24% | 33 | 6 | 7 | 17 | 14 | 5 | 13 | 32 |
| CWHO | 5827 | 25% | 42 | 8 | 10 | 16 | 20 | 17 | 15 | 46 |
| WATT | 4700 | 34% | 49 | 6 | 8 | 18 | 15 | 18 | 9 | 31 |
| WTOO | 6443 | 38% | 77 | 12 | 12 | 32 | 25 | 21 | 18 | 36 |
| SAWT | 7184 | 57% | 141 | 27 | 25 | 38 | 22 | 18 | 19 | 21 |
| SWDS | 7585 | 63% | 197 | 19 | 27 | 27 | 25 | 19 | 10 | 21 |

**Table 1 Citereader Analysis of the Coulthard, Sinclair and Woolls Texts**

The major difficulty for any authorship analyst in a forensic context, as we noted above, is usually the shortness of the texts provided for analysis and it was for this reason that we chose shortish extracts from *TAD* for comparison purposes. We then took similar length short extracts from the complete Sinclair, Woolls and Coulthard texts already analysed above and compared them first. Even though there were now only a few sentences on which to base the comparison, the texts were still clearly separated. When we added in the Sinclair and Coulthard texts, as you can clearly see from Table 2 below, Text A was placed with Sinclair's SAWT extract and Text B with Coulthard's CAWT extract.

| File | Words | % Levels 1 - 3 | L1 | L2 | L3 | L4 | L5 | L6 | L7 | L8 |
|---|---|---|---|---|---|---|---|---|---|---|
| Text B | 322 | 11% | 0 | 1 | 0 | 2 | 2 | 0 | 0 | 6 |
| CAWTp3 | 347 | 15% | 0 | 1 | 0 | 1 | 1 | 0 | 1 | 5 |
| WATT | 405 | 29% | 3 | 2 | 1 | 2 | 1 | 0 | 1 | 5 |
| WTOO | 334 | 37% | 1 | 1 | 1 | 4 | 2 | 1 | 2 | 0 |
| Text B | 353 | 50% | 6 | 2 | 3 | 5 | 2 | 2 | 0 | 1 |
| SAWTp15 | 337 | 55% | 5 | 0 | 2 | 4 | 3 | 1 | 1 | 1 |

**Table 2 Citereader Analysis of the Coulthard, Sinclair and Woolls Extracts**

Many forensic cases will not yield such clear categorisations as this, but this party trick, designed to entertain a group of John Sinclair's friends, may have produced results of great significance for forensic authorship analysis. Only further work will tell, but for the moment it may be wise not to place too much trust in the text.

**NOTE**

For this Section I have had a great deal of assistance from David Woolls of CFL Software Development, both with the original analyses and with their verbal and visual presentation.

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## Appendix - Extracts from *Towards an Analysis of Discourse,* Sinclair and Coulthard, London: OUP 1975

**TEXT A** At the highest stratum of all there is the interpenetration of minds. Each individual constructs his private linguistic universe, and through his utterances gives hints as to its nature. A problem which has always been with linguistics is the relation between subjective and objective ways of understanding the nature of language. Firth tried to exorcise this dichotomy along with the others but did not succeed. But through the concept of orientation we are able to build both subjective and objective aspects into a coherent model of verbal communication.

One possibility is that participants can maintain a consistent orientation towards each other throughout an interaction. Another is that they can converge on or diverge from each other. Or their orientation may be sensitive to smaller units of the discourse and may vary considerably. Or one participant may adopt an idiosyncratic mode. Because orientation is signalled through a complex network of choices, there are many configurations.

In classroom discourse we have mainly examples of consistency. The teacher's orientation is rarely challenged. The process of education is seen as the pupils accepting the teacher's conceptual world, since he is the mouthpiece of the culture. In some lessons the quality of acceptance seems to superficial – literally making the same noises as the teachers; as when the teacher indicates clearly the answer required and then demands a choral response of the target word or phrase.

The domination of the teacher's language is fully displayed in earlier chapters of this book. The basic IRF structure, giving the teacher the last word, allows him to recast in his own terms any pupil response. Pupils acknowledge the domination by choosing elliptical responses, and by avoiding initiating. Programmed instruction texts often take this sort of interaction to embarrassing extremes.

In an interview between doctor and patient, there is an attempt to construct a conceptual frame compounded of what each brings to the interaction. The doctor brings his expertise in classification and diagnosis and the patient brings his symptoms. The doctor is able to dominate, but the patient retains many subtle ways of insisting on his own view of things. P 130

**TEXT B** In our effort to make things as simple as possible initially, we chose classroom situations in which the teacher was at the front of the class 'teaching', and therefore likely to be exerting the maximum amount of control over the structure of the discourse. While it was basic to our theory that the verbal and non-verbal context would affect the discourse, we had no theoretical basis for distinguishing between important and unimportant features and therefore set out to control as many potential variables as possible – age, ability, class size, teacher/pupil familiarity, topic of lessons.

Our initial sample consisted of the tapes of six lessons, all based on the hieroglyph materials reproduced in Appendix I, all taught to groups of up to eight 10-11 year-old children by their own class teacher. The system of analysis outlined in Chapter 3 was devised for and based on these lessons. However, once we felt able to handle the controlled sample, we collected a wide variety of tapes covering children of different age groups, in different schools, being taught different subjects by teachers with differing degrees of formality. The system required some, but not major, revision and is now able to cope with most teacher/pupil interaction inside the classroom. What it cannot handle, and of course was not designed to handle, is pupil/pupil interaction in project work, discussion groups, or the playground.

Armed with the results of this research, we are currently attempting to specify a descriptive apparatus capable of greater generality. We have selected a small number of situations which contrast with the classroom along various dimensions but which all have clearly recognizable roles, objectives, and conventions. Chapter 6 gives a brief account of work in progress and indicates the main lines of a developing theory of language interaction. Publication of this volume is designed to promote the generalization of the descriptive apparatus by making it readily available to critics and fellow practitioners. P 67

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**H**
Only the Westlaw citation is currently available.

United States District Court,
E.D. California.
Amy McCONNELL and Amy McConnell on behalf of her four minor children, A.B., A.B. J.M. and J.M., Plaintiffs,
v.
LASSEN COUNTY, CALIFORNIA; James Chapman, Bob Pyle, Lloyd Keifer, Brian Dahle and Jack Hanson, Board of Supervisors of Lassen County, California; Margaret Crosby, Director of Child Protective Services, Lassen County, Terry Chapman, Loel Griffith and Director of California State Department of Social Services, Defendants.

No. CIV. S-05-0909 FCD DAD.
Oct. 16, 2009.

Randall Kevin Edwards, Randall K. Edwards, PLLC, Salt Lake City, UT, Robert R. Hager, PHV, Treva Jean Hearne, Hager & Hearne, Reno, NV, for Plaintiffs.

Kathleen J. Williams, Martha Macon Stringer, Williams And Associates, Ronald Eugene Enabnit, Matheny Sears Linkert & Long, Sacramento, CA, Mark Lowary, Spencer A. Schneider, Berman Berman And Berman LLP, Stephanie Berman Schneider, Los Angeles, CA, for Defendants.

*MEMORANDUM AND ORDER*
FRANK C. DAMRELL, JR., District Judge.

***1** This matter comes before the court on defendants' motion for attorneys' fees and costs, pursuant to 28 U.S.C. § 1927 and the court's inherent authority, for expenses incurred in relation to a motion in limine. Plaintiffs oppose the motion. For the reasons set forth below,[FN1] defendants' motion is GRANTED.

FN1. Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. Local Rule 78-230(n).

**BACKGROUND**

This case arises out of the removal of plaintiff Amy McConnell's four minor children from her custody and their placement in foster care, where at least one of the minor children was sexually abused. On May 10, 2005, plaintiffs filed a complaint in this court, alleging, inter alia, claims under 42 U.S.C. § 1983 for violations of their Fourteenth Amendment rights to family integrity and due process. On June 29, 2007, the court issued a Memorandum and Order, granting in part and denying in part defendants' motions for summary judgment. (Mem. & Order, filed June 29, 2007.) After a stay pending a Ninth Circuit en banc decision and various motions for reconsideration in light of that decision, the court determined there were triable issues of fact regarding plaintiffs' § 1983 claims against defendant Terry Chapman ("Chapman") and defendant Lassen County.

In support of their opposition to defendants' motion for summary judgment brought in 2007, plaintiffs attempted to offer a copy of a letter purportedly written by defendant Chapman. On its face, the document appeared to be an unqualified admission that Chapman was responsible for the purported injuries to plaintiffs. However, the court did not consider this document as plaintiffs failed to properly authenticate it or disclose its source. Further, defendants presented expert declarations from a forensic linguistics expert and a forensic document examiner, both of whom opined the copy of the letter was not authored by defendant Chapman and was not genuine.

Subsequently, in their Joint Pretrial Statement, plaintiffs included this letter as a trial exhibit, and defendants provided that they would be filing a motion in limine to exclude the document "because it is unauthenticated and a fake." (Third Am. Joint Pretrial Conference Statement [Docket # 288], filed

Apr. 3, 2009, at 8.) On July 21, 2009, defendants filed their motion in limine to exclude the letter and scheduled an evidentiary hearing in relation to the motion. Plaintiffs filed a written opposition to the motion.

On August 21, 2009, the court heard oral argument on defendants' motion in limine and was prepared to hear testimony from witnesses. Because plaintiffs, as the parties seeking to offer the evidence at trial, bore the burden of establishing authenticity, the court directed them to present their evidence. Plaintiffs failed to call any witnesses or present any evidence. Plaintiffs' counsel first erroneously argued that because defendants brought the motion to exclude, defendants also bore the burden of establishing that the document was not authentic. (Hr'g Tr. [Docket # 302], filed Sept. 10, 2009, at 2.) Plaintiffs' counsel then submitted a proffer that if sworn to testify, Treva Hearne ("Hearne"), co-counsel for the plaintiffs, would submit evidence that she received three different copies [FN2] of the letter at different times. (*Id.* at 4-5.) In the first instance, the copy of the letter was received through the mail by an unidentified sender. (*Id.* at 6.) In the second instance, the copy of the letter was mailed by a social worker who had been terminated by Lassen County with no accompanying documents. In the third instance, Debbie Henson ("Henson"), an alleged recipient of the letter, mailed or faxed the copy of the letter to Hearne. (*Id.* at 8.) However, Henson testified under oath that she had never seen the document prior to 2007 when it was produced in connection with separate litigation against Lassen County. (*See id.* at 10-11.) As such, the court noted and plaintiffs' counsel conceded that plaintiffs did not have a knowledgeable witness that defendant Chapman signed, wrote, or sent the letter or that the alleged recipients received it. (*Id.* at 13-14.) [FN3] Subsequently, plaintiffs' counsel withdrew the letter and represented that the letter would not be used at trial for any purpose. (*Id.* at 17.) [FN4]

FN2. Plaintiffs counsel admitted that it did not have the original document. (*Id.* at 13.)

FN3. For the first time, plaintiffs' counsel then attempted to argue that the letter would be introduced in order to demonstrate that Lassen County CPS "was so dysfunctional that these are the kinds of things [forgeries] that are occurring." (*Id.* at 16.) The court noted that such a theory would present admission problems pursuant to Rule 403. (*Id.*)

FN4. Defendants subsequently solicited the testimony of Terry Chapman. Plaintiffs' counsel objected to the presentation of any evidence after it had withdrawn the letter. After plaintiffs' counsel further clarified that they would not be offering the letter for any purpose and that the letter "will not see the light of day," the court concluded the hearing. (*Id.* at 24-27.)

***2** Through this motion, defendants seek attorneys' fees and costs in the amount of $20,084.98 that were incurred in connection to the motion in limine and the current motion for attorneys' fees. Defendants' counsel presents evidence that $11,698.50 in attorneys' fees were incurred for preparing the motion in limine, preparing witnesses for the motion in limine, and attending hearing on the motion in limine. (Decl. of Kathleen J. Williams in Supp. of Motion for Fees and Costs ("Williams Decl."), filed Sept. 15, 2009.) Further, defendants expended $6,571.48 in expert fees and costs. (*Id.*) Finally, $1,815.00 was incurred in attorneys' fees related to the motion for fees. (*Id.*) [FN5]

FN5. Plaintiff has objected to any and all sanctions, but has offered no analysis as to the reasonableness of defendants' computation of fees and costs. The court nevertheless has reviewed defendants' counsel's billing rates and cost reports and finds them reasonable.

**ANALYSIS**

Section 1927 allows the court to award fees against "any attorney ... who so multiplies the pro-

ceedings in any case unreasonably and vexatiously." This section is not specific to any statute, but applies to any civil suit in federal court. *Hyde v. Midland Credit Mgmt., Inc.,* 567 F.3d 1137, 1141 (9th Cir.2009). Further, the statute "explicitly provides for remedies against offending attorneys." *Id.; F.T.C. v. Alaska Land Leasing, Inc.,* 799 F.2d 507, 510 (9th Cir.1986) (noting that § 1927 does not authorize recovery from a party, but *"only* from an attorney or otherwise admitted representative of a party") (emphasis in original) (internal quotations and citations omitted).

Attorneys fees under § 1927 are appropriate if an attorney's conduct is in bad faith; recklessness satisfies this standard. *B.K.B. v. Maui Police Dept.,* 276 F.3d 1091, 1107 (9th Cir.2002); *Barber v. Miller,* 146 F.3d 707, 711 (9th Cir.1998) ("An award of sanctions under 28 U.S.C. § 1927 or the district court's inherent authority requires a finding of recklessness or bad faith."). The Ninth Circuit has also required a finding of subjective bad faith, "which is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Id.* (emphasis in original) (quoting *In re Keegan Mgmt. Co., Sec. Lit.,* 78 F.3d 431, 436 (9th Cir.1996)). Moreover, the Ninth Circuit has cautioned that "[s]anctions should be reserved for the 'rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose.' " *Primus Auto. Fin. Servs., Inc. v. Batarse,* 115 F.3d 644, 649 (9th Cir.1997) (quoting *Operating Eng'rs Pension Trust v. A-C Co.,* 859 F.2d 1336, 1344 (9th Cir.1988)).

The court also has the inherent power to issue sanctions in order "to protect the due and orderly administration of justice and maintain the authority and dignity of the court." *Id.* at 648 (internal quotations and citation omitted). These sanctions may be issued when the party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" and may take the form of attorneys' fees. *Id.* Before awarding such sanctions however, "the court must make an explicit finding that counsel's conduct 'constituted or was tantamount to bad faith.' " *Id.* (quoting *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 767, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)). A finding of bad faith is supported by the same standard required under § 1927. *See id.*

***3** In this case, plaintiffs' counsel's conduct was tantamount to bad faith pursuant to § 1927. As a result of the court's summary judgment order, plaintiffs were on notice in June 2007 that the court had identified authentication problems with the copy of the letter they sought to introduce. However, plaintiffs continued to proffer the copy of the letter in question, including it as an exhibit in numerous drafts of the Joint Pretrial Conference Statement. Plaintiffs also knew that defendants vigorously opposed introduction of the document and had retained experts relating to authenticity. Accordingly, defendants filed a motion in limine and requested an evidentiary hearing. Plaintiffs' counsel filed a brief in opposition to this motion. However, despite ultimately acknowledging that they bore the burden of establishing authenticity, plaintiffs failed to offer any evidence or argument that supported authentication under the Federal Rules of Evidence in either their briefing or at the evidentiary hearing. Importantly, plaintiffs' counsel's proffer provided no basis for admission. Yet, despite prior notice of deficiencies, plaintiffs' counsel insisted upon litigating the admissibility of the document without any factual or legal support. *See Gomez v. Vernon,* 255 F.3d 1118, 1135 (9th Cir.2001) (affirming the imposition of sanctions pursuant to § 1927 where counsel's conduct unreasonably resulted in a hearing on the motion and a three-day evidentiary hearing on follow-on sanctions); *see also Serritella v. Markum,* 119 F.3d 506 (7th Cir.1997) (affirming sanctions under Rule 11 where counsel raised issues which had previously been decided against him).

Indeed, in its opposition to defendants' motion for attorneys' fees, plaintiffs continue to argue, yet

again without citation to any legal authority, that the evidence should be admitted based upon a finding that defendant Terry Chapman is "not credible." Plaintiffs further argue that the content of the document should provide sufficient evidence of authentication; if the letter's contents are verified as true, there is sufficient evidence to believe the letter was written by Terry Chapman. Not only do plaintiffs fail to support this argument with legal authority, [FN6] plaintiffs mischaracterize the factual basis for this assertion. Plaintiffs assert that in his deposition, Terry Chapman testified to facts that were reflected in the copy of the letter. However, a review of the relevant deposition testimony reflects that Terry Chapman did not testify that everything in the letter was a true statement. Further, plaintiffs failed to present any evidence that the information contained in the letter was something that only Terry Chapman could have known and thus, the document must have been authored by him.

> FN6. Further, this theory runs afoul of the principles served by authentication. In essence, it would allow the jury to consider the evidence relating to the merits prior to determining if the evidence is actually what a party purports it to be.

Plaintiffs' counsel also contends that until Terry Chapman was questioned about the letter, the obvious truth of its creation would not be tested. [FN7] However, plaintiffs' counsel did not call Terry Chapman as a witness at the evidentiary hearing. Rather, *it withdrew the letter without presenting any evidence* and prior to defense counsel's direct examination of Chapman.

> FN7. Plaintiffs' argument also rings hollow as Terry Chapman had previously been deposed prior to the evidentiary hearing and plaintiffs failed to point to any deposition testimony to adequately support its opposition to defendants' motion in limine. The testimony cited by plaintiff merely provided that while Terry Chapman identified the signature on the letter as his own, he denied writing the letter itself. This was consistent with defendants' expert opinions *that the signature block was cut from a separate document and pasted onto a forged letter.*

***4** Plaintiffs have never provided evidence of the origins of the letter, much less evidence, either direct or circumstantial, that the letter was in the possession of any defendants or authored by defendant Chapman. Fed.R.Evid. 901(a).[FN8] Plaintiffs' counsel's adamance on pressing arguments that the court has repeatedly found deficient, regarding evidence that they have already withdrawn, is further evidence of counsel's recklessness and bad faith in pursuing the motion in limine. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (holding that sanctions in the form of attorneys' fees are justified in "making the prevailing party whole for expenses caused by his opponent's obstinacy").

> FN8. Plaintiffs also argue that the court refused to allow an offer of proof based upon admission as a business record or as an admission against interest. First, the transcript does not reflect such a refusal. Second, potential applicability of exceptions to the hearsay rule does not obviate the need for proper authentication or certification. Third, as plaintiffs could present no evidence regarding the source of the copy of the letter, it is incredulous that they now speculate they could lay a proper foundation that the letter was prepared in the ordinary course of business.

Plaintiffs' contention that defendants' experts were unnecessary is without merit. Plaintiffs continued to assert that the copy of the letter was admissible until after oral argument on the motion in limine and a proffer by plaintiffs' counsel.[FN9] Moreover, in their written opposition to defendants' motion in limine, plaintiffs also raised a *Daubert* challenge to the expert opinions, necessitating further preparation by defendants and the court. [FN10]

Under these facts, the court cannot find that defendants' vigorous preparation of evidence to support their arguments was either irrelevant or unnecessary.

> FN9. Again, the opposition to defendants' current motion makes clear that, despite a dearth of legal or factual support, plaintiffs' counsel still believes the copy of the letter is admissible.
>
> FN10. Plaintiffs appear to argue that because they challenged the alleged experts as presenting "junk science," they should not have to pay costs relating to their testimony. Because plaintiffs withdrew the letter, the court had no occasion to rule on the merits of the *Daubert* challenge. Plaintiffs' conclusion that the mere advancement of a challenge should relieve them of sanctions is meritless, particularly where they were well aware of defendants' preparations. Further, plaintiffs' argument that expert testimony was unnecessary because it was clear to the trier of fact the documents were misaligned (and thus, likely fraudulent) is not well taken, particularly in light of their vigorous protestations that the copy of the letter is authentic.

Therefore, for the foregoing reasons, the court finds that plaintiffs' counsel's conduct in pursuing the admission of the copy of the letter after June 2007 was done in bad faith. Plaintiffs' counsel knowingly and recklessly raised a frivolous argument, which the court had previously addressed, without providing any legal or factual support. The court therefore imposes sanctions, pursuant to both § 1927 and the court's inherent power, against plaintiffs' counsel in the amount of $20,084.98.

IT IS SO ORDERED.

E.D.Cal.,2009.
McConnell v. Lassen County, California
Slip Copy, 2009 WL 3365912 (E.D.Cal.)

END OF DOCUMENT

## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Jarvis Masters, On Habeas Corpus.**

No.:**S130495 & S016883**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 16, 2012, I served the attached **RESPONDENT'S EXCEPTIONS TO REFEREE'S REPORT AND BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope 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:

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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 March 16, 2012, at San Francisco, California.

M. Argarin
Declarant

Signature

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