SUPREME COURT COPY

No: S 130495

DEATH PENALTY

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS [REDACTED]

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[REDACTED] *

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* This redacted public version of the brief was prepared in accordance with this Court's November 28, 2012 order. The unredacted, sealed version of the brief is for the use of the California Supreme Court.

TABLE OF CONTENTS

EXPANDED OUTLINE iii

TABLE OF AUTHORITIES xvii

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 3

III. THE CRIME, THE INVESTIGATION, AND THE TRIAL 6

IV. QUESTIONS SUBMITTED TO THE REFEREE 11

V. SUMMARY OF REFERENCE HEARING TESTIMONY AND EXHIBITS 13

VI. THE REFEREE'S REPORT 40

VII. EXCEPTIONS 45

VIII. THE STANDARD OF REVIEW 49

IX. ARGUMENT AND DISCUSSION OF REFERENCE QUESTIONS 52

Question 1: *Was false evidence regarding petitioner's role in the charged offenses admitted at the guilt phase of petitioner's trial? YES. If so, what was that evidence?* 52

Question 2: *Is there newly discovered, credible evidence indicative of petitioner's not having been a participant in the charged offenses? YES.* 90

Question 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* 136

Willis's trial testimony affected by any such promises or threats, (YES) and, if so, how?

Question 4: *Were there promises, threats or facts* 148
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? YES. If so, what are those promises, threats or facts?

Question 6: *What, if any, promises or threats were* 179
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?

X. THE REFEREE MADE EVIDENTIARY ERRORS, ... 189
TO PETITIONER'S DETRIMENT

XI. THE STATE AND FEDERAL MATERIALITY STANDARDS . 213
FOR ISSUING THE WRIT OF HABEAS CORPUS

XII. THE WRIT OF HABEAS CORPUS SHOULD ISSUE 222

EXPANDED OUTLINE

I. INTRODUCTION 1

II. PROCEDURAL BACKGROUND 3

III. THE CRIME, THE INVESTIGATION, AND THE TRIAL 6

A. THE CRIME AND INVESTIGATION 7

B. THE TRIAL 8

IV. QUESTIONS SUBMITTED TO THE REFEREE 11

V. SUMMARY OF REFERENCE HEARING TESTIMONY AND EXHIBITS 13

A. HAROLD RICHARDSON ADMITTED BEING A CO-CONSPIRATOR AND NAMED ALL OF THE CO-CONSPIRATORS IDENTIFIED BY WILLIS EXCEPT PETITIONER

B. POST-TRIAL EVIDENCE FROM RUFUS WILLIS THAT HE LIED AT TRIAL 15

1. Willis Admitted That He Lied at Trial to Three Investigators on Two Occasions, and So Declared under Penalty of Perjury 15

2. Willis, on His Own, Wrote a Letter of Apology to Jarvis Masters 20

3. Willis' May 22, 2005 Letter to Petitioner's Counsel Corroborates (1) His February 2001 Declarations, and (2) His May and June 2010 Statements That He Hid Exculpatory Kite Evidence in His Television Set 20

4. Willis's Recantation Declarations Are Further Corroborated by Other Evidence

in the Record 22

C. MICHAEL RHINEHART PROVIDED EVIDENCE OF JARVIS MASTERS' INNOCENCE, FURTHER CORROBORATING RUFUS WILLIS' ADMISSION THAT HE PROVIDED FALSE EVIDENCE 22

D. THE TESTIMONY OF LAWRENCE WOODARD PROVIDED FURTHER EVIDENCE OF JARVIS MASTERS' INNOCENCE, AND CORROBORATED RUFUS WILLIS' ADMISSION THAT HE LIED AT TRIAL 26

E. EXPERT EVIDENCE THAT JARVIS MASTERS DID NOT AUTHOR THE TWO INCRIMINATING KITES 27

F. THE STATE FAILED TO DISCLOSE THAT BOBBY EVANS WAS A PROFESSIONAL INFORMANT WHO HAD WORKED REPEATEDLY FOR CDC, BNE, ATF, AND THE OAKLAND POLICE DEPARTMENT PRIOR TO HIS 1989 TESTIMONY 30

1. Bobby Evans' 2010 Testimony 31

2. The Reference Hearing Testimony of James Hahn 32

3. The Reference Hearing Testimony of James Moore 33

4. The Reference Hearing Testimony of Robert Conner 34

G. THE STATE DID NOT DISCLOSE THAT BOBBY EVANS WAS A KEY POLICE SUSPECT IN THE MURDER OF JAMES BEASLEY, SR. AT THE TIME OF HIS 1989 TESTIMONY 34

H. BOBBY EVANS HAS NEVER SPOKEN TO

JARVIS MASTERS AND DID NOT EVEN KNOW WHO HE WAS 36

I. MASTERS BRIEFLY APPEARED ON THE ADJUSTMENT CENTER YARD IN LATE DECEMBER 1985 36

J. BOBBY EVANS' TRIAL TESTIMONY WAS GIVEN IN EXCHANGE FOR BEING KEPT OUT OF PRISON FOR AN ALAMEDA COUNTY ROBBERY CONVICTION 37

VI. THE REFEREE'S REPORT 40

VII. EXCEPTIONS 45

VIII. THE STANDARD OF REVIEW 49

IX. ARGUMENT AND DISCUSSION OF REFERENCE QUESTIONS 52

Question 1: ***Was false evidence regarding petitioner's role in the charged offenses admitted at the guilt phase of petitioner's trial? YES. If so, what was that evidence?*** 52

A. BOBBY EVANS PROVIDED FALSE EVIDENCE THAT MASTERS VOTED FOR THE HIT 54

B. BOBBY EVANS' AND JAMES HAHN'S TRIAL TESTIMONY AND DISCOVERY PRODUCED BY THE PROSECUTION MASSIVELY UNDERSTATED EVANS' RELATIONSHIP AS A SNITCH WITH LAW ENFORCEMENT AND, IN PARTICULAR, WITH CDC AGENT JAMES HAHN. THUS, FALSE EVIDENCE WAS USED TO CONVICT JARVIS MATTERS 54

1. In 1989, Evans Testified That He had Only Worked with Hahn Once Before, When He Provided Information on a Bad Cop 55

2. Bobby Evans Was a Professional Informant Who Had Worked for CDC, BNE, ATF, and the Oakland Police Department on Countless Operations Prior to His 1989 Testimony 57

(a) Bobby Evans' 2010 testimony 57

(b) Reference hearing testimony of James Hahn 58

(c) Reference hearing testimony of James Moore 59

(d) Reference hearing testimony of Robert Conner 60

3. Conclusions 61

C. THE REFEREE CONFIRMED THAT RUFUS WILLIS AND BOBBY EVANS WERE CHRONIC AND HABITUAL LIARS. THEIR TESTIMONY SHOULD BE CREDITED AS FALSE EVIDENCE . . . 61

D. JARVIS MASTERS WAS NOT THE AUTHOR OF THE TWO KITES ATTRIBUTED TO HIM AT THE 1989 TRIAL 62

E. RUFUS WILLIS GAVE FALSE EVIDENCE IN 1989 . 64

1. Harold Richardson, Not Jarvis Masters, Was the Un-Named Fourth Co-Conspirator Identified by Rufus Willis 65

Chart 1: WILLIS' DESCRIPTION OF THE FOURTH CO-CONSPIRATOR CLOSELY MATCHES HAROLD RICHARDSON, WHO ADMITTED HE WAS THE FOURTH CO-CONSPIRATOR 70

2. Willis Admitted He Lied to Three Investigators

on Two Occasions, and So Declared under Penalty of Perjury 71

(a) The 2001 and 2010 Meetings with Petitioner's Investigators 74

(b) Willis, on his own, wrote a letter of apology to Jarvis Masters in 2001 74

(c) Willis' May 22, 2005 letter to petitioner's counsel corroborates (1) his February 2001 declarations, and (2) his May and June 2010 statements that he hid exculpatory kite evidence in his television set 75

3. "A Witness Willfully False in One Part of Testimony Is Not to Be Trusted in Others"; Willis' Lying Character Supports the Conclusion That He Lied at Trial 76

4. While Willis Was Motivated to Lie When He First Came Forward, and When He Testified, His 2001 and 2010 Exoneration of Petitioner Was Against His Penal Interest 78

(a) Willis was motivated to lie in 1985 when he was offered a deal by Numark 78

(b) Willis was motivated to lie when he testified 79

(c) Willis had no motivation to lie every time he came forward to exculpate Jarvis Masters. His exoneration of Jarvis Masters is against his penal interest 80

5. The Precise Unanimity of the Richardson, Rhinehart, Woodard and Willis Exonerating Evidence Points to Masters' Innocence

and Supports the Conclusion that Willis Lied at the Trial 81

Chart 2: EVIDENCE THAT JARVIS MASTERS OPPOSED THE MURDER OF SGT. BURCHFIELD 82

Chart 3: EVIDENCE THAT JARVIS MASTERS WAS NOT INVOLVED IN THE PLANNING OF THE MURDER OF SGT. BURCHFIELD 83

Chart 4: EVIDENCE THAT JARVIS MASTERS WAS NOT INVOLVED IN THE MANUFACTURE OF THE WEAPON 84

6. Willis Testimony Is Impeached by the Fact That His Testimony Was the Result of Promises and Threats by the District Attorney 85

7. Willis Admitted to Fellow Inmates that He Made a Deal to Get out of Prison 87

CONCLUSION 87

Question 2: ***Is there newly discovered, credible evidence indicative of petitioner's not having been a participant in the charged offenses? YES.*** 90

A. THE RICHARDSON EVIDENCE 97

B. THE EVANS EVIDENCE 98

C. THE KITE EVIDENCE 98

D. THE PRECISE UNANIMITY OF THE RHINEHART/ RICHARDSON/WOODARD/WILLIS EVIDENCE 99

E. THE EVIDENCE IN THE RECORD THAT THE CONSPIRATORS WOULD NOT HAVE PASSED THE WEAPON UP AND DOWN BETWEEN THE SECOND AND FOURTH TIERS TO SHARPEN THE WEAPON IS CREDIBLE 101

F. THE WILLIS DECLARATION IS CAPABLE OF BEING BELIEVED 106

1. Willis' February 23, 2001 Declaration 107

(a) Willis' February 23, 2001 declaration is corroborated by overwhelming evidence in the record 107

Chart 5: RUFUS WILLIS' FEBRUARY 23, 2001 DECLARATION IS CORROBORATED BY OVERWHELMING EVIDENCE IN THE RECORD 108

(b) Willis' declaration is corroborated by the testimony of investigators Melody Ermachild and Pam Siller which the referee found to be uncoerced 119

(c) Willis' declaration is corroborated by his letter of apology to Jarvis Masters 120

(d) Willis' declaration is corroborated by the testimony of investigator Chris Reynolds 120

(e) Willis' declaration is corroborated by the testimony of Julie Cader and Darrell Wright 120

(f) Willis had no motivation to lie in 2001 when he spoke to Melody Ermachild and Pam Siller and executed declarations, when he wrote a letter of apology to Jarvis Masters, and when he spoke freely with investigator Chris Reynolds

in 2010 121

(g) Willis' May 22, 2005 letter to petitioner's counsel, and his admission to petitioner's counsel and respondent's counsel corroborate his declaration 121

(h) Willis' declaration is corroborated by the testimony of Michael Rhinehart and Lawrence Woodard, and the precise unanimity of the Rhinehart, Woodard, Richardson, and Willis evidence on all matters concerning Jarvis Masters 121

(i) Willis' statements that the kites were not authored by Jarvis Masters are corroborated by Dr. Leonard's testimony, which the referee accepted 122

(j) Willis' declaration is against his penal interest 122

2. Willis' 1989 Testimony Is Impeached and Completely Undermined 122

3. Willis' June 30, 2010 Telephone Conversation with the Attorney General 124

4. The Willis Declaration Is Capable of Being Believed 132

CONCLUSIONS 134

Question 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, (YES) and, if so, how?*** 136

A. THE JUNE 20, 1985 DEAL 138

B. THERE IS REPEATED CONFIRMATION OF THE DEAL WITH THE DISTRICT ATTORNEY 141

C. HOW WILLIS WAS AFFECTED BY THESE PROMISES AND THREATS 144

Question 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? YES. If so, what are those promises, threats or facts?*** 148

A. THE BOBBY EVANS EVIDENCE THAT SHOULD HAVE BEEN DISCLOSED 150

1. Bobby Evans' and James Hahn's Trial Testimony and Discovery Produced by the Prosecution Massively Understated Evans' Relationship as a Snitch with Law Enforcement and, in Particular, with CDC Agent James Hahn 150

(a) What the trial jury heard 150

(b) What the trial judge heard but kept from the jury (and the defense) 152

(c) The defense was not informed of "*facts concerning*" Bobby Evans' pre-existing and significant contacts with James Hahn, the Oakland police,

BNE, and ATF, as a government informant 153

CHART 6: THE JURY WERE MISLED 154

(d) The state failed to disclose that Bobby Evans was the prime police suspect in the murder of James Beasley, Sr. at the time of his 1989 testimony 155

(1) *Ronald Nalls* 156

(2) *Gregory Smith* 156

(3) *Bobby Evans* 158

(e) The State failed to disclose evidence that the SFPD murder investigation of Bobby Evans abruptly ended after Evans came forward in the Burchfield case 162

(f) Hahn knew that Bobby Evans was a professional informant. He knew that Evans was a suspect in the James Beasley murder. Keeping close track of Evans was his job. 163

B. AS A MEMBER OF THE PROSECUTION AND INVESTIGATIVE TEAM AND AS AN INVESTIGATOR FOR ONE OF THE INVESTIGATIVE AGENCIES, HAHN'S KNOWLEDGE MUST BE IMPUTED TO THE PROSECUTION FOR *BRADY* PURPOSES 166

C. CDC WAS AN INVESTIGATION AND PROSECUTION AGENCY IN THIS CASE, AND JAMES HAHN WAS A MEMBER OF THE INVESTIGATION AND PROSECUTION TEAM . . . 169

1. Hahn's Work with Welvie Johnson 170

2. Hahn's Work with Donald Carruthers 170

3. Hahn's Work with Bobby Evans 171

4. Hahn's Work with David Gasser 171

5. Hahn's Wrap-Around Involvement with his Burchfield Witnesses 171

6. Hahn's and CDC Were Investigation and Prosecuting Agents 173

D. THE REFEREE SOUGHT TO MINIMIZE THE IMPORTANCE OF THE *BRADY* MATERIAL "BECAUSE HAHN DID NOT WORK IN MARIN" ... 174

E. THE REFEREE SOUGHT TO MINIMIZE THE IMPORTANCE OF THE FACT THAT BOBBY EVANS WAS A SUSPECT IN THE BEASLEY, SR. MURDER INVESTIGATION 175

F. THE FACTS CONCERNING BOBBY EVANS' RELATIONSHIP WITH LAW ENFORCEMENT AGENCIES, AND THE FACT THAT HE WAS A SUSPECT IN THE BEASLEY MURDER INVESTIGATION WERE MATERIAL 176

Question 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?*** 179

A. THE SUSPENSION OF THE BEASLEY MURDER INVESTIGATION 180

B. EVANS' TESTIMONY REGARDING PROMISES AND EXPECTATIONS OF BENEFITS 181

C. EVANS' TESTIMONY IS CORROBORATED 183

D. THE LONGSTANDING INFORMANT RELATIONSHIP CREATED A REASONABLE EXPECTATION OF BENEFITS 186

X. THE REFEREE MADE EVIDENTIARY ERRORS, TO PETITIONER'S DETRIMENT 189

A. THE REFEREE FAILED TO RULE ON THE ADMISSIBILITY OF BOBBY EVANS' PRIOR CONSISTENT TESTIMONY WHICH SHOULD HAVE BEEN ADMITTED 189

1. Procedural History of the Prior Consistent Statement Issue 189

2. The Prior Consistent Statements 191

(a) Bobby Evans' 1996 and 1998 testimony under oath 191

(b) Evans' statement to his correctional counselor when he was admitted to prison in 2002 192

3. Evans' Prior Consistent Statements Are Admissible under Evidence Code Sections 1236 and 791(b) and the "Negative Evidence" Exception 192

(a) Admissibility under Evidence Code section 791 193

(i) The implied charge of recent fabrication 194

(ii) The negative evidence exception . . 195

(b) The cross-examination of Mr. Evans . . . 196

(c) Respondent's cross-examination 197
Implied a recent fabrication

(d) The cross-examination also levied an implied charge of recent fabrication by negative evidence 199

4. Bobby Evans' Prior Consistent Statements Should Also Be Admitted Because They Satisfy the Basic Requirements of All Exceptions to the Hearsay Rule: They Are Inherently Reliable and Do Not Violate the Confrontation Clause 199

B. THE COURT'S REFUSAL TO ALLOW PETITIONER TO PRESENT COMPETENT, RELEVANT, AND MATERIAL EVIDENCE REGARDING THE KITES HIDDEN IN WILLIS' TELEVISION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND CONSTITUTED AN ABUSE OF DISCRETION 204

1. Procedural and Factual Background 204

2. Petitioner Had a Due Process Right to Present Mr. Baxter's Testimony on the TV Evidence Because the Evidence Was Competent, Relevant and Material Evidence That Supported His Defense Theory 207

XI. THE STATE AND FEDERAL MATERIALITY STANDARDS FOR ISSUING THE WRIT OF HABEAS CORPUS . 213

A. CALIFORNIA MATERIALITY STANDARDS FOR THE GRANTING OF THE WRIT 213

1. Claims of False Evidence 213

2. Claims of Newly Discovered Evidence 214

3. Questions 1, 3, 4 and 6 215

4. Question 2 215

5. Cumulative Prejudice Must Be Evaluated . . . 216

B. FEDERAL CONSTITUTIONAL MATERIALITY STANDARDS 216

1. Question 3 217

2. Question 6 219

3. Question 4 220

C. THE CONVERGENCE OF THE MATERIALITY STANDARDS 220

XII. THE WRIT OF HABEAS CORPUS SHOULD ISSUE 222

A. THE RECORD CASTS FUNDAMENTAL DOUBT ON PETITIONER'S GUILT AND POINTS UNERRINGLY TO HIS INNOCENCE 222

B. THE RECORD BEFORE THIS COURT UNDERMINES CONFIDENCE IN PETITIONER'S 1989 CONVICTION 227

TABLE OF AUTHORITIES

CASES:

Alicia R. v. Timothy M. 29 Cal.App.4th 1232 143

Ainsworth v. Woodford (9th Cir.) 268 F.3d 868 198

Barnett v. Superior Court 50 Cal. 4th 890 . . . . . 149, 169, 174

Brady v. Maryland
373 U.S. 83 . . . . . 45, 46, 55, 96, 150, 168, 169, 175, 178

Caldwell v. Caldwell 204 Cal.App.2d 819 208

Chambers v. Mississippi 410 U.S. 28 200

City of El Cajon v. El Cajon Police Officers' Assn.
49 Cal.App.4th 64 51

Crawford v. Washington 541 U.S. 36 205

Edgar v. Workmen's Comp. Appeals Bd. 246
Cal. App. 2d 660 210

Espinosa v. Florida 505 U.S. 1079 50

Estate of Larson 106 Cal.App.3d 560 . . . . . 50, 88, 134, 179, 183

Exxcess Electronix v. Heger Realty Corp. 64 Cal.App.4th 698 . . . 51

Giglio v. United States 405 U.S. 150 . . . . . 219, 221

Greenspan v. LADT, LLC 191 Cal.App.4th 486 143

Harustak v. Wilkins 84 Cal.App.4th 208 50

In re Avena 12 Cal.4th 694 49

In re Brown 17 Cal. 4th 873 . . . . . 149, 169, 174, 210, 211

In re Cordero 46 Cal.3d 161 49

In re Cindy L. 17 Cal.4th 15 201

In re Cudjo 20 Cal.4th 447 144

In re Estate of Horman 265 Cal.App.2d 796 . . . . . 209, 211

In re Hall 30 Cal. 3d 408 215

In re Hitchings 6 Cal.4th 97 49

In re K.D. 124 Cal.App.4th 1013 . . . . . 50, 87

In re Lawley 42 Cal.4th 1231 . . . . . 91, 215, 216

In re Malone 12 Cal.4th 935 . . . . . 49, 214

In re Marriage of Eggers 131 Cal.App.4th 695 50

In re Marriage of Carlsson 163 Cal.App.4th 281 207

In re Marquez 1 Cal. 4th 584 49

In re Michael G. 19 Cal.App.4th 1674 200

In re Roberts 29 Cal.4th 726 214

In re Serrano 10 Cal.4th 447 144

In re Sassounian 9 Cal.4th 535 . . . . . 214, 220

Keller v. Key system Transit Lines 129 Cal.app. 593 143

Kemp Bros. Constr., Inc. v. Titan Elec. Corp.
146 Cal.App.4th 1474 50

Kyles v. Whitley 514 U.S. 419 . . . . . 149, 168, 174

Lipman v. Ashburn 106 Cal.App.2d 616 209

Napue v. Illinois 360 U.S. 264 209

Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co. 68 Cal.App.4th 83 50

Mayhew v. Benninghoff III Investment Co. 68 Cal.App.4th 1365 50

Morrissey v. Brewer 408 U.S. 471 . . . . . 152, 183

Nightlife Partners v. City of Beverly Hills 108 Cal.App.4th 81 . . . 143

People Ex Rel Department of Corporations v. SpeedDee Oil Change Systems, Inc. 20 Cal.4th 1135 50

People v. Ainsworth 45 Cal.3d 984 198

People v. Allen 42 Cal. 3d 1222 217

People v. Badgett 10 Cal.4th 300 218

People v. Blodgett 10 Cal.4th 330 85

People v. Brown 226 Cal.App.3d 1361 . . . . . 93, 211

People v. Bunyard 45 Cal.3d 1189 194

People v. Burrell-Hart 192 Cal.App.3d 593 207

People v. Claxton 129 Cal.App.3d 638 78

People v. Chavez 26 Cal.3d 334 . . . . . 193, 200

People v. Cudjo 6 Cal. 4th 585 200

People v. Douglas 50 Cal.3d 468 . . . . . 217, 218

People v. Edelbacher 47 Cal.3d 983 . . . . . 196, 199

People v. Gentry 270 Cal.App.2d 462 . . . . . 196, 199

People v. Hall 17 Cal.4th 800 216

People v. Harris 47 Cal.3d 1047 77

People v. Hillhouse 27 Cal.4th 469 194

People v. Kennedy 36 Cal.4th 595 50

People v. Knox 95 Cal.App.3d 420 78

People v. Lavergne 4 Cal.3d 735 76

People v. Ramus 15 Cal.4th 1133 77

People v. Manson 61 Cal.App.3 . . . . . 102, 195, 196

People v. Noguera 4 Cal.4th 509 . . . . . 195, 198

People v. Pic'l 114 Cal.App.3d 824 . . . . . 194, 195

People v. Williams 102 Cal.App.4th 995 . . . . . 194, 195, 199

People v. Zamora 18 Cal.3d 735 93

U.S. v. Payne (2d Cir.) 63 F.3d 1200 169

United States v. Bagley 473 U.S. 667 220

Washington Mutual Bank, FA v. Superior Court (Briceno)
24 Cal.4th 906 50

Williams v. Carter (8 Cir.) 10 F.3d 563 50

STATUTES:

Code of Civil Procedure section 607 . . . . . 208, 209

Evidence Code section 160 200

Evidence Code section 550 144

Evidence Code section 780 . . . . . 77, 78

Evidence Code section 786 51

Evidence Code section 791 51

Evidence Code section 1200 200

Evidence Code section 1221 143

Evidence Code section 1236 192

Penal Code section 32 94

Penal Code section 182 93

Penal Code section 187 3

Penal Code section 971 94

Penal Code section 4501 4

OTHER AUTHORITIES:

5 Wigmore, Evidence (Chadbourn rev. 1974) 200

CALJIC No. 2.21.2 76

Eisenberg, Horvitz and Weiner, California Practice Guide: Civil Appeals and Writs (Rutter 2011) 50,

Hammarskjold, Carl N., *Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather Than Circumstantial, Evidence Contributes to Wrongful Convictions* (2011) 45 U.S.F. L. Rev. 1103 201

Fifth Amendment to the U.S. Constitution 25, 204

McCormick on Evidence (3d ed. 1984) 200

Recommendation Proposing an Evidence Code
(Jan. 1965) 7 Cal. Revision Com. Rep. (1965) 200

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PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS [REDACTED]

I. INTRODUCTION

Petitioner, Jarvis J. Masters, submits his exceptions and Brief on the Merits, with respect to the Report of the Referee ("Report"), filed April 11, 2011 in Marin County Superior Court, Department L., and transmitted to this court. The Report was the result of habeas proceedings filed by petitioner in 2005 in this Court, in which he challenged his conviction and death judgment on numerous grounds

including but not limited to his conviction having been based upon significant and material false evidence.

Petitioner and two co-defendants, Andre Johnson and Lawrence Woodard, were tried for the 1985 murder of Correctional Sergeant Hal Burchfield at San Quentin. Following his conviction and sentence of death in the Marin County Superior Court in 1990, and the completion of appellate briefing, petitioner Masters filed his Petition for Writ of Habeas Corpus in this Court on January 7, 2005. An Order to Show Cause was issued on February 14, 2007. After the parties engaged in formal briefing, the Court, on December 23, 2008, referred seven questions to its appointed referee, the Honorable M. Lynn Duryee.

An evidentiary hearing before Judge Duryee commenced on January 4, 2011, and was completed on April 8, 2011.

Judge Duryee answered all seven questions in the negative – that is, she supported the State's position that no violations had occurred warranting granting of the writ.

In the argument below, petitioner will argue that, at least as to five of the seven questions, the referee's conclusions are (1) not supported by the record adduced at the evidentiary hearing; (2) not supported by her specific factual findings; (3) contrary to the record

in this case, (4) contrary to law, and/or (5) so untethered to the record of the underlying trial and the law as to not be entitled to deference.

II. PROCEDURAL BACKGROUND

Petitioner was charged along with co-defendants Lawrence Woodard and Andre Johnson with first degree murder (Pen. Code § 187, subd. (a)) [1] and with conspiracy to commit murder and assault on a correctional officer (§ 182). (CT 5121-23) [2]

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[1] Unless otherwise noted, all statutory references are to the California Penal Code.

[2] Citations to the record will follow the usual format, using the following abbreviations:

1. "RHRT": refers to the Reference Hearing Reporter's Transcript.
2. "Ex. __": refers to trial exhibits. The trial exhibits identified also include a reference to the party who offered the exhibit.
3. "Pet. Ex." refers to Petitioner's Reference Hearing exhibits.
4. "Resp. Ex." refers to Respondent's Reference Hearing Exhibits.
5. "CT": refers to the Clerk's Transcript in the related appeal.
6. "RT": refers to the Reporter's Transcript in the related appeal.
7. "PHRT": to the Preliminary Hearing Reporter's Transcript in the related appeal. Where two numbers appear (e.g., 12485 (1235)) the second number refers to the original pagination of the PHRT.
8. A dated transcript (e.g., "1-10-88 RT") refers to a separately bound reporter's transcript in the related appeal, unless otherwise noted.
9. "AOB": refers to Appellant's Opening Brief in the related appeal.
10. "Petition": refers to the original Petition for Writ of Habeas Corpus filed herein.
11. "Evans' Deposition" refers to the May 14, 2010 in-court deposition of Bobby Evans. A copy of the transcript was admitted as Pet. Ex. 58.

Prior to trial, co-defendant Johnson's case was severed from that of Woodard and Masters, and an amended information filed August 17, 1989 charged petitioner and Woodard with conspiracy to commit murder and aggravated assault by a prisoner on correctional staff (§ 4501); and murder with special circumstances for the murder on June 8, 1985, of Correctional Sergeant Howell Burchfield. (CT 4519)

The trial of all three defendants commenced before two juries on August 25, 1989. (CT 4633) On January 8, 1990, the Masters-Woodard jury returned findings of guilt on both counts as to both defendants. (CT 5124) The Johnson jury also found Johnson guilty. The juries made findings on the special circumstance that the victim was a peace officer, and the trial court set successive penalty trials, first of Woodard, then petitioner, then Johnson. (CT 5158)

The Woodard penalty phase trial ended in a hung jury (CT 6137), and the trial court imposed life without parole on Woodard. (See Woodard Clerk's Transcript) The Masters penalty phase commenced before the jury on April 2, 1990 (CT 6148), and the jury returned a penalty verdict of death on May 18, 1990. (CT 6553)

The court denied petitioner's motions for a new trial and modification of the sentence, and pronounced judgment of death on August 2, 1990. (CT 6719)

In 1993, attorneys Joseph G. Baxter and Richard I. Targow were appointed by the Court to represent petitioner in both his automatic appeal and his related state habeas corpus action.

Petitioner's petition for writ of habeas corpus was filed January 7, 2005. This court issued its Order to Show Cause on February 14, 2007. The reference order for an evidentiary hearing was first issued on April 9, 2008, and the Honorable John Steven Graham was appointed referee on April 30, 2008. Following Judge Graham's submission a letter seeking to withdraw from the case, Judge Duryee was appointed in a reference order dated December 23, 2008. Judge Duryee subsequently set the cause for hearing in early September, 2010.

On July 30, 2010, petitioner's motion for a continuance to early April 2011 was heard. In a subsequent order, Judge Duryee set the hearing to commence on January 3 (later amended to January 4), 2011.

The hearing commenced on January 4, and, except for one expert witness, was completed on January 27, 2011. The court disallowed any final briefing or proposed findings of fact, and instead

ordered oral closing arguments, which took place on January 27, immediately after the taking of evidence. [3]

The final witness, Dr. Robert Leonard, initially testified on March 28. On April 8, redirect and re-cross examination of Dr. Leonard were taken by telephone, and oral argument concerning Dr. Leonard's testimony was heard.

The referee issued her Report on April 11, 2011.

III. THE CRIME, THE INVESTIGATION, AND THE TRIAL

Extensive statements of the facts appear in Appellant's Opening Brief in the related appeal (AOB 1-40), and throughout the Claims for Relief in the habeas petition. The fact-related portions of his Petition were presented to Judge Duryee in late December 2010, in a filing entitled "FACTUAL EXCERPTS FROM PETITION FOR WRIT OF HABEAS CORPUS." In addition, during the hearing, petitioner filed as exhibits the trial testimony of the principal prosecution inmate-witnesses, Rufus Willis and Bobby Evans. (Pet. Exs. 45-50, inclusive)

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[3] (See 15 RHRT 828; "SETTLED STATEMENT RE: OFF-THE-RECORD DISCUSSIONS BETWEEN COUNSEL AND THE COURT ON OR ABOUT JANUARY 21, 2011," filed in the Marin County Superior Court on December 19, 2011, and filed herein on February 1, 2012)

For the purposes of this brief, the salient facts of the crime and of the trial are as follows:

A. THE CRIME AND INVESTIGATION

On the night of June 8, 1985, Correctional Sergeant Howell (Hal) Burchfield began a patrol of the tiers in Carson (C) Section of San Quentin State Prison. At that time, C-Section housed a large number of prison gang members, including those of the Black Guerilla Family (BGF). As Burchfield entered Tier 2 and passed cell number 2-C-2, a BGF "soldier," Andre Johnson, fatally speared him with a prison-made weapon. (42 RT 11349)

Not long after, Rufus Willis, one of the two BGF C-Section leaders who planned and ordered the killing (the other one was Woodard) came forward to offer himself as a snitch. He began working with District Attorney's Investigator Charles Numark. (54 RT 13062, *et seq.*) Willis fingered Woodard as the BGF leader in C-Section, Andre Johnson as the killer, and petitioner Masters as both part of the C-Section leadership group[4] that ordered the hit on, and

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[4] While Bobby Evans labeled the planning group as the "Commission" or "BGF Command Group" (See, e.g., 58 RT 13711, 13725-13726), Rufus Willis sometimes referred to it as the "Central Committee." (See, e.g., 52 RT 12759) The information referred to the group as the "BGF Central Committee." (40 RT 10811-10812) The District Attorney also sometimes referred to the group as the "BGF Central (continued...)

as the sharpener of the shank which, attached to a rolled-newspaper spear, was the weapon used by Johnson. (52 RT 12730-12731, 12747, 12763, People's exs. 150-C, 159-C)

On June 20, 1985, Numark told Willis they did not have enough evidence on Masters, and told him to get something further. (9 PHRT 8657-8658 (1670-1671); 9 PHRT 8680:8-10 (1693); 10 PHRT 8805:19-23(1812)) Using his authority as a BGF leader in C-Section, Willis ordered Masters to write two "kites" indicating his involvement in the crime. (9 PHRT 8658:14-15 (1671); 54 RT 13088-13090) This was precisely the corroboration that the lead prosecutor, Deputy District Attorney Edward Berberian, needed to file against Masters.

B. THE TRIAL

The prosecution's case against Jarvis Masters rested upon three legs:

1. The testimony of Rufus Willis;
2. Two prison kites that were penned by Jarvis Masters; and

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[4](...continued)
Committee." (73 RT 16050) This Carson Setion group, however, should not be confused with the "Central Committee" of the entire BGF. (See, e.g., 58 RT 13714-13715, 13719)

3. The corroborating testimony of Bobby Evans.

Willis testified that Jarvis Masters was one of the four members of the BGF leadership group in C-section who approved the plan. (See, e.g., 52 RT 12740, 12747, 12758-12760; 53 RT 12889.) Willis testified that Jarvis Masters, however, was more than simply a member of the group of four that approved the plan. He was also the architect of the plan. (52 RT 12735, 12740-12741, 12749, 12761; 53 RT 12891; 54 RT 12946-12947)

The second leg of the State's case against Jarvis Masters were two kites penned by Jarvis Masters which Willis interpreted for the jury. While the first of the two kites ("Oh we to change the Codes") (People's Ex. 150-C) is ambiguous, the second kite, the so called "Usalama Report," (People's Ex. 159-C) specifically identifies Jarvis Masters as someone who was involved in the planning of the attack, and as a member of the commission that approved the attack. The detailed "Usalama Report" also clearly suggests that Masters was intimately familiar with all the details of the attack. (*Id.*)

The third leg of the State's case was Bobby Evans, the prosecution's chief corroborating witness. After the trial judge certified Bobby Evans as an expert in BGF activities, Evans testified that Masters was a member of the Carson Section BGF Commission.

Evans also testified that Jarvis Masters appeared before the BGF Super Commission in the Adjustment Center at San Quentin and admitted that he was a member of the Carson Section BGF Command Group and that he voted for the plan. (58 RT 13711, 13725-13726) Significantly, the jury, after 9 days of deliberations, reached its guilt verdict shortly after a readback of Evans' testimony. (78 RT 16903; 79 RT 17093; 17 CT 5098; 18 CT 5103-5108, 5119, 5124)

Three of the trial court's rulings are relevant to petitioner's claims: First, with respect to the kites, the trial judge, Hon. Beverly Savitt, allowed Willis – the principal snitch-witness against the defendants who also ordered Masters to produce the kites – to testify as an expert in BGF lingo and interpret the two kites for the jury. (53 RT 12852-12860) Second, the trial judge allowed Bobby Evans to testify as a BGF expert. (58 RT 13711) Third, Judge Savitt refused to admit a CDC memorandum regarding a debriefing by inmate Harold Richardson, implicating himself in conspiracy in the roles that the prosecution ascribed to Masters. (12-13-88 RT 7; see also 1-9-89 RT 12; 2-15-89 RT 25; 9 CT 2430, 2436, 2647) [5]

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[5] Petitioner's direct appeal strenuously challenges this exclusion of compelling evidence of innocence. (AOB at 89-104; RB at 22-52)

IV. QUESTIONS SUBMITTED TO THE REFEREE

On December 23, 2008, this court ordered the referee to:

. . . take evidence and make findings of fact on the following questions regarding the case of People v. Jarvis J. Masters (Marin County Superior Court No. 10467; Judge Beverly B. Savitt):

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?

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? It is further ordered that the referee prepare and submit to this court a report of the proceedings conducted pursuant to this appointment, of the evidence adduced, and the findings of fact made.

During the hearing, petitioner acknowledged that he had no evidence regarding question 5 (1 RHRT 25-26) and offered no additional evidence regarding question 7, instead submitting only the series of written recantations and re-recantations that had been provided over the years by witness Hoze (set forth in the Report at pp. 22-25)

V. SUMMARY OF REFERENCE HEARING TESTIMONY AND EXHIBITS

A. HAROLD RICHARDSON ADMITTED BEING A CO-CONSPIRATOR AND NAMED ALL OF THE CO-CONSPIRATORS IDENTIFIED D BY WILLIS EXCEPT PETITIONER

At the 1989 trial, Rufus Willis testified that four BGF members conspired to kill Sgt. Burchfield: himself, Lawrence Woodard, Andre Johnson, and a fourth co-conspirator whom Willis identified as petitioner.

At the Reference Hearing the parties stipulated that San Quentin Program Administrator J.S. Ballatore's August 22, 1986 report of her August 21, 1986 interview of Harold Richardson, and Harold Richardson's August 8, 1987 letter to Ms. Ballatore would be admitted into evidence, and the referee ordered them admitted. The two exhibits are found at 1CT 237-243. No objections to Richardson's statements to Ballatore on hearsay or other grounds were made. (14 RHRT 730-731) In addition, the truth of Richardson's statements, as reported by Ballatore, and in his own handwriting, were not disputed by respondent, and no contrary evidence was offered.

In August of 1986, Harold Richardson was a BGF Lieutenant and "a member of the BGF hit squad." (1CT 237) He admitted to being one of the planners of the hit on Sgt. Burchfield; the other planners were Rufus Willis, Andre Johnson, and Lawrence Woodard. (*Id.* at 238) Nowhere in the document is petitioner Masters named as a planner or a co-conspirator. (1CT 237-239)

Richardson, who stated that he knew "all the details about the Burchfield murder," identified ten C-Section BGF members as having been involved in the hit:

1. Himself as a planner, sharpener, and one of the proposed executioners;
2. Rufus Willis, as a planner;
3. Andre Johnson, as a planner and executioner;
4. Lawrence Woodard, as a planner;
5. Redmond, who ordered the hit;
6. Carruthers, who cut the bed brace and sent it down to Richardson to sharpen;
7. Ingram (Richardson sent the bed frame to Ingram to cut. After the hit, Ingram was supposed to dispose of the knife);

8. Vaughn, as an execution messenger;

9. Gomez, as a back-up executioner;

10. Daily (After the hit Daily was supposed to send the weapon to Ingram to dispose of it).

(1CT 237-243)

Again, petitioner Masters is not named as one of the four planners, or even as one of the 10 co-conspirators. (*Id.*)

The trial jury did not hear this evidence because the trial court ruled that Harold Richardson's 1986 and 1987 admissions were hearsay that did not fall within an exception to the hearsay rule.[6] (12-13-88 RT 7; see also 2-15-89 RT 25; 1-9-89 RT 12; CT 2430, 2436, 2647)

B. POST-TRIAL EVIDENCE FROM RUFUS WILLIS THAT HE LIED AT TRIAL

1. Willis Admitted That He Lied at Trial to Three Investigators on Two Occasions, and So Declared under Penalty of Perjury

Rufus Willis met with defense investigators Melody Ermachild and Pam Siller on February 8, 2001, and February 23, 2001. (11

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6 The propriety of this ruling was challenged in petitioner's appeal before this Court. (AOB at 89-104; RB at 22-52))

RHRT 596, 602) At the time, Willis was housed in a Utah penitentiary in Draper, Utah. (11 RHRT 588, 592; Pet. Ex. 28, at 1) During the course of the two meetings, Willis repeatedly admitted that he had lied at the 1989 trial, and that Jarvis Masters was completely innocent, as evidenced by his handwritten declaration, and thereafter by reviewing, revising, and signing a revised version of a typewritten declaration.[7] (Pet. Exs. 22, 29; 11 RHRT 594-595, 603-604)

In May 2010 Rufus Willis also met with defense investigator Chris Reynolds at the federal institution where he was then housed. (10 RHRT 530) Reynolds testified that when he met with Willis in May 2010, he went through the February 23, 2001 declaration with

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[7] The first declaration, based upon Willis' statements at the February 8, 2001 prison interview with investigators Melody Ermachild and Pam Siller, concluded the meeting. In addition to executing the declaration under penalty of perjury, Willis initialed each page, and each and every change to the declaration. (Pet. Ex. 29; 10 RHRT 604-605)

After again meeting with Willis, on February 23, 2001, and after reviewing with him a typed clarification of his February 8, 2001 declaration, Ermachild made the necessary revisions to the typed clarification, and submitted the revised document to Willis for his approval. In addition to executing the second declaration under penalty of perjury, Willis again placed his initials on the bottom of each page and initialed all handwritten amendments to the typed declaration. (Pet. Ex. 22; 11 RHRT 603-604)

Willis, line by line, and except for a few minor matters, Willis verified its complete accuracy. (Pet. Exs. 21, 26; [8] 10 RHRT 534-543) Willis again repeatedly admitted that he lied at the 1989 trial and stated that Jarvis Masters was completely innocent in the course of confirming the contents of his 2001 declaration. (Pet. Ex. 22, 10 RHRT 529-530, 534-535)

Willis' signed declaration, which he reconfirmed in 2010, states, *inter alia,* that

(a) He was coerced into testifying by the prosecutor's refusal to honor a prior agreement by investigators that he would be released from prison if he testified. (Pet. Ex. 22 ¶ 3)

(b) He did not initially tell the investigators that Masters was involved; rather, he only later agreed to implicate Masters because "Numark wanted to implicate Masters." (Pet. Ex. 22 ¶ 5)

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[8] Petitioner's Exhibits 21 and 26 are the same, except that Exhibit 26 is the original, which was not available on January 13, 2011, the date the exhibit was first utilized. (9 RHRT 499; 10 RHRT 532)

(c) Numark told Willis he needed more from Johnson and Masters, and told him to get a complete account of what happened from Masters. (Pet. Ex. 22 ¶ 10)

(d) "Masters had nothing to do with the planning of the Burchfield killing." (Pet. Ex. 22, ¶¶ 16, 20)

(e) Masters "wasn't involved in the killing of Sgt. Burchfield." (Pet. Ex. 22 ¶ 5)

(f) Masters "did not play any role in the death of Sgt. Burchfield. (Pet. Ex. 22 ¶¶ 22, 31)

(g) Masters was not involved in the manufacture of the murder knife. (Pet. Ex. 22 ¶¶ 13, 14)

(h) Masters would not have been involved in making weapons. (Pet. Ex. 22 ¶ 13)

(i) The weapon was sharpened by "Chicken Swoop" (Vaughn) and perhaps "Tabari" (Ingram), not Masters. (Pet. Ex. 22 ¶¶ 13, 14, 20)

(j) The two kites penned by Masters were written under orders from Willis. (Pet. Ex. 22 ¶¶ 12, 15)

(k) Numark told Willis to get these kites. (Pet. Ex. 22 ¶¶ 10, 11, 12, 14, 15)

(l) The first kite written by Masters, the one that starts out, "Oh, we to change codes . . ." is copied, at least in part, from a kite written by Woodard. (Pet. Ex. 22 ¶ 12)

(m) The first kite is not about the murder weapon, but is instead about the BGF's stock of metal and knives after Burchfield was killed. (Pet. Ex. 22 ¶ 12) Willis did not understand the meaning of this kite. (Pet. Ex. 22 ¶ 12)

(n) Numark said the first kite was not enough to implicate Masters and told Willis to get Masters to write about how certain events occurred. (Pet. Ex. 22 ¶ 15)

(o) The second kite, the "Usalama Report." is copied from Willis' own writings. (Pet. Ex. 22 ¶ 15)

(p) Masters copied it from many reports that Willis had written and sent Masters. These reports were not factual. Masters had no way of knowing the information in the Usalama Report. (Pet. Ex. 22 ¶ 15)

The referee, it should be noted, found that Willis' 2001 declarations were uncoerced. (Referee's Report at p. 10)

2. Willis, on His Own, Wrote a Letter of Apology to Jarvis Masters in 2001

In addition to executing the two declarations that exonerated Jarvis Masters, Rufus Willis wrote a letter of apology to Masters. (Pet. Ex. 30) *The letter was not solicited by investigators Ermachild and Siller, and was instead, totally Willis' idea* . (11 RHRT 596) In his letter, Willis told Jarvis Masters that he apologized "for all the pain I've caused you and your family," and asked for Masters' forgiveness. (Pet. Ex. 30)

3. Willis' May 22, 2005 Letter to Petitioner's Counsel Corroborates (1) His February 2001 Declarations, and (2) His May and June 2010 Statements That He Hid Exculpatory Kite Evidence in His Television Set

Willis' two 2001 declarations and his February 2001 statements to investigators Ermachild and Siller are also corroborated by a May 22, 2005 letter by Rufus Willis to petitioner's attorney Joseph Baxter. At the bottom of the letter, in which Willis asked for a "protective order," Willis added the following postscript: "PS Why Masters' lawyers never looked through my property in San Quentin – Hint Hint." Willis then placed his signature beneath the postscript. (Pet. Ex. 25)

Willis explained the significance of his postscript to investigator Chris Reynolds and attorney Joseph Baxter when they met him in May 2010. According to Reynolds, Willis told him that he had a television set that was part of his property in which he hid kites on a regular basis, and that there were kites that were present and stashed in his television set. (12 RHRT 748-749) Willis told Reynolds that the kites had information about this case, and particularly about various things that had happened. (*Id.*)

Willis also corroborated this information when he spoke to respondent's counsel Alice Lustre and Glen Pruden during a June 30, 2010 telephone call. The TV set was a 13-inch black-and-white television. (Resp. Ex. II at p. 31) While Willis admitted that some of the reports hidden inside his TV set related to the Burchfield case, he refused to provide the Attorney General with any further incriminating details. (*Id.* at 32)

After the Court admitted a transcript of Willis' telephone conversation with respondent's counsel, over petitioner's objection, petitioner sought to call petitioner's counsel, Joseph Baxter, so that he could testify regarding his own conversation with Willis in May 2010 about the kites in the TV set. Petitioner offered to prove that

Willis told Baxter that all of the kites prior to the murder of Sgt. Burchfield were destroyed, but that Willis placed kites created *after the murder*, including those he gave to Jarvis Masters, or that he had Mr. Masters write, in this television set, which has since disappeared. (16 RHRT 850)

4. Willis's Recantation Declarations Are Further Corroborated by Other Evidence in the Record

In addition to the foregoing corroboration, and as will be set forth below in the argument section of this brief, *infra* at pp. 107-122. Willis's recantations are further corroborated throughout the preliminary hearing, trial, and Reference Hearing testimony and exhibits.

C. MICHAEL RHINEHART PROVIDED EVIDENCE OF JARVIS MASTERS' INNOCENCE, FURTHER CORROBORATING RUFUS WILLIS' ADMISSION THAT HE PROVIDED FALSE EVIDENCE

Michael Rhinehart testified at the reference hearing that he was one of the BGF leaders in Carson section in June 1985. He was probably second in command, below Lawrence Woodard. (5 RHRT 314) He heard about the plan to assault a prison guard from Larry Woodard, Harold Richardson, and probably also from Rufus Willis. (5 RHRT 317) Richardson told him that the plan came from

Redmond. (5 RHRT 318) Rhinehart testified that he was present at a meeting when Masters voted against the plan. (5 RHRT 319) Rhinehart also voted against the plan. (5 RHRT 319) Woodard, however, had veto power, and ignored their opposition. (5 RHRT 319)

Rhinehart was not aware of any role that Jarvis Masters had in the attack. (6 RHRT 331) Yet he did know this: as a result of Masters' opposition to the plan, Woodard disciplined Masters and removed him from his position as Security. (5 RHRT 324) And he knew that there was animosity against Masters for his failure to participate in the plan. (6 RHRT 333)

Willis confirmed that Rhinehart voted against the plan. (Pet. Ex. 57) But Rhinehart wound up participating in the circumstances that led to Sgt. Burchfield's death. (5 RHRT 319) He was involved in passing some of the kites that led to Sgt. Burchfield's death. (*Id.*) He also directed inmate Carruthers to make the spear. (6 RHRT 331)

Rhinehart's cell was located on the second tier in the middle of the BGF group that assembled and sharpened the spear and sent it to Andre Johnson. Andre Johnson was located in cell 2, Carruthers

was located in cell 8, Rhinehart was located in cell 10, Ingram was located in cell 12, and Vaughn was located in cell 16. (6 RHRT 340) As noted by all the inmate witnesses who testified at the hearing, the knife was fashioned from metal that Carruthers (two cells away from Rhinehart) cut from his bed brace. (6 RHRT 338) Rhinehart directed him to do this. (6 RHRT 331) Masters, it should be noted, was housed on the fourth tier, in Cell 2. (41 RT 11210)

Ingram and Vaughn were also involved in sharpening the weapon. (6 RHRT 339) Vaughn was very good at making spears. (6 RHRT 342) He performed the final assembly of the weapon, i.e., he joined the sharpened shank with the spear. (*Id.*) Andre Johnson, in turn, carried out the assault with the weapon assembled by Vaughn. (*Id.*)

Rhinehart said that he heard about the plan from Richardson, and that Richardson was present at the meeting when Masters voted against the plan.[9] (5 RHRT 317-319)

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[9] The fact that Rhinehart also voted against the plan may explain why Rhinehart, like Masters, does not make Richardson's "list of 10." (See pp. 14-15, *supra*) While Rhinehart, unlike Masters, participated in the hit, his participation was limited to the passing of communications to his neighbors on the second tier. (5 RHRT 319, 331) Richardson, however, could not possibly have observed Rhinehart's message-passing activities since his cell was located on

(continued...)

Rhinehart also testified that he was celled with Bobby Evans, the State's second principal witness, at Tehachapi in the spring of 1987. (6 RHRT 333) According to Rhinehart, Evans learned about the Burchfield murder from him. (*Id.*) Evans told Rhinehart that he didn't know anything about the murder, and had no knowledge of what had happened. (6 RHRT 333-334)

Rhinehart, who saw Masters sitting with his counsel in court on January 10, 2011, hadn't seen Masters for 25 years. (5 RHRT 312) His testimony at the trial was sought in 1987, but he created trouble and, as a result, was released from testifying. (6 RHRT 343)

At the time of his January 10, 2011 testimony, Rhinehart was serving a life sentence with the possibility of parole. (5 RHRT 309)

The referee warned Rhinehart that there was no statute of limitations for murder and that he had the right to assert the Fifth Amendment so as to not incriminate himself. (5 RHRT 308) By acknowledging his participation in the plan to murder Sgt. Burchfield, Rhinehart clearly exposed himself to prosecution for the murder of Sgt. Burchfield. (5 RHRT 319; 6 RHRT 331)

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[9](...continued)
the opposite side of Carson Section.

D. THE TESTIMONY OF LAWRENCE WOODARD PROVIDED FURTHER EVIDENCE OF JARVIS MASTERS' INNOCENCE, AND CORROBORATED RUFUS WILLIS' ADMISSION THAT HE LIED AT TRIAL

Lawrence Woodard testified that he was in charge of Carson Section after Redmond left the section. (4 RHRT 217) Rufus Willis was the intelligence officer. (*Id.*) The plan to attack Sgt. Burchfield arose out of an earlier plan that called for an attack on rival gangs. (4 RHRT 221-222) Willis and Redmond were responsible for the change of plans. (4 RHRT 222)

Jarvis Masters was present when the change of plans was discussed. Woodard confirmed that Masters expressed his opposition and indicated his unwillingness to go along with the plan on a number of occasions. As a result, Woodard stripped Masters of all responsibilities, placed him on discipline, and excused him from group meetings. (4 RHRT 223) Woodard corroborated both Rufus Willis' declaration, that Jarvis Masters opposed the attack on Burchfield, and Michael Rhinehart's testimony that he was present when Masters expressed his opposition to the plan. (4 RHRT 222-224)

Woodard confirmed that Richardson was involved in the planning meetings. There were also meetings with the people that were on the second tier to prepare them. Woodard believed that Richardson was there for a couple of those meetings. (4 RHRT 227) Richardson was also there during a meeting, after Masters pulled out of the plan, that Woodard had with Willis when they discussed some of the ideas "back and forth about the plan." (4 RHRT 227-228) Woodard also corroborated the testimony of Michael Rhinehart that Richardson was present on the day that Masters withdrew from the plan, once he knew that it involved a prison guard. (4 RHRT 228; 5 RHRT 319)

As was true of Rhinehart, Lawrence Woodard has had absolutely no contact with Jarvis Masters since the time of the trial. For nearly 30 years, Woodard has been housed in a prison Security Housing Unit (SHU), isolated from the general population. (4 RHRT 212)

E. EXPERT EVIDENCE THAT JARVIS MASTERS DID NOT AUTHOR THE TWO INCRIMINATING KITES

Petitioner called Dr. Robert Leonard, an esteemed forensic linguist, who examined the two kites introduced at trial against

petitioner (People's Exs. 150-C and 159-C) in order to render an opinion regarding their authorship. (18 RHRT 975-976)

Dr. Leonard examined the two kites *penned* by Jarvis Masters (the Questioned (Q) documents), and compared them to 14 other documents that were known to have been *authored* by Jarvis Masters (the Known (K) documents), to evaluate the probability that Jarvis Masters had in fact authored the two kites that were attributed to him by Rufus Willis at the 1989 trial. (18 RHRT 984) Dr. Leonard's conclusions were stated as follows: "The hypothesis that the Q and K documents are *not* consistent with common authorship is *superior* to the hypothesis that they *are* consistent with common authorship." (Pet. Ex. 72, p. 13, emphases in original; 18 RHRT 971) After listing the various measures used to analyze the language of the Q and K documents (described below), Dr. Leonard further stated: "Each of these has shown that the data present demonstrable differences through a variety of measures, between the language patterns of Masters and the language patterns of the Q. (Pet. Ex. 72, at p. 13)

In reaching his conclusions, Dr. Leonard employed many different methods of analysis. Several of the methods employed

noted that the word frequencies in the questioned documents were significantly different from those in the documents known to be Masters'. (Pet. Ex. 72, at 7, ¶¶ 2, 3; 18 RHRT 992-996) Another method noted markedly different frequencies in the use of a significant word. (Pet. Ex. 72, at 7-8, ¶ 4; 18 RHRT 996) A fourth method analyzed the distinctive uses of the common word, "must." (Pet. Ex. 72 at 8–10, ¶ 5; 18 RHRT 999-1002) Three additional methods noted that Jarvis Masters' known words included a number of idiosyncratic features that were either not found, or only rarely found, in the two kites. (Pet. Ex. 72, at 8-13, ¶¶ 6-8; 18 RHRT 1002-1010, 1013-1014) All of the analyses by Dr. Leonard established that Jarvis Masters was not the author of the questioned documents.[10] The data points to "separate authorship." (18 RHRT 984)

Dr. Leonard's conclusions were also corroborated by a 1998 report prepared by Dr. Roger Shuy, "the pre-eminent for forensic linguist in the United States, probably in the world." (18 RHRT 1014, 1018) Dr. Shuy's conclusions were attached as an exhibit to Dr.

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[10] It should be noted that in his testimony, Dr. Leonard withdrew the finding he made with respect to the first method of analysis, type/token ratios (Pet. Ex. 72, at 6-7, § 1), because of the variance in size between the questioned and the known documents. (18 RHRT 990-992)

Leonard's report. Dr. Shuy noted that Masters' writing style is quite different from that of the author of the two kites, and that Masters' known writings had usages that were noticeably different from the two kites. (Pet. Ex. 72, Attachment at 1-5 [11])

The referee, it should be noted, found Dr. Leonard's testimony credible, and that Respondent presented no opposing expert. (Referee's Report at p. 15)

F. THE STATE FAILED TO DISCLOSE THAT BOBBY EVANS WAS A PROFESSIONAL INFORMANT WHO HAD WORKED REPEATEDLY FOR CDC, BNE, ATF, AND THE OAKLAND POLICE DEPARTMENT PRIOR TO HIS 1989 TESTIMONY

The reference hearing testimony of Bobby Evans, James Hahn, James Moore and Robert Conner established that, contrary to what was disclosed to the defense and trial court, Evans was a long-time government snitch, who was managed by SSU Officer James Hahn, a member of the prosecution team. In the argument below, *infra* at pages 150-152, petitioner will review what little was disclosed to the defense. The jury, who heard even less, were led to believe

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[11] Dr. Shuy's report is located at the end of the text of Dr. Leonard's report (Pet. Ex. 72), immediately preceding the tabbed exhibits.

that prior to his contacting Hahn after his 1989 arrest, Evans' relationship with Hahn was principally adversarial.

In contrast, Evans' reference hearing testimony, corroborated by Hahn himself and two of Hahn's colleagues, painted a very different tale.

1. Bobby Evans' 2010 Testimony

Evans provided deposition testimony before the referee in May, 2010. (Pet. Ex. 58) [12] He testified that, contrary to his testimony at the trial in 1989, his working relationship with James Hahn began after Hahn kicked down his mother's door in 1986. (Pet. Ex. 58, at 51) During the 3-year period between this first encounter with Hahn and when Evans came forward in the Masters case, they had over 50 face-to-face meetings. (*Id.* at 53) During this same period Hahn and Oakland Police Department Officer James Moore worked as a team. (*Id.*) Moore was present at about 40 of the meetings with Evans. (*Id.*)

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12 Because of concern about Evans' physical well being, his testimony was taken by way of deposition before the Referee on May 14, 2010. The parties stipulated that the transcript of the deposition could be used as court testimony in this proceeding. A copy of the transcript was admitted into evidence as Pet. Ex. 58.

During this same period Evans, with Hahn's assistance, began working as an informant for the State Bureau of Narcotics Enforcement Task Force (BNE). (*Id.* at 57) Evans did "gun buy" operations for the BNE. (*Id.*)

During this period, also with Hahn's assistance, Evans worked for the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). (*Id.* at 57) For the ATF work, Evans was paid by commission, depending on how many guns or drugs he would buy, anywhere from $300 to $1000. (*Id.* at 58) During this period Evans was involved in approximately 50 to 60 gun buy operations. (*Id.*)

Hahn told Evans to keep his informant work secret and not to testify at the trial about it because Hahn wanted to use Evans in the future. (*Id.* at 78) Hahn told Evans that if someone asked how many times they had met, he should just say "a few times." (*Id.*)

Evans' Reference Hearing testimony was corroborated by the testimony of three former law enforcement officers:

2. The Reference Hearing Testimony of James Hahn

Much of Evans' reference hearing testimony was corroborated by James Hahn. Bobby Evans started giving Hahn information in

1986. (8 RHRT 434, 448) Before cooperating on the Burchfield case, Hahn admitted, Evans had worked with him on as many as a dozen cases. (8 RHRT 448-449) According to Hahn, some of Evans' information was true and some was false, though it was useful, notwithstanding that it only led to two or three arrests. (*Id.* at 449)

Hahn confirmed Evans' testimony that Evans was also working for a number of Oakland police officers. (8 RHRT 449) Hahn also confirmed that Evans worked for the BNE. (8 RHRT 450) Hahn testified that he was personally involved in providing Bobby Evans to the state Department of Justice (DOJ) as an informant. (8 RHRT451) Hahn explained that information from Evans was conveyed to the BNE either by himself or directly by Evans on the occasions that Hahn would take him to the BNE. (8 RHRT 452)

3. The Reference Hearing Testimony of James Moore

James Moore worked as an officer in the Oakland Police Department between 1969 and 1990. During the period 1984-1990, he was assigned to the intelligence section. (3 RHRT 190) During the last two years of Moore's career, Bobby Evans worked as an informant for him, providing information on criminal activity in the

Oakland area. (3 RHRT 192) Moore had 30 or more meetings and discussions with Bobby Evans, most of these with James Hahn. (3 RHRT193) Moore acknowledged Bobby Evans was paid money for ongoing work providing information involving criminal suspects, narcotics, robberies, etc. (3 RHRT 196-197)

4. The Reference Hearing Testimony of Robert Conner

James Moore's supervisor in the intelligence unit was Oakland Police Intelligence Officer Robert Conner, who also knew of Bobby Evans. (3 RHRT 165). According to Conner, Evans "was an informant that was developed by Jim Hahn and/or Jim Moore." (3 RHRT 165) Evans' work as an informant was known to Conner before the murder investigation of James Beasley, Sr., began in August of 1988. (3 RHRT at 167)

G. THE STATE DID NOT DISCLOSE THAT BOBBY EVANS WAS A KEY POLICE SUSPECT IN THE MURDER OF JAMES BEASLEY, SR. AT THE TIME OF HIS 1989 TESTIMONY

James Beasley, Sr., was brutally murdered on August 17, 1988, **[FOUR LINES REDACTED]**

During their investigation of the Beasley, Sr., murder, the San Francisco Police Department turned up a number of potential suspects. **[REDACTED CITATION** [13]) As will be set forth in detail in the argument (*infra* at 155-161), all the other suspects were eliminated, and at the time that Evans came forward with information about the Burchfield killing, he was the only remaining suspect in the Beasley investigation. Indeed, while the investigation seems to have come to a halt without explanation, **[FOUR WORDS REDACTED]** as of that time, Evans was a viable, and indeed the primary, suspect. [14]

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13 **[FOOTNOTE REDACTED]**

14 Petitioner has no evidence showing why the investigation was halted when it was. He would note, however, that it appears to have come to a halt at about the same time as Evans was identified as a witness in the trial in this case. Thus, Evans came forward after he was arrested two days after he was fully identified as the murderer of James Beasley, Sr. (See pp. 162-163, *infra.*)

H. BOBBY EVANS HAS NEVER SPOKEN TO JARVIS MASTERS AND DID NOT EVEN KNOW WHO HE WAS

At the 1989 trial, Bobby Evans testified that Jarvis Masters appeared before the BGF Commission in the San Quentin Adjustment Center in 1985 and admitted that he was on the BGF Commission in Carson Section and that he voted for the plan to kill Sgt. Burchfield. (58 RT 13725-13726)

At the Reference Hearing, Bobby Evans admitted that his 1989 testimony against Jarvis Masters was a complete lie, and the referee so found. (Evans Deposition at 41-42; Referee's Report at p. 8) Evans testified that he did not know Jarvis Masters in 1985, or even know who he was. (*Id.* at 36) In fact, he has never spoken to Jarvis Masters. (*Id.* at 41)

I. MASTERS BRIEFLY APPEARED ON THE ADJUSTMENT CENTER YARD IN LATE DECEMBER 1985

CDCR and gang expert Graham McGruer testified that Jarvis Masters arrived in the Adjustment Center on December 2, 1985, and only briefly appeared on the Adjustment Center yard in late December. (5 RHRT 281, 286-290; Pet. Ex. 16) McGruer's testimony, read in light of other evidence, suggests that an

Adjustment Center yard appearance of Jarvis Masters before the BGF Super Commission would have been highly unlikely. (See also 5 RHRT 302) Given the referee's finding that Bobby Evans lied at the 1989 trial, McGruer's testimony will not be discussed. (Referee's Report at p. 8)

J. BOBBY EVANS' TRIAL TESTIMONY WAS GIVEN IN EXCHANGE FOR BEING KEPT OUT OF PRISON FOR AN ALAMEDA COUNTY ROBBERY CONVICTION

Evans testified in his Reference Hearing deposition before the referee that his 1989 testimony against Jarvis Masters was a product of his longstanding relationship with James Hahn. He contacted Hahn after he was arrested on an Alameda County armed robbery case. (Evans Deposition at 60-62) His only objective was to get out. (*Id.* at 70-71) He knew that Hahn had ties the District Attorneys in Oakland and Alameda. (*Id.* at 97) Evans told Hahn that he would do anything that Hahn wanted because he knew that he was facing 18 years if he went back to prison. (*Id.* at 62:7-10) Evans knew that he was facing 18 years because "the DA said he was going to file a Career Criminal Act, and [Evans had] convictions for being imprisoned on three other prison offenses." (*Id.* at 62:12-15)

Evans spoke to James Hahn and Jim Moore prior to entering a plea. (*Id.* at 62:19-25) They told him that the Marin District Attorney wanted to talk to him about the Burchfield murder. Evans said he would talk if they could guarantee that he would get out of jail within a year. (*Id.* at 63:1-5, 12-15)

Evans said that Woodard and Johnson admitted to him their responsibility for the murder of Sgt. Burchfield. (*Id.* at 46:4-49:18) But he told Hahn that he didn't know anything about Jarvis Masters being involved. (*Id.* at 65:14-17) Hahn and DA investigator David Gasser, however, kept on saying that "they needed all three of them" (i.e., Woodard, Johnson and Masters) because that's the way the case was being charged. (*Id.* at 65:18-22, 101:2-3, 106:5-13) Evans, however, was willing to do anything to stay out of prison and a deal was struck. He would testify against Masters. (*Id.* at 84:6-10, 100:1-4) Evans was assured that he would get less than a year. (*Id.* at 98:11-15)

The deal was made with Hahn and Moore. (*Id.* at 13-15) Moore was with the Oakland Police Department and it involved an Alameda charge. (*Id.* at 98:8-9, 16-17) He had worked other cases for Moore, and he was one of his regular informants. (*Id.* at 98:21-99:1) As Evans put it:

> "I was going by peoples I had already dealt with in the past, that had work [*sic*] deals out for me that I knew would tell the truth and keep the truth as a truth and that was Jim Hahn and Jim Moore." (*Id.* at 99:14-17)

Evans testified that at some point he changed his mind because he felt they were going to renege on the deal that he had with them. (*Id.* at 69:24-70:19) At that point Hahn and Moore threatened him with prosecution on a number of cases, and in particular, cases where he could have been involved. (*Id.* at 71:11-21) One case involved a kidnaping that he could have been involved in. (*Id.* at 74:22-25, 111:23) They also threatened him with shooting people and murders. (*Id.* at 72:1-3, 72:8-17) DA investigator Gasser also said that they were going to file charges against him on the Burchfield murder based upon his membership in the BGF commission. (*Id.* at 72:8-25) They were "going to say that the commission called the shot." (*Id.* at 73:3-4)

Evans admitted that he was guilty in some of the cases that they brought up. (*Id.* at 73:16-19) Evans, however, also feared being tossed into prison for the rest of his life for crimes that he didn't commit. (*Id.* at 73:10-12) Evans consequently agreed to say what Mr. Hahn and Mr. Gasser had told him to say. (*Id.* at 84:7-8)

VI. THE REFEREE'S REPORT

The referee's Report answers "No" to each of the questions asked by this Court. In the sections below, petitioner will set forth his exceptions to the report, followed by Argument which sets forth the evidence in his favor, question-by-question.

The most striking aspect of the referee's Report are the factual findings she made in appellant's favor. Those factual findings, which should have led to opposite conclusions regarding the Court's questions, are as follows:

Introduction: In the referee's introductory remarks, she found that Willis was not coerced to sign his February 23, 2001 declaration made to defense investigators Ermachild and Siller. This declaration, the Report says, occurred "[o]ver the course of several friendly and voluntary visits between the investigators and Willis." (Referee's Report at p. 4)

> In his declaration, Willis stated
>
> > "that Masters had *not* been involved in either the planning or execution of the murder; that in fact Masters had told Willis privately that he did not agree with 'doing the hit.' He also said that Masters had no authority to issues orders at any meetings." (Report at pp. 4-5, emphasis in original)

Moreover,

> His change of testimony was significant, because Willis had testified at trial that Masters was present at many of the planning meetings for the Burchfield murder; that Masters had developed a plan to attack Burchfield; and that Masters was part of the BGF central committee [52 RT 12726:10-14; 12730:16-26; 12733:5-7; 12735:17-19; 12738:2-11: 12740:3-9]. (Referee's Report at p. 5)

With regard to Bobby Evans, the referee specifically noted that Bobby Evans "corroborated Willis' testimony at trial." (*Id.*)

> Evans' new testimony was likewise significant, because he had corroborated Willis' trial testimony against Masters with the damning testimony that Masters appeared before the BGF Commission and admitted guilt. (*Id.*)

Question No. 1:

On the question of whether false evidence regarding petitioner's role in the charged offense was admitted at the guilt phase of the trial, the referee made the following specific findings favorable to petitioner:

1. Both Willis and Evans were endemic liars:

> From all the evidence submitted, it is clear that Evans and Willis are utterly lacking in credibility. Both are career criminals whose word, under oath or otherwise, means nothing. Both are well-known snitches. Both would say anything to save their own hide and both have so admitted. Both are manipulative and unreliable.

> There is little doubt but that Evans lied at trial – he seems to have no ability to tell the truth. (Referee's Report at 8)

2. The referee "found no basis for Willis' claim that the statement" he gave to petitioner's investigators in 2001 "was coerced. The two investigators testified credibly and consistently about the friendly and voluntary meeting they had with Willis." (Referee's Report at 9)

3. "Petitioner argues that Evans had more extensive contact with law enforcement than was disclosed at trial, and this does in fact appear to be true." (Referee's Report at p. 11)

4. "The fact that Evans was a suspect in the "Beasley Senior" case is "new information" for the purpose of the habeas proceeding." (*Id.*)

Question No. 2:

On the question of whether there was "newly discovered, credible evidence indicative of petitioner's not having been a participant in the charged offenses," the referee found the following with respect to Petitioner's having actually authored the two prison communications on which the prosecution at trial relied:

> Petitioner also presented the testimony of Dr. Robert Leonard, a forensic linguist. Dr. Leonard examined the "kites," or notes, which were written in petitioner's

> handwriting and which were offered into evidence in the underlying trial to prove petitioner's involvement in the conspiracy. Dr. Leonard compared the two kites (the "Questioned" or "Q documents") with several samples of writing known to be written by petitioner around the same time (the "Known" or "K documents"). He concluded that it was more likely that the kites were written by someone other than the writer of the known documents.
>
> Dr. Leonard testified convincingly, and no opposing expert was offered by respondent. [Footnote omitted.] (Referee's Report at pp. 14-15)

***Question No. 3*:**

Question No. 3 concerns promises or threats made by various named prosecution team figures to Rufus Willis, and whether his trial testimony was affected thereby. The referee made no specific findings favorable to petitioner. As we will show below, however, the evidence is otherwise.

***Question No. 4*:**

Question No. 4 concerns promises, threats or facts concerning Bobby Evans's relationship with law enforcement of which the prosecuting attorneys, Deputy District Attorneys Berberian and Kamena, were or should have been aware but were not disclosed to the defense.

The referee found that, indeed, " Evans did have more extensive contacts with Hahn than was testified to at trial." (Referee's Report at p. 16)

***Question No. 5*:**

Petitioner offered no evidence concerning question No. 5.

Question No. 6:

Question No. 6 concerns promises or threats to Bobby Evans by specified agents of the State that affected his trial testimony.

The referee acknowledged the evidence concerning the Beasley, Sr., murder, which she found was "new evidence" for the purposes of this proceeding. (Referee's Report at p. 11) She discounted, however, the impact of that information. (*Id.* at p. 17)

VII. EXCEPTIONS

The following Exceptions are intended solely as a general overview of the flaws that resulted in a referee's report not entitled to deference by this Court. In the argument that follows these Exceptions, petitioner will set forth, question-by-question, the evidence showing that the referee should have answered all of the contested questions "yes" rather than "no." Petitioner will set forth here the overarching flaws that prevented the referee from properly answering the Court's questions.

1. *Mistakes of Fact.* The referee's conclusions are not anchored in the record below. In several instances, she drew her conclusions from mistakes of fact regarding what occurred at trial, despite the parties' efforts to provide sufficient excerpts from the record to prevent this. For example, the referee states that petitioner was "not tried as the planner or leader of the conspiracy; he was tried as the knife-sharpener and the messenger." (Referee's Report at 15). This is simply incorrect. Other examples will be discussed in the Argument that follows.

2. *Mistakes of Law.* The referee made many errors of law, the most obvious of which displayed a remarkable misunderstanding of the law under *Brady v. Maryland* and its progeny, under which the

knowledge of in investigator working for one of the investigating agencies working on the case is imputed to the prosecutor for *Brady* purposes. Another error of law was to import the "new evidence" standards of motions for a new trial into the law of habeas corpus, thus enabling the referee to reject otherwise valid and material evidence. An even more stunning error of law was the referee's belief that Masters could be found guilty of capital murder, simply for copying a kite 12 days after the murder.

3. *Mistakes of Logic.* The referee made errors of logic. For example, the referee stated that the jurors were in a better position to weigh the credibility of Bobby Evans, since his credibility was the subject of "an unsparing attack by petitioner's trial lawyers." This logic fails because petitioner's trial lawyers, and thus the jury, did not have the benefit of the storehouse of evidence that Evans lied to them about almost everything.

4. *Mistakes of Standard.* The referee consistently ignored the language of the questions posed by this Court. For example, she incorporates a District Attorney *scienter* requirement into Question 1, even though the District Attorney's *scienter* is not a relevant issue. In the same way, she ignores the "credible evidence" standard which

defines the Question 2 issue. In the same way, she imposes a "newly disclosed" standard upon her analysis of Question 3.

5. *Mistakes of Contradiction.* Many of the referee's findings contradict her own findings. For example, while she found that Evans testified falsely at trial, she did not find under Question 1 that false evidence was presented at the trial.

6. *Materiality.* This Court's seven reference questions did not ask the referee to make findings regarding materiality. Nonetheless, the referee made many findings regarding materiality without advising counsel that she intended to do so, and without allowing counsel an opportunity to brief the materiality issues. Because of an incomplete knowledge of the case, and in part because of the afore-mentioned mistakes of law, the referee repeatedly and erroneously minimized the importance – the materiality – of the evidence adduced at the hearing, including the evidence that she explicitly credited.

7. *Conflation and Confusion Regarding the Questions and the Evidence Relating to Them.* The referee's report appears to confuse and conflate evidence she regards as "new" or "false." Thus, her discussion of Question 1 – the false evidence question – includes a discussion of new evidence, while her discussion of

Question 2 – the new evidence question – looks at only a small part of the new evidence brought forward, and ignores the impact of that evidence upon the false-evidence question, Question 1.

8. *Failure to Weigh Evidence*. The referee failed to weigh the relevant evidence and entirely ignored the bulk of the relevant evidence. For example, (1) in answering Questions 1 and 2, the referee did not weigh the evidence, (2) in answering Question 3 the referee ignored the evidence, and (3) in answering Question 6, the referee ignored the bulk of the evidence. This failure, as well as many other factual and legal errors made by the referee, may have been due, in part, to the referee's unwillingness to allow the parties to file proposed findings of fact and briefing regarding the law and the facts. [15]

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[15] See, e.g., "Settled Statement Re: Off-the-Record Discussions between Counsel and the Court on or about January 21, 2011," filed in the Marin County Superior Court on December 19, 2011, and filed herein on February 1, 2012; 15 RHRT 828.

VIII. THE STANDARD OF REVIEW

Because "petitioner seeks to overturn a final judgment in a collateral attack, he bears the burden of proof. [Citation.] 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands . . . .' [Citations.]" *In re Avena* (1996) 12 Cal.4th 694, 710.

A referee's findings on factual questions are not binding on the Court, but are entitled to great weight when supported by substantial evidence. *In re Malone* (1996) 12 Cal.4th 935, 945. Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, when the referee has the opportunity to observe the witnesses' demeanor and manner of testifying. *Id.*; see also *In re Avena*, *supra*, 12 Cal.4th at p. 710. If, however, the referee's factual findings are not supported by ample, credible evidence, they may be disregarded. *In re Hitchings* (1993) 6 Cal.4th 97, 122. The referee's resolution of any legal issues or of mixed questions of law and fact is subject to the Court's independent review. *In re Cordero* (1988) 46 Cal.3d 161, 180-181. 'Mixed questions' include the ultimate issue. *In re Marquez* (1992) 1 Cal.4th 584, 603.

The question of whether the findings are supported by substantial evidence is governed by traditional rules of appellate law. The deference accorded trial court findings does not apply where the trial court did not perform its function of weighing all the evidence.

Estate of Larson (1980) 106 Cal.App.3d 560,567. Thus, if the record demonstrates that a trial court's decision was based on an erroneous legal ruling, substantial evidence deference does not apply. *Kemp Bros. Constr., Inc. v. Titan Elec. Corp.* (2007) 146 Cal.App.4th 1474, 1477-1478. Eisenberg, Horvitz and Weiner, *California Practice Guide*: *Civil Appeals and Writs* 8:46 (Rutter 2011). Cf. *Washington Mutual Bank, FA v. Superior Court (Briceno)* (2001) 24 Cal.4th 906, 914; *People Ex Rel Department of Corporations v. SpeedDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144. For the same reason, where the decision of the trial court does not actually reach the relevant issue, *de novo* review applies. See *In re Marriage of Eggers* (2005) 131 Cal.App.4th 695.

Independent review is also conducted when the decision of the trial court contradicts one of its own findings. See *In re K.D.* (2004) 124 Cal.App.4th 1013, 1018-1019. Independent review likewise applies where the trial court gives significant weight to an irrelevant or improper factor, or false information. See *Espinosa v. Florida* (1992) 505 U.S. 1079, 1082-83; *Williams v. Carter* (8 Cir. 1993) 10 F.3d 563, 566. Finally, an appellate court conducts *de novo* review of documentary evidence and written declarations, and under other circumstances where the appellate court is in as good a position as the trial court to decide the issue. *People v. Kennedy* (2005) 36 Cal.4th 595; *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 214; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89; *Mayhew v. Benninghoff III Investment Co.* (1998) 68 Cal.App.4th 1365, 1369;

Exxcess Electronix v. Heger Realty Corp. (1998) 64 Cal.App.4th 698, 704; *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 71.

In the argument below, petitioner will set forth, question-by-question, the evidence supporting his claims, including the referee's factual findings, and make the connections to the law and to the record of the trial below that the referee was not able, or willing, to make. It should be noted that petitioner will make no argument with regard to questions 5 and 7, the first because he was unable to find satisfactory and sufficient evidence to satisfy a legal burden of proof, and the latter because Johnny Hoze's recantations and re-recantations proved impossible to untangle, and because petitioner does not want to spend the rest of his life in prison, and only wants to be proven innocent.

As will be shown below, the referee's conclusions are not entitled to deference, as they are the result of legal error and a failure to weigh the relevant evidence, and because they are not supported by her specific findings of fact or substantial evidence.

IX. ARGUMENT AND DISCUSSION OF REFERENCE QUESTIONS

Question 1:	**Was false evidence regarding petitioner's role in the charged offenses admitted at the guilt phase of petitioner's trial? YES. If so, what was that evidence?**

Question 1 poses a straightforward question: "Was false evidence regarding petitioner's role in the charged offense admitted at the guilt phase of petitioner's trial?" The referee's answer, "No," however, is not consistent with her factual findings; nor is it consistent with the record as a whole.

The referee accedes to "some false (but not coerced) testimony" being offered at trial, but absolves the prosecution from knowingly presenting it. (Report, at p. 6) The question asked by the this Court, however, made no reference to the prosecution's scienter. More important, the referee's "No" answer is directly contradicted by her findings that: (1) neither Willis nor Evans – the State's principal witnesses can be believed – both are chronic liars. (Referee's Report at pp. 6, 9, and 10); (2) "[t]here is little doubt but that Evans lied at trial (Referee's Report at p. 8); (3) Evans, moreover, "had more extensive contact with law enforcement than was disclosed at trial" (Referee's Report at p. 11); and (4) the later finding that Masters most likely did not author the two crucial kites, which means that Willis falsely testified that he did. (Referee's Report at pp. 14-15)

The referee found that because Willis and Evans are chronic liars, "the court has scant ability to discern whether are were lying

now, or whether they were lying then." (Referee's Report at p. 6) The referee's job, however, was not to weigh "now" versus "then." Her job was to weigh the evidence of the falsity of Evans' 1989 testimony against the evidence of its truth, and the evidence of the falsity of Willis' 1989 testimony against the evidence of its truth.

The court's "scant ability" finding was partly the product of another illogical finding. By the court's view, the trial jurors were in a better position to evaluate the credibility of the witnesses, especially since Evans' credibility was the subject of an "unsparing attack by petitioner's trial lawyers." (Referee's Report at pp. 6, 11-13) This logic utterly fails because neither the jurors nor petitioner's trial lawyers had the benefit of the newly discovered evidence introduced at the Evidentiary Hearing. Had they known that Willis and Evans were chronic liars, had they known that Evans lied to them about everything, had they known that Willis lied to them about the kites, had they known that Willis' description of the Fourth Co-Conspirator precisely fit Harold Richardson – who admitted his role and leaves out Masters – and had they known that they were completely misled about Evans' background, Jarvis Masters would be a free man today.

Question 1, moreover, does not ask the trial court to make a finding regarding materiality, which is a matter for this Court to decide.

Given the fact that the referee failed to address the clear issue posed by Question 1, petitioner will now marshall the relevant evidence, apply the legal standard to the evidence, and answer

Question 1 as it should have been answered. As shown in the following sections, the evidence that false evidence was presented at trial is overwhelming.

We begin with the referee's findings, which by themselves require a "Yes" answer to Question 1. (Sections A, B, C, and D, *infra*.) We then discuss a store of evidence, largely overlooked by the referee, which compels the same conclusion and unerringly points to Jarvis Master's innocence. (Section E below)

A. BOBBY EVANS PROVIDED FALSE EVIDENCE THAT MASTERS VOTED FOR THE HIT

After the trial judge certified that Bobby Evans was a BGF expert, Evans testified both that Jarvis Masters sat on the BGF Commission in Carson Section and that Masters admitted to him that he voted for the plan to kill Sgt. Burchfield. (58 RT 13725-13726)

The referee found that Bobby Evans was "utterly lacking in credibility," that he was "spectacularly unreliable," and that "[t]here is little doubt but that he lied at trial." (Referee's Report at 8, 10) Thus, for this reason alone, the answer to Question 1 can only be "Yes."

B. BOBBY EVANS' AND JAMES HAHN'S TRIAL TESTIMONY AND DISCOVERY PRODUCED BY THE PROSECUTION MASSIVELY UNDERSTATED EVANS' RELATIONSHIP AS A SNITCH WITH LAW ENFORCEMENT AND, IN PARTICULAR, WITH CDC AGENT JAMES HAHN. THUS, FALSE EVIDENCE WAS USED TO CONVICT JARVIS MATTERS

The referee found that Bobby "Evans did have more extensive contacts with Hahn that was testified to at trial." (Referee's Report at p. 16).

The reference hearing testimony of Bobby Evans, James Hahn, James Moore and Robert Conner established that, contrary to what was disclosed to the defense and trial court, Evans was a long-time, well-paid, government snitch – information that the defense were clearly entitled to under *Brady v. Maryland* (1963) 373 U.S. 83, because Hahn was an agent with the Department of Corrections, the primary investigating and prosecuting agency in the case, and because Hahn himself was an active member of the investigation and prosecution team. [54]

1. In 1989, Evans Testified That He had Only Worked with Hahn Once Before, When He Provided Information on a Bad Cop

Only two snippets of information were provided to Masters' trial counsel regarding Bobby Evans' role as an informant prior to becoming an informant against Masters, and both related to the same individual: Roy Smith. That, on or about June 10, 1988, Evans provided information to SSU Officer Bruccoleri (James Hahn's boss) that the parolee at large was currently residing at an apartment in Oakland, and that on March 8, 1989, Smith was residing at 1627 12th Street in Oakland. (Pet. Ex. 59; 14 RHRT 741-748)

According to Evans' trial testimony, his relationship with James Hahn prior to his coming forward was extremely adversarial. He first encountered Hahn on December 17, 1986, when Hahn and 14 other officers kicked down the door of his mother's house after his release from prison. (58 RT 138) Hahn introduce himself as SSU, but

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[54] See pp. 167-175, *infra.*

Evans did not talk to him and did not provide him any information. (58 RT 13801, 13837-13838) His next contact with Hahn was in 1987 when the Oakland Police Department and SSU arrested him for Possession of UZI's. Hahn came to the Oakland Police Department and identified Evans. (59 RT 13972-13973)

Prior to coming forward in the Burchfield case, the only time Evans ever worked with James Hahn, or gave him information, was in May 1988. According to Evans, he gave Hahn information against a correctional officer, a Lieutenant Kane. (58 RT 13832, 13834-13836, 13838; 59 RT 13985) Evans did not talk to Hahn at all in 1986 or 1987. (58 RT 13833-13834, 13837) Nonetheless, according to Evans' trial testimony, he contacted Hahn after he entered his plea to robbery charges on June 1, 1989. (59 RT 13862-13863)

While Evans referred to earlier contacts with SSU Officer James Hahn, they were all adversarial, and none involved snitching. Thus, Hahn kicked down the door of his mother's house to arrest Evans, along with about 14 other police officers on December 17, 1986. (58 RT 13800, 13837) Evans did not provide him any information at that time. (58 RT 13801) The next time he met Hahn was in 1987, prior to Evans being busted with some Uzi's. Hahn violated him and sent him to back to prison. (58 RT 13801)

Simply stated, Evans testified in 1989 that prior to coming forward in the Masters case, the only significant information he had previously given to authorities was against a police officer, and that this was the only time he had ever worked with James Hahn.

2. Bobby Evans Was a Professional Informant Who Had Worked for CDC, BNE, ATF, and the Oakland Police Department on Countless Operations Prior to His 1989 Testimony

(a) Bobby Evans' 2010 testimony

The uncontested evidence introduced at the Reference Hearing establishes that Bobby Evans was a well-paid professional informant. Evans testified that his working relationship with James Hahn began after Hahn kicked down his mother's door in 1986.[55] (Depo at p. 51) During the 3-year period between this forceful beginning of the relationship, and the time when Evans came forward in the Masters case, he said he had over 50 face-to-face informant meetings with Hahn. (*Id.* at 53) During this period Hahn and Oakland Police Department Officer James Moore were working as a team. (*Id.*) Moore was present at about 40 of these meetings. (*Id.*)

During this three-year period Evans was also working for the Bureau of Narcotics Enforcement Task Force (BNE) that Jim Hahn and Jim Moore "hooked [him] up with." (*Id.* at 57) A federal and state operation, they paid Evans to "buy guns or dope" and turn over the sellers to them. (*Id.* at 57) Evans reported his BNE work to Hahn and Moore, and was well paid for his efforts. (*Id.* at 58-59; Pet. Ex.

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55 Evans testified in *People v. Bailey* that he initially became an informant to keep himself from getting arrested. (Pet. Ex. 66 at p. 14) He also told his correctional counselor in 2002 that he had been an informant for 16 years, i.e., since 1986. (Pet. Ex. 68) This confirms his Reference Hearing testimony that his work with Hahn began after Hahn broke down his mother's door in 1986.

68 ($500/week)) *Significantly, Evans' testimony about his BNE work was uncontested.*

During this period he also worked for the federal Bureau of Alcohol, Tobacco and Firearms (ATF). Hahn also introduced him to this work. (*Id.* at 58) Evans was paid by commission depending on "how many guns or how much dope I would buy." Sometimes he got $1,000.00, and sometimes he got $300.00, depending on the number of guns or the amount of drugs. (*Id.* at 58) *During this period Evans was involved in approximately 50 to 60 gun buy operations.* (*Id.*) *Significantly, Evans' testimony about his ATF work was also uncontested.*

Hahn told Evans to keep his informant work secretive, and not to testify at the trial about it because he wanted to use Evans in the future. Hahn told Evans that if someone asked how many times they had met, he should just say "a few times." (*Id.*)

(b) Reference hearing testimony of James Hahn

Evans' reference hearing testimony was substantially corroborated by James Hahn. Bobby Evans was giving Hahn information long before the Burchfield case, having started snitching in 1986. (8 RHRT 434, 448-449) Up until the time that he gave him information regarding Jarvis Masters, he had personally worked with Evans on as many as a dozen cases. (*Id.* at 448-449) As with most snitches, some of Evans' information was true and some was false, but most of it was useful. (*Id.* at 449, 470, 471)

While Hahn stated that Evans' information only led to two or three arrests (*Id.* at 449), he testified that it would be unfair to suggest that the information provided by Evans was not important since the number of convictions is not a benchmark of the usefulness of information. (*Id.* at 471)

Significantly, Hahn corroborated Evans' testimony that Evans was also working for a number of Oakland police officers. (*Id.*) Hahn also corroborated Evans' information that he was working for BNE. (*Id.* at 450) Hahn also testified that he was personally involved in providing Bobby Evans to the state Department of Justice (DOJ), who most likely introduced Evans to BNE, since their offices are just next door to each other. (*Id.* at 451) On further examination, however, Hahn conceded that during this period of time, the period of time that Bobby was working with BNE, Evans would give Hahn the information, and Hahn would sometimes contact BNE, and then Hahn would either take Evans to the BNE himself, or introduce the facts that Bobby Evans had told him to the BNE. (*Id.* at 452)

(c) Reference hearing testimony by James Moore

Evans' Reference Hearing testimony was also corroborated by former Oakland Police Department Intelligence Officer James Moore. Hahn worked very closely with Moore – close enough to call him his partner. (8 RHRT 423)

Moore worked for the Oakland Police Department between 1969 and 1990. (3 RHRT 190) During the last seven years of his career, Bobby Evans worked as an informant for him, providing

information on criminal activity in the Oakland area. (*Id.* 3 RHRT at 192) On 30 or more occasions, he had meetings and discussions with Bobby Evans. (*Id.* at 193) James Hahn accompanied him during most of those meetings. (*Id.* at 193) While Moore admitted that he probably paid Bobby Evans money, he couldn't remember on how many occasions he did so. [56] (*Id.* at 196) Evans would provide him information on criminal suspects, narcotics, robberies, you name it, who's doing what, when and how. (*Id.* at 197) His informant work was ongoing. (*Id.* at 197)

(d) Reference hearing testimony by Robert Conner

Evan's professional informant status was further corroborated by Robert Conner, the former head of the Oakland Police Department Intelligence Unit. (3 RHRT 163)

Conner, who was Moore's boss, also knew of Bobby Evans. (*Id.* at 165-166) Evans "was an informant that was developed by Jim Hahn and/or Jim Moore." (*Id.*) He was a known person to him, to Mr. Hahn, and to Mr. Moore, prior to his receiving information about the James Beasley, Sr. murder investigation in August of 1988. Conner knew Evans was an informant back then. (*Id.* at 167)

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[56] This is consistent with Evans' testimony that he met with Hahn about 50 times since we don't know how many times he met with Hahn alone

3. Conclusions

Bobby Evans was a critical prosecution witness. Under Penal Code 1111, the testimony of Rufus Willis, an alleged accomplice, needed to be corroborated. Bobby Evans was that corroboration. Indeed, he was one of the three legs of the prosecution's case. Thus, inasmuch as prosecution witness Bobby Evans testified falsely about his prior relationship with his handler, James Hahn, and about his prior work as an informant, and inasmuch as the prosecution failed to disclose this longstanding relationship, false evidence was clearly used to convict Jarvis Masters.

C. THE REFEREE CONFIRMED THAT RUFUS WILLIS AND BOBBY EVANS WERE CHRONIC AND HABITUAL LIARS. THEIR TESTIMONY SHOULD BE CREDITED AS FALSE EVIDENCE.

The referee found that Evans and Willis were "utterly lacking in credibility." (Referee's Report at p. 8) The referee, nonetheless, was unable to say with any certainty that Willis lied at trial. (Referee's Report at p. 10) As the referee said regarding both Evans and Willis, "the court has scant ability to discern whether they are lying now or are lying then." (Referee's Report at p. 6) [57]

The referee's findings regarding Wills and Evans are entirely reminiscent of a famous scene from the movie "Witness for the Prosecution," and Charles Laughton's famous question for the lying witness, played by Marlene Dietrich:

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[57] While the Referee claimed she had this "scant ability" regarding Evans' 1989 trial testimony, she proceeded to find that "[t]here is little doubt but that he lied at trial." (Referee's Report at p. 6)

Sir Wilfred: And now today you've told us a new story entirely. This question is, Frau Helm, were you lying then, are you lying now, or are you now in fact a chronic and habitual LIAR?!"

If Rufus Willis and Bobby Evans are "utterly lacking in credibility," then nothing they said at the 1989 trial should be believed. If Willis and Evans – the State's principal witnesses – are chronic and habitual liars, then the State's case against Jarvis Masters is rotten to the core. Had the jury known what the referee now knows – that Willis and Evans are "utterly lacking in credibility" – they would have discounted their testimony as false evidence and Jarvis Masters would be a free man today.

D. JARVIS MASTERS WAS NOT THE AUTHOR OF THE TWO KITES ATTRIBUTED TO HIM AT THE 1989 TRIAL

The referee was convinced by Dr. Leonard's testimony that the two kites attributed to Jarvis Masters at the 1989 trial were not authored by him:

> Petitioner also presented the testimony of Dr. Robert Leonard, a forensic linguist. Dr. Leonard examined the "kites," or notes, which were written in petitioner's handwriting and which were offered into evidence in the underlying trial to prove petitioner's involvement in the conspiracy. Dr. Leonard compared the two kites (the "Questioned" or "Q documents") with several samples of writing known to be written by petitioner around the same time (the "Known" or "K documents"). He concluded that it was more likely that the kites were written by someone other than the writer of the known documents.
>
> Dr. Leonard testified convincingly, and no opposing expert was offered by respondent. [Footnote omitted.] (Referee's Report at pp. 14-15).

The referee's finding was heavily corroborated by other evidence. Willis' February 23, 2001 declaration states that one of the kites was copied in large part from a Woodard kite, and that the other one was copied from his own kites. (Pet. Ex. 22, at 4-6 ¶¶12,14) He admitted this to three investigators on three separate occasions: to investigators Pam Siller and Melody Ermachild on February 8, 2011, and February 23, 2001, and to investigator Chris Reynolds, in May 2010. (11 RHRT 594-596, 602-604; 10 RHRT 529-530, 534-535)

Dr. Leonard's conclusions, and Willis' admissions, are also corroborated by Willis' repeated admissions, even to the Attorney General that kites concerning this case were stored in his TV set, including the kites he gave to Jarvis Masters, or that he had him write. (Resp. Ex. II at pp. 5, 27, 29) Willis' admission that Masters copied the two kites from kites provided to him is also corroborated by evidence that transcription was routinely used by both Willis and the BGF. At the 1989 trial, Willis admitted that kites were sometimes written by several people as a coverup. (54 RT 13086-13087) State witness Bobby Evans also admitted that BGF leadership never wanted their handwriting on any document. (59 RT 13917) Defense witness Thurston McAfee further testified that Willis had others writing kites for him. (65 RT 14905) Indeed, Willis described himself as a BGF "transcriber" to San Quentin Officer Ollison. (45 RT 11749) Willis admitted that the second kite penned by Masters was written in response to the CDC's request that he provide them documents with more details. (54 RT 13088-89) The

trial court itself noted that one of the kites was an obvious transcription. (55 RT 13297)

By logic and reason, the answer to Question 1 can only be "Yes."

E. RUFUS WILLIS GAVE FALSE EVIDENCE IN 1989

As we noted at the outset of this brief, the prosecution's case against Jarvis Masters rested upon three legs:

1. The testimony of Rufus Willis;
2. The corroborating testimony of Bobby Evans; and
3. Two prison kites that were penned by Jarvis Masters.

The referee's finding that Bobby Evans lied at the 1989 trial removes one of these legs. The referee's finding that the two kites were most likely not authored by Jarvis Masters removes a second leg. The State's remaining case against Jarvis Masters, if it stands at all, stands upon a crumbling, entirely rotten, leg: the repeatedly recanted 1989 testimony of Rufus Willis, a man found by the referee to be "utterly incredible."

The referee's findings sidestep the rotten character of the State's case by declaring a dilemma. [58] Because Willis and Evans were chronic liars, the referee stated she could not affirm "the present trustworthiness" of their statements. The dilemma, however,

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[58] The Referee's dilemma may be in part the result of her lack of familiarity with the record, and her refusal to allow counsel to file proposed findings of facts and briefing regarding the law and the facts. (See, e.g., 15 RHRT 828; "Settled Statement Re: Off-the-Record Discussions Between Counsel and the Court on or about January 21, 2011, filed in the Marin County Superior Court on December 19, 2011 and filed herein on February 1, 2012.)

is entirely false. The issue is not their trustworthiness in the present; it is their trustworthiness at the time of trial.

There is a store of evidence on this issue, and the evidence is entirely in petitioner's favor.

1. Harold Richardson, Not Jarvis Masters, Was the Un-Named Fourth Co-Conspirator Identified by Rufus Willis

At the 1989 trial, Rufus Willis testified that four BGF members were principally involved in the killing of Sgt. Burchfield: himself, Lawrence Woodard, Andre Johnson , and a Fourth Co-Conspirator whom he identified as Jarvis Masters. (52 RT 12747, 12750, 12760, 12764) The evidence, however, overwhelmingly establishes that Harold Richardson, not Jarvis Masters, was the person identified by Rufus Willis as the Fourth Co-Conspirator.

At the Reference Hearing the parties stipulated that San Quentin Program Administrator J.S. Ballatore's August 22, 1986 report of her August 21, 1986 interview of Harold Richardson, and Harold Richardson's August 8, 1987 letter to Ms. Ballatore would be admitted into evidence, and the referee ordered them admitted. (14 RHRT 730-731) (The two exhibits are located at 1CT 237-243) No objections to Richardson's statements to Ballatore on hearsay or other grounds were made, and the evidence was admitted. (14 RHRT 730-731) In addition, the truth of Richardson's statements, as reported by Ballatore, and in his own handwriting, were not disputed by respondent, and no contrary evidence was offered.

As a result, it is undisputed in the record that Harold Richardson in August of 1986 was a BGF Lieutenant and "a member of the BGF hit squad." (1CT 237) *It is also undisputed that Richardson admitted to prison officials that he was one of the four BGF members who planned the June 8, 1985 hit on Sgt. Burchfield.* (*Id.* at p. 2) According to Richardson, the other planners were Rufus Willis, Andre Johnson, and Lawrence Woodard. (*Id.*)

Richardson, who stated that he knew "all the details about the Burchfield murder," identified ten C-Section BGF members as having been involved in the hit:

1. Himself as planner, sharpener, and one of the proposed executioners;
2. Rufus Willis, as a planner;
3. Andre Johnson, as a planner and executioner;
4. Lawrence Woodard, as a planner;
5. Redmond, who ordered the hit;
6. Carruthers, who cut the bed brace and sent it down to Richardson to sharpen;
7. Ingram (Richardson sent the bed frame to Ingram to cut. After the hit, Ingram was supposed to dispose of the knife);
8. Vaughn, as an execution messenger;
9. Gomez, as a back-up executioner; and
10. Daily (After the hit Daily was supposed to send the weapon to Ingram to dispose of it). (1CT 237-243)

Significantly, Jarvis Masters is not mentioned by Richardson in any of the roles ascribed to him at trial – as one of the planners, as the sharpener of the knife, or even as one of the ten individuals who had a major or minor role in the murder of Sergeant Burchfield.

Jarvis Masters also did not appear to qualify to be a member of the planning group. He was a common soldier in the BGF. (52 RT 12676) That is why Willis barely knew him. (8 PHRT 8388-8389 (1406-1407); 8404 (1422)) Harold Richardson, by contrast, was a BGF lieutenant and "a member of the BGF hit squad." (1CT 237) Why would a common soldier take the place of a BGF lieutenant on a BGF Commission?

The accuracy of the Richardson list is corroborated by the Marin County District Attorney's own list. The District Attorney twice identified for the jury the BGF members who were involved in the attack on Sgt. Burchfield. (40 RT 10831; 73 RT 16034) The District Attorney's list is nearly identical to Richardson's list. All ten of the individuals on the Richardson list are contained on the District Attorney's list. This by itself confirms the reliability of the Richardson list.

The only difference between the Richardson list and the District Attorney list, is that the District Attorney added the names of Michael Rhinehart and Jarvis Masters. Yet *only* Rhinehart and Masters share a remarkable distinguishing characteristic which sets them apart from everyone else. They are the only Carson-Section

members of the BGF who have been identified as having opposed the attack on Sgt. Burchfield:

(1) Rhinehart's opposition to the attack is uncontested in the record. When Willis first came forward, he told the authorities that Rhinehart opposed the attack. (Pet. Ex. 57) Rhinehart, himself, confirmed this fact. (5 RHRT 319)

(2) Willis told three different investigators on three different occasions that Jarvis Masters opposed the attack on Sgt. Burchfield. (Pet. Exs. 21, 22, 28, 29, 33; 11 RHRT 590, 592-605) He also executed two declarations under penalty of perjury affirming Masters' opposition. (Pet. Exs. 22, 29) Willis' statements are corroborated by both Rhinehart and Woodard. (5 RHRT 319, 321; 4 RHRT 222-223, 228, 233, 235) Indeed, Rhinehart testified that he was present when Masters voted against the plan. (5 RHRT 317-319)

Willis' own testimony reinforces the conclusion that Harold Richardson, not Jarvis Masters, was the Fourth Co-Conspirator. Willis was able to give a precise description of the physical characteristics of the Fourth Co-Conspirator, which by itself suggests that he knew this person well. But Willis' description matches that of Harold Richardson, and is nothing like that of Jarvis Masters.

A chart setting forth this information with copies of cited pages of the

record, was introduced at the Reference Hearing. (16 RHRT 835, 386) [59] A copy of the chart is set forth on the following page.

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[59] The parties stipulated that a Demonstrative Exhibit including the chart would be deemed filed January 27, 2011. A copy of the stipulation was mailed to this Court on March 12, 2012.

Chart 1: WILLIS' DESCRIPTION OF THE FOURTH CO-CONSPIRATOR CLOSELY MATCHES HAROLD RICHARDSON, WHO ADMITTED HE WAS THE FOURTH CO-CONSPIRATOR

	Willis' Description of Fourth Co-Conspirator ("Askari")	**Harold Richardson**	**Jarvis Masters**
HEIGHT	5' 7" 54 RT 12970; 8 PHRT 8383 (1401)	5' 7½" 52 PHRT 14819 (7637)	6' 1" People's Ex. 87; 11 PHRT 9110 (2115)
WEIGHT & BUILD	175-180 lbs. 8 PHRT 8387 (1405) Chubby/Heavy, Stocky/Husky, "Had a stomach" 8 PHRT 8387 (1405)	185 lbs. 52 PHRT 14819 (7636) At 5' 7½" and 185 lbs., Richardson would be stocky and heavy (See MetLife Height & Weight Tables)	170 lbs. (People's Ex. 87) At 6' 1" and 170 lbs., (People's Ex. 87), Masters would be "slim." (See MetLife Height & Weight Tables)
HAIR	Bald/shaved head 8 PHRT 8386 (1404), 8389 (1407); 11 PHRT 9107 (2112)	Bald/shaved head 8 PHRT 8386 (1404), 52 PHRT 14819 (7637))	Hair a little longer; head not shaved 41 RT 11055-56
FACIAL TATOOS	Doesn't remember any from being 1' to 2' away from him 11 PHRT 9107 (2112)	No information	Tatoo on left cheek visible from 20' 11 PHRT 9109 (2114); Def. Ex. 1214B; 41 RT 11056
AGE	Looked old: 30s to late 20s 8 PHRT 8385 (1403); 54 RT 12970	29 years old: DoB 8-24-56 52 PHRT 14819 (7636)	23 years old: DoB 2-24-62 (People's Ex. 87; 95 RT 21551)
FACIAL HAIR	Doesn't remember any 11 PHRT 9107 (2112); 54 RT 13104	No information	Moustache and goatee 41 RT 11056
GLASSES	Wore glasses 8 PHRT 8384 (1402)	Richardson refused to testify as to whether he wore glasses in 1985 52 PHRT 14819 (7637)	Did not wear glasses 41 RT 11056-57

This evidence fits hand-in-glove with Richardson's 1986 and 1987 admissions. Thus, Harold Richardson, not Jarvis Masters, is the Fourth Co-Conspirator. Harold Richardson, who admits that he was the Fourth Co-Conspirator, Harold Richardson, who precisely fits Willis' description of the Fourth Co-Conspirator, Harold Richardson, who leaves Masters out of the group of ten conspirators. [60]

Petitioner submits that this evidence, by itself, warrants a new trial. Had the jury known that the man identified by Rufus Willis as the Fourth Co-Conspirator was Harold Richardson, not Jarvis Masters, and that Richardson himself admitted that he was the Fourth Co-Conspirator, and that Richardson was a BGF lieutenant, a member of the BGF hit squad, while Masters was only a common soldier, the outcome below would have been different.

2. Willis Admitted He Lied to Three Investigators on Two Occasions, and So Declared under Penalty of Perjury

Willis, the prosecution's principal inmate snitch-witness, was visited by Masters' investigators in February, 2001, in a Utah prison and gave a declaration that the referee found was freely given and

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[60] Sadly, the jury did not get to hear this evidence because the trial court ruled that Harold Richardson's 1986 and 1987 admissions were hearsay that did not fall within an exception to the hearsay rule. (12-13-88 RT 7; see also 2-15-89 RT 25; 1-9-89 RT 12; CT 2430, 2436, 2647) Petitioner's direct appeal strenuously challenges this exclusion of compelling evidence of innocence. (AOB 89-104; RB 22-52) At the Reference Hearing, however, the evidence was admitted, without objection.

uncoerced. (Referee's Report at pp. 9-10) Willis' signed declaration, which he reconfirmed in 2010, states, *inter alia,* that:

(a) He was coerced into testifying by the prosecutor's refusal to honor a prior agreement by investigators that he would be released from prison if he testified. (Pet. Ex. 22 ¶ 3)

(b) He did not initially tell the investigators that Masters was involved; rather, he only later agreed to implicate Masters because "Numark wanted to implicate Masters." (Pet. Ex. 22 ¶ 5)

(c) Numark told Willis he needed more from Johnson and Masters, and told him to get a complete account of what happened from Masters. (Pet. Ex. 22 ¶ 10)

(d) "Masters had nothing to do with the planning of the Burchfield killing." (Pet. Ex. 22, ¶¶ 16, 20)

(e) Masters "wasn't involved in the killing of Sgt. Burchfield." (Pet. Ex. 22 ¶ 5)

(f) Masters "did not play any role in the death of Sgt. Burchfield. (Pet. Ex. 22 ¶¶ 22, 31)

(g) Masters was not involved in the manufacture of the murder knife. (Pet. Ex. 22 ¶¶ 13, 14)

(h) Masters would not have been involved in making weapons. (Pet. Ex. 22 ¶ 13)

(i) The weapon was sharpened by "Chicken Swoop" (Vaughn) and perhaps "Tabari" (Ingram), not Masters. (Pet. Ex. 22 ¶¶ 13, 14, 20)

(j) The two kites penned by Masters were written under orders from Willis. (Pet. Ex. 22 ¶¶ 12, 15)

(k) Numark told Willis to get these kites. (Pet. Ex. 22 ¶¶ 10, 11, 12, 14, 15)

(l) The first kite written by Masters, the one that starts out, "Oh, we to change codes . . ." is copied, at least in part, from a kite written by Woodard. (Pet. Ex. 22 ¶ 12)

(m) The first kite is not about the murder weapon, but is instead about the BGF's stock of metal and knives after Burchfield was killed. (Pet. Ex. 22 ¶ 12) Willis did not understand the meaning of this kite. (Pet. Ex. 22 ¶ 12)

(n) Numark said the first kite was not enough to implicate Masters and told Willis to get Masters to write about how certain events occurred. (Pet. Ex. 22 ¶ 15)

(o) The second kite, the "Usalama Report." is copied from Willis' own writings. (Pet. Ex. 22 ¶ 15)

(p) Masters copied it from many reports that Willis had written and sent Masters. These reports were not factual. Masters had no way of knowing the information in the Usalama Report. (Pet. Ex. 22 ¶ 15)

Petitioner presented at the hearing the testimony of three investigators, two of whom met with Willis twice in 2001, and one who met with him again in 2010. Willis confirmed the truth of his recantations at each of these meetings, and declared so under penalty of perjury on two of those occasions. The referee, it should be noted, found that Willis's declarations were uncoerced.

(a) The 2001 and 2010 Meetings with Petitioner's Investigators

Rufus Willis met with defense investigators Melody Ermachild and Pam Siller on February 8, 2001, and February 23, 2001. (11 RHRT 596, 602) At the time, Willis was housed in a Utah penitentiary in Draper, Utah. (11 RHRT 588, 592; Pet. Ex. 28, at 1) During the course of the two meetings, Willis repeatedly admitted that he had lied at the 1989 trial, and that Jarvis Masters was completely innocent, as evidenced by his handwritten declaration, and thereafter by reviewing, revising, and signing a revised version of a typewritten declaration. (Pet. Exs. 22, 29; 11 RHRT 594-595, 603-604)

In May 2010 Rufus Willis also met with defense investigator Chris Reynolds at the federal institution where he was then housed. (10 RHRT 530) Willis again repeatedly and unqualifiedly admitted that he lied at the 1989 trial and stated that Jarvis Masters was completely innocent in the course of confirming the contents of his 2001 declaration. (Pet. Ex. 21, 26, 10 RHRT 529-530, 534-535)

(b) Willis, on his own, wrote a letter of apology to Jarvis Masters in 2001

In addition to executing the two declarations which exonerated Jarvis Masters, Rufus Willis wrote a letter of apology to Masters. (Pet. Ex. 30) *The letter was not solicited by investigators Ermachild and Siller, and was instead, totally Willis' idea* . (11 RHRT 596) In his letter, Willis told Jarvis Masters that he apologized "for all the

pain I've caused you and your family," and asked for Masters' forgiveness. (Pet. Ex. 30)

(c) Willis' May 22, 2005 letter to petitioner's counsel corroborates (1) his February 2001 declarations, and (2) his May and June 2010 statements that he hid exculpatory kite evidence in his television set

Willis' two 2001 declarations and his February 2001 statements to investigators Ermachild and Siller are also corroborated by a May 22, 2005 letter by Rufus Willis to petitioner's attorney Joseph Baxter. At the bottom of the letter, in which Willis asked for a "protective order," Willis added the following postscript: "PS Why Masters' lawyers never looked through my property in San Quentin – Hint Hint." Willis then placed his signature beneath the postscript. (Pet. Ex. 25)

Willis explained the significance of his postscript to investigator Chris Reynolds and attorney Joseph Baxter when they met him in May 2010. According to Reynolds, Willis told him that he had a television set that was part of his property which he used to hide kites on a regular basis, and that there were kites that were present and stashed in his television set. (12 RHRT 748-749) Willis told Reynolds that the kites had information about this case, and particularly about various things that had happened. (*Id.*)

Willis also corroborated this information when he spoke to respondent's counsel Alice Lustre and Glen Pruden during a June 30, 2010 telephone call. The TV set was a 13-inch black-and-white television. (Resp. Ex. II at p. 28) While Willis admitted that some of the reports hidden inside his TV set related to the Burchfield case, he

refused to provide the Attorney General with any further incriminating details. (*Id.* at 32) Moreover, he refused to answer the most important questions asked him: Whether what he told the District Attorney was truthful, and whether someone told him what to say. (Resp. Ex. II at 27, 28, 36)

After the Court admitted a transcript of Willis' telephone conversation with respondent's counsel, over petitioner's objection, petitioner sought to call petitioner's counsel, Joseph Baxter, so that he could testify regarding his own conversation with Willis in May 2010 about the kites in the TV set. Petitioner offered to prove that Willis told Baxter that all of the kites prior to the murder of Sgt. Burchfield were destroyed, but that Willis placed kites created *after the murder* in his television set. (14 RHRT 790; 16 RHRT 849-850) *Significantly, kites that he gave to Jarvis Masters, or that he had Mr. Masters write, were placed in Willis' TV set, which thereafter disappeared.* (16 RHRT 849-850)

This body of evidence, and Willis' refusal to talk about the "Hint Hint" letter when he spoke to the Attorney General further confirms the fact that his 1989 testimony about the two kites was a lie.

3. "A Witness Willfully False in One Part of Testimony Is Not to Be Trusted in Others"; Willis' Lying Character Supports the Conclusion That He Lied at Trial

The rule that a witness willfully false in one part of his testimony is not to be trusted in others is followed in every court of this State. *See, e.g.*, CALJIC No. 2.21.2; *People v. Lavergne* (1971)

4 Cal.3d 735, 742 ["a witness willfully false in one part of his testimony is not to be trusted in others."]

The two Masters kites were the centerpiece of the prosecution's case against Jarvis Masters. (73 RT 16033 ("central to our case"), 16070; 74 RT 16341 ("like a choke chain" around the defendants' necks)) The fact that Willis lied about the centerpiece of the State's case, as well as the fact that he actually identified Richardson as the Fourth Co-Conspirator, means that Willis' accusations against Jarvis Masters should be regarded as false evidence.

The referee's finding that Rufus Willis was "utterly lacking in credibility" (Referee's Report at 8) re-enforces this conclusion. Testimony "under oath . . . means nothing" to Willis. (*Id.*) Willis "would and will say anything if he thinks it will get him attention that will gain him release from prison." (Referee's Report at 10)

California Evidence Code sections 780, subdivisions (e), (h), (i) and (k), and section 786, require the same result. Evidence that a witness is a habitual liar supports the conclusion that a witness' testimony under oath is false. See *People v. Harris* (1989) 47 Cal.3d 1047, 1082; *People v. Ramus* (1997) 15 Cal.4th 1133, 1179. Thus, given the facts that (1) the trial court effectively found that Rufus Willis lied about the kites, (2) the additional fact that a witness willfully false in one part of his testimony is not to be believed in others, and (3) the further corroborating fact that Rufus Willis is a chronic and habitual liar, the preponderance of the evidence points

to the conclusion that his accusations against Jarvis Masters should be regarded as false evidence.

4. While Willis Was Motivated to Lie When He First Came Forward, and When He Testified, His 2001 and 2010 Exoneration of Petitioner Was Against His Penal Interest

The evidence shows that *every* time that Willis gave evidence on behalf of the State, or spoke with government agents or lawyers, he was motivated to lie. In contrast, when he spoke with petitioner's representatives and signed, re-signed, and then reconfirmed his declaration absolving petitioner, he had nothing to gain by not telling the truth.

(a) Willis was motivated to lie in 1985 when he was offered a deal by Numark

A witness's motivation to lie supports the conclusion that he lied. *Evidence Code* § 780 subd. (f); *People v. Claxton* (1982) 129 Cal.App.3d 638; *People v. Knox* (1979) 95 Cal.App.3d 420.

The referee found that Willis "would and will say anything if he thinks it will . . . gain him release from prison" (Referee's Report at p. 10) Thus, when Willis first came forward on June 11, 1985, he wrote a letter to the Warden and agreed to provide information "if I can get released out of prison for my testimony." If he can't get this deal "then I got nothin' to say." (Pet. Ex. 55)

The deal was sealed on June 20, 1985, when Willis was brought to the hospital at San Quentin. DA Investigator Numark assured Willis that he would be released a few years after the trial. (54 RT 13062:13-13063:16) Each time he saw Numark, Willis

wanted to make sure that the deal was still in order. Numark continued to assure him that he would be released. (55 RT 13174:13-15, 13174:27-13175:1) These facts are completely undisputed, and have been confirmed and reconfirmed every time Willis has spoken since 1989. (See pp. 137-147, *infra.*)

(b) Willis was motivated to lie when he testified

It is also undisputed in the record that Willis was motivated to lie when he testified, but for different reasons. Willis testified that at a certain point he realized that Numark did not have authority to make any deals with him. By that time, it was too late to "back out of it." (27 PHRT 11407:11-15 (4343)) Willis believed that if he backed out he would be put back in prison, and possibly set up by the Department of Corrections. (27 PHRT 11407-11408 (4343-4344); 29 PHRT 11415:22-25 (4551))

Willis' February 23, 2001 declaration reconfirmed this testimony. (Pet. Ex. 22 at 1-2, ¶¶ 1-4, 20, 22) He again reconfirmed these facts when he met with investigator Chris Reynolds in May 2010. (Pet. Ex. 26; 10 RHRT 529-530, 534-535) He also told Reynolds that the District Attorney threatened to put him back in San Quentin if he didn't testify, and he took that as a death threat. (14 RHRT 748-749)

Willis provided further detail when he spoke to respondent's counsel on June 30, 2010. Willis stated that after Berberian said there would not be any deals, Willis told Berberian that he had nothing "else to say to you guys absent everything that I've been

promised" and told Berberian "[D]on't count on my testimony." At that point Berberian threatened to throw Willis' "ass back in San Quentin." But when Willis refused to back down, Berberian changed his tone and assured Willis that he would get what Numark promised him "when this case is over." (Resp. Ex. II at 26:17-27:12)

Willis' statements that the District Attorney made these threats and promises to get Willis' testimony against Masters were not challenged at the Reference Hearing.

(c) Willis had no motivation to lie every time he came forward to exculpate Jarvis Masters. His exoneration of Jarvis Masters is against his penal interest

Unlike each of the instances when he came forward against Masters to get a deal to get out of prison, or the instances when he testified against Masters, out of fear that he would be thrown back in San Quentin and be killed, Rufus Willis had no motivation to lie whenever he came forward to exculpate Jarvis Masters. He had no motivation to lie in 2001 when he spoke to Melody Ermachild and Pam Siller, when he executed his February 2001 declarations, when he wrote a letter of apology to Jarvis Masters, when he wrote his "hint-hint" letter to attorney Baxter, and when he spoke freely with investigator Chris Reynolds and attorney Baxter in 2010.

The referee specifically found that the statement he gave to investigators Melody Ermachild and Pam Siller was uncoerced. (Referee's Report at p. 9) The referee also specifically found that the investigators' testimony that their meetings with Willis were friendly and voluntary was credible. (Referee's Report at p. 9)

Willis' 2001 declarations, moreover, and his statements to defense investigators are clearly against his penal interest. Willis has admitted that he was intimately involved in the murder of Sgt. Burchfield. While he testified under a grant of immunity, his admission that he lied essentially voids his immunity agreement. (Pet. Ex. 20, at 1-4, ¶¶ (1), (7), (8)) He is now subject to prosecution for the murder of Sgt. Burchfield.

Willis' multiple admissions that he lied also interfere with his chances of ever obtaining parole. As part of the deal for his trial testimony, the District Attorney agreed to assist in his parole. (Pet. Ex. 20 at 3, ¶ (6)) Admitting that he lied when he testified for the State in 1989 clearly jeopardizes his chance of ever obtaining parole.

5. The Precise Unanimity of the Richardson, Rhinehart, Woodard and Willis Exonerating Evidence Points to Masters' Innocence and Supports the Conclusion that Willis Lied at the Trial

Richardson, Rhinehart, Woodard, and Willis each came forward with their evidence at different times, and under different circumstances. Richardson came forward in 1986 and spoke only to the State. Willis first came forward in 2001, wrote a significant letter in 2005, and again came forward in 2010. (10 RHRT 529-545) Rhinehart spoke to no one, and only came forward in 2011. Woodard, who has been in solitary confinement for 25 years, also came forward in 2011.

There is absolutely no evidence of any communication between these four witnesses. Yet in every important detail, the new evidence from these four witnesses is one and the same. Their evidence is charted on the following pages.

Chart 2: EVIDENCE THAT JARVIS MASTERS OPPOSED THE MURDER OF SGT. BURCHFIELD

RICHARDSON	RHINEHART	WOODARD	WILLIS
Jarvis Masters was not one of the four planners. (1CT 237-243) (See pp. 66-67, *supra.)*	Jarvis Masters voted against the plan. (5 RHRT 319)	Jarvis Masters voted against the plan (4 RHRT 222-223)	Jarvis Masters was opposed to the plan to murder Burchfield. (Pet. Ex. 22 ¶ 18)
Jarvis Masters was not one of the 10 people involved. (1CT 237-243) (See pp. 66-67, *supra*)	Rhinehart present at the meeting when Jarvis Masters voted against the plan to murder Burchfield. (5 RHRT 319-320, 6 RHRT 332-333)	Rhinehart present at the meeting when Jarvis Masters voted against the plan to murder Burchfield. (4 RHRT 224)	Jarvis Masters "did not play any part in the death of Sgt. Burchfield. (Pet. Ex. 22 ¶ 22)

Chart 3: EVIDENCE THAT JARVIS MASTERS WAS NOT INVOLVED IN THE PLANNING OF THE MURDER OF SGT. BURCHFIELD

RICHARDSON	RHINEHART	WOODARD	WILLIS
Jarvis Masters is not one of the four planners identified by Richardson. (1CT 237-243) (See p. 66-67, *supra*)	Rhinehart was second in command of the BGF in C-section at the time of the attack on Burchfield. (5 RHRT 314) Richardson told him that the plan came from Redmond. (5 RHRT 318)	The plan came from Redmond and Willis. (4 RHRT 222)	Jarvis Masters "wasn't involved" with the killing of Sgt. Burchfield. (Pet. Ex. 22 ¶ 5) "Masters had nothing to do with the planning of the Burchfield killing." (Pet. Ex. 22 ¶¶ 6, 20
Richardson said he was familiar with all the details of the attack on Burchfield. (*Id.*) Yet Jarvis Masters is not one of the 10 C-section BGF members identified by Richardson as having been involved in the hit. (*Id.*)	Jarvis Masters voted against the plan and was disciplined for his opposition. (5 RHRT 319; 6 RHRT 332-333) He was not aware of any role that Masters had in the attack. (5 RHRT 321)	Jarvis Masters expressed his opposition and was disciplined for his opposition and was therefore excused from group meetings. (4 RHRT 222-223, 228, 233, 235)	Masters "did not play any role in the death of Sgt. Burchfield." (Pet. Ex. 22 ¶¶ 22, 31) Masters said that he was against doing the hit. (Pet. Ex. 22 ¶ 18)

Chart 4: EVIDENCE THAT JARVIS MASTERS WAS NOT INVOLVED IN THE MANUFACTURE OF THE WEAPON

RICHARDSON	RHINEHART	WOODARD	WILLIS
Richardson "knew all the details about the Burchfield murder." (1CT 237-243) Masters not listed as one of the ten people involved. (*Id.*) Richardson identifies three people, including himself, involved in making the weapon. Masters is not one of them. (*Id.*)	Carruthers, Ingram and Vaughn were involved in the manufacture of the weapon. (6 RHRT 338, 339, 342)	Masters expressed his opposition and indicated his unwillingness to go along with the plan. As a result Woodard placed Masters on discipline, stripped him of responsibilities, and excused him from group meetings. (4 RHRT 223)	Masters was not involved in the manufacture of the murder knife. (Pet. Ex. 22 ¶¶ 13, 14) Masters would not have been involved in making weapons. (Pet. Ex. 22 ¶ 13)
			The weapon was sharpened by "Chicken Swoop" (Vaughn) and perhaps "Tabari" (Ingram), not Masters. (Pet. Ex. 22 ¶¶ 13, 14, 20)

6. Willis Testimony Is Impeached by the Fact That His Testimony Was the Result of Promises and Threats by the District Attorney

This Court's Question 3 asks whether threats and promises were made to Rufus Willis by anyone working for the District Attorney's office, and whether Willis' trial testimony was affected by these threats and promises. While petitioner sets forth a complete response to this question at pages 137-147, *infra*, the answer to Question 3 clearly bears on the answer to the question of whether false evidence was introduced. Informants are unreliable precisely because they are looking for something in return, and testimony obtained as a result of coercion is *per se* unreliable. See, e.g., *People v. Blodgett* (1995) 10 Cal.4th 330, 344-345.

What is perhaps most remarkable about this case is that it has always been undisputed – during the preliminary hearing, at the 1989 trial, and at the 2011 Reference Hearing – that false promises were made to Rufus Willis to obtain both his evidence and his testimony against Jarvis Masters, and that Willis' release from prison hinged on getting something in writing from Masters. At the Reference Hearing, moreover, testimony and evidence that continuing promises and threats were employed to obtain his testimony went unchallenged. (See pp. 137-147, *infra*)

Simply stated, Jarvis Masters was only named *after* Numark falsely promised Willis that he would be released if he could corroborate what he said. (10 PHRT 8800-8801 (1809-1810); 54 RT 1319) Thus, Numark asked for something in writing from Masters after Willis named Masters. Willis' release from prison hinged on

getting Masters to admit his guilt in writing. (9 PHRT 8657:21 (1670), 8658:1-2, 14-15 (1671), 8680:8-10 (1693); 54 RT 13088-13090) [61] (See pp. 145-148, *infra.*)

Willis performed with lightening speed. Only fifteen minutes after his return to his cell, *after the deal with Numark was made*, Willis procured Masters' "Usalama report," the centerpiece of the State's case against Jarvis Masters. (9 PHRT 8657, 8659, 8680 (1670, 1672-1673, 1693); 10 PHRT 8810:15-18 (1819); Pet. Ex. 22 at ¶¶ 3, 9, 15; 54 RT 13062; 73 RT 16033, 16070, 74 RT 16341)

At the Reference Hearing further evidence of promises to Willis, and evidence of actual threats upon Willis were introduced by both petitioner and respondent. According to Willis' recorded statement to Berberian's counsel, the District Attorney threatened Willis, promising that he would throw his "ass back into San Quentin" if he didn't testify. [62] (Resp. Ex. II at 27:5-12) Mr. Berberian finally relented and assured him that he would be released after he testified. Significantly, Mr. Berberian was not called to refute Willis' claim. (See pp. 138-144, *infra.*)

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61 Willis stated in his February 23, 2001 declaration: "I worked with him [Numark] to create evidence for the arrest of Woodard and Johnson and Masters, under the expectation that I would be released for my cooperation. . . . Numark wanted to implicate Masters. Numark was interested in anyone who I could say was at any meetings on the yard prior to Burchfield's killing." (Pet. Ex. 22 ¶¶ 3, 5)

62 Willis also told this to investigator Chris Reynolds when he interviewed him in May 2010. (10 RHRT 534-543; Pet. Ex. 21, 26)

7. Willis Admitted to Fellow Inmates that He Made a Deal to Get out of Prison

Even before the 1989 trial in this case, Willis admitted to his fellow inmates that he had made a deal to get out of prison.

In 1987, Willis was an inmate at the Marin County Jail. (68 RT 15280) While housed there, Willis told trustee Julie Cader that he had made a deal under which he would serve eight years in prison. (68 RT 15279-15280) He said he "would do whatever he had to make sure he wouldn't spend the rest of his life in prison." (68 RT 15281)

In 1988, Willis was transferred to a prison in Carson City, Nevada. While there, Willis told fellow inmate Darrell Wright that although he was serving a life sentence, he had come up with a plan to get out of prison. (70 RT 15512, 15519-21)

CONCLUSION

The referee's Question 1 findings against Jarvis Masters are not entitled to deference. By disregarding the question posed by the Court and imposing her own legal standards – a scienter requirement, and a new evidence requirement – the referee committed legal error. The referee compounded these errors by imposing materiality requirements outside of both her provenance and her knowledge of the record and the law. The referee further compounded her errors by making findings inconsistent with her own findings. *In re K.D.* (2004) 124 Cal.App.4th 1013, 1018-1019. Finally, and most significantly, the referee failed to consider the bulk

of the evidence, and failed to weigh the evidence. *Estate of Larson* (1980) 106 Cal.app.3d 560, 567.

Notwithstanding her erroneous general conclusions, the referee's specific findings require a "yes" answer to Question 1. The referee specifically found that Bobby Evans provided false evidence that Masters voted for the hit. The referee was convinced by Dr. Leonard's testimony that the two kites attributed to Jarvis Masters at the 1989 trial – the centerpiece of the State's case – were most likely authored by someone else. (Referee's Report at pp. 14-15; 73 RT 16033, 16070; 74 RT 16341) The referee also found that the two principal witnesses against Masters – Evans and Willis – were "utterly lacking in credibility." (Referee's Report at p. 8) Thus, by the referee's specific findings, the case against Jarvis Masters was rotten at its core.

This corruption extended to every aspect of the State's case. Bobby Evans' and James Hahn's trial testimony, and discovery produced by the prosecution grossly understated Evans' relationship as a snitch with law enforcement and, in particular, with CDC agent James Hahn. Before Willis first uttered petitioner's name , DA investigators told him he would be released if he could provide the information alluded to in his letter to the Warden. And after he spoke petitioner's name he was told he needed to get something in writing from Masters, if he wanted to get out of prison. (See pp. 138-144, *infra*.) By the time Willis was told he had been lied to, it was too late for him to tell the truth, if he wanted to stay alive.

Evans lied. That by itself requires a finding of "Yes" on Question 1.

As for Rufus Willis, if all of the evidence that Rufus Willis lied in 1989 is weighed against the evidence that he told the truth, nearly all of the evidence would be on the side which says that he lied. We know that he gave false evidence regarding the kites, the centerpiece of the State's case. (73 RT 16033, 16070; 74 RT 16341) A witness wilfully false in one part of his testimony is not to be believed in other parts, and we know that he is a chronic liar. He has admitted that he lied, twice under oath, and to three investigators and three lawyers. We know that his testimony was a result of threats and false promises. And we know that the person he identified as Masters precisely matches Harold Richardson, who admitted his role, and left Masters out of the entire operation.

And what is on the other scale? What evidence do we have that this chronic liar told the truth in 1989, after he had been cornered, both by his own lies and the lies of the State? Nothing.

By logic and reason, the answer to Question 1 can only be "Yes."

Question 2:	***Is there newly discovered, credible evidence indicative of petitioner's not having been a participant in the charged offenses? YES.***

The referee's view and analysis of this question is stunningly incomplete, and misunderstands both the trial record and the law.

Curiously, the referee considered only two items of evidence in conjunction with Question 2:

1. Evidence that the murder weapon was not dropped from the fourth tier to the second tier, but was passed along the second tier.
2. Dr. Leonard's testimony that Jarvis Masters was most likely not the author of the two kites, which the court found convincing. (Referee's Report at pp. 14-15)

With regard to the former, with referee chose to ignore the *one* area in which all of the inmate-witnesses at the hearing were in agreement.

With regard to the latter, the referee made a fundamental legal error. In discounting the significance of Dr. Leonard's evidence, the referee "pointed out" that Dr. Leonard's testimony "is not 'new' evidence" because,

> "At 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." (Referee's Report at p. 15, fn. 9)

While not saying so explicitly, the referee is saying implicitly that "new" evidence does not include evidence which could have been presented at trial. In doing so, she is importing the law from motions for a new trial. In habeas corpus proceedings, however, once the petitioner has presented newly discovered evidence, he may thereafter present "'any evidence not presented to the trial court and which is not merely cumulative in relation to evidence which was presented at trial' (citation) insofar as it assists in establishing his innocence." *In re Hall* (1981) 30 Cal. 3d 408, 420, cited with approval, *In re Lawley* (2008) 42 Cal.4th 1231, 1238.

Inasmuch as petitioner is presenting other newly discovered evidence, Dr. Leonard's testimony is admissible under Question 2 irrespective of whether it could have been introduced in 1989. [63] It clearly assists the trier of fact in establishing petitioner's innocence, and it is not merely cumulative. *Id.*

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63 Again the Referee displays a misunderstanding of the record. Her statement that petitioner called a handwriting expert, and chose not to offer linguistic testimony at the 1989 trial, is both incorrect and without foundation in the record. (Referee's Report at p. 15, n. 9)

The prosecution called the handwriting expert who identified the two kites as having been handwritten by Jarvis Masters. (67 RT 14388-14389) While the defense called a handwriting expert, it was solely for the purpose of testifying regarding an alteration of the document. (65 RT 14840-14844, 14875) Thus, the District Attorney twice told the jury in his closing argument that the defense did not rebut the testimony of their handwriting expert. (74 RT 16317, 16341)

The referee's claim that the evidence could have been introduced in 1989 is also without foundation in the record. Dr. Leonard was called in the reference hearing to *corroborate* Rufus Willis' 2001 admission that Jarvis Masters did not author the kites. Without Willis' admission, Dr. Leonard's testimony would have been attacked as speculative and without foundation in the record. Diligent trial counsel are not required to present expert testimony that is not corroborated by other evidence.

The referee, in minimizing the impact on Question 2 of Dr. Leonard's testimony, also made a striking error with respect to what occurred at trial:

> "However, 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 (sic) 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." (Referee's Report at 15; emphasis added)

It is difficult to imagine a more fundamental misunderstanding of the trial record. While it is true that Masters was tried as the sharpener of the weapon, he was primarily charged and convicted for being a member of the BGF leadership (the BGF "Central Committee") that approved the plan to murder Sgt. Burchfield. (See, e.g., 40 RT 10811-10815; 52 RT 12740, 12747, 12759-12760; 53 RHRT 12889; 58 RT 13711, 13725-13726; 73 RT 16048, 16050) The lynchpin of the prosecution's case, moreover, was that Jarvis Masters was one of the planners, and perhaps the principal architect of the plan. (52 RT 12735, 12740-12741, 12749, 12761; 53 RT 12891; 54 RT 12946-12947)

The Information read to the jury specifically charged Jarvis Masters with approving the selection of Sgt. Burchfield for the hit at a June 7, 1985 meeting of the BGF Central Committee. (40 RT 10811-10812) The District Attorney also read from the portion of the Information that charged Jarvis Masters with approving the selection of Andre Johnson to carry out the execution at the June 7 BGF

Central Committee meeting. (40 RT 10812-10813) The Information read to the jury also charged Jarvis Masters with giving orders to other BGF members, and with planning a second hit upon a San Quentin staff member. (40 RT 10813-10815)

In his opening statement to the jury, the District Attorney also told the jury that Jarvis Masters sat on the BGF Commission in C-Section when plans were made to kill Sgt. Burchfield. (73 RT 16048) And he told the jury that Woodard and Masters, "being members of the BGF Central Committee in Carson-Section, gave the final approval for the selection of Andre Johnson to carry out the murder of Sergeant Burchfield." (73 RT 16050)

Thus, Jarvis Masters was *not* tried as a messenger, and the fact that he was willing to pass along information *after* the killing took place – and, indeed, under orders from Willis who was already taking orders from Investigator Numark – is entirely irrelevant to what he was accused of at trial. In addition, the evidence is uncontroverted that the kites in question were written *after* the murder of Sergeant Burchfield. This would not make Masters either an aider and abettor or co-conspirator in the murder of Burchfield.

California law is well-settled in two areas: First, any overt act committed by a co-conspirator must be one that took place *before* the completion of the conspiracy's objective. See *Penal Code* sections 182 (conspiracy defined), 183 (conspiracy - limitation of statute), 184 (acts effectuating conspiracy); *People v. Brown* (1991) 226 Cal.App.3d 1361; *People v. Zamora* (1976) 18 Cal.3d 735.

Second, there is no longer a combined classification of accessory before the fact (one who aids a principal before the crime) and accessory after the fact (one who aids a principal after the crime). *Penal Code* section 971 (Abolition of Distinction Between Accessory and Principal) An accessory is someone who, after a felony has been committed, aids a principal who was involved in the commission of a felony. *Penal Code* section 32 (Accessories)

The referee's findings appear to be based on the theory that Dr. Leonard's testimony establishing that Masters did not author the kites would not necessarily absolve Masters of being a co-conspirator because he was following orders of the BGF, which had through some of its members agreed and carried out a plan to kill Burchfield. While the referee's factual premises are false – Masters was actually taking orders from Willis who was acting under the State's guidance – even if the premises were true, Masters' conduct would at most be a violation of *Penal Code* section 32, as an accessory after the fact. Masters, nonetheless, was not charged or tried for such a crime.

Apparently, the referee did not understand Question 2. The second question does not ask whether newly discovered evidence is true or false, but only whether it is "credible," i.e., whether it is "capable of being believed." *Webster's Encyclopedic Unabridged Dictionary of the English Language* (Dilithium Press, Ltd. 1989)

Second, under Question 2, the evidence need not be "new." It need only be "newly discovered."

Third, the newly discovered evidence need not *prove* that petitioner did not participate in the murder of Sgt. Burchfiled. It need only be *indicative* of his non-involvement in the murder.

Fourth, the referee also did not consider her own relevant findings:

1. "From all the evidence submitted, it is clear that Evans and Willis are utterly lacking in credibility." (Referee's Report at p. 8) Inasmuch as the State's case is founded upon the testimony of these two witnesses, the fact that Evans and Willis are utterly lacking in credibility is "indicative of petitioner's not having been a participant in the charged offenses." Inasmuch as the referee's conclusion is based upon the evidence introduced at the evidentiary hearing, this constitutes "newly discovered" evidence.

2. "There is little doubt but that Evans lied at trial." (Report, at p. 8) Inasmuch as the referee's conclusion is based upon the evidence introduced at the evidentiary hearing, this constitutes "newly discovered" evidence.

3. The referee found that Willis' recantation to investigators Melody Ermachild and Pam Siller was uncoerced, which is newly discovered evidence suggesting at least that his recantation is credible – evidence which was more-than-amply corroborated. (Referee's Report at p. 9)

4. "Dr. Leonard testified convincingly . . . that it was more likely that the kites were written by someone other than" Jarvis Masters. (Referee's Report at p. 15) This is "newly discovered

credible evidence" which goes to the heart of the prosecution's case, and entirely undercuts Willis' testimony regarding the kites.

5. The referee agreed with petitioner that Bobby Evans had more contacts with law enforcement than was disclosed at trial. (Report, at pp. 11, 16) Indeed, as discussed above at pages 59-60, the minimum number of these additional contacts was 30. The evidence introduced in the trial, however, was that Evans had been an informant on only one occasion prior to becoming an informant in this case. (58 RT 13832, 13834-13836, 13838; 59 RT 13985) The referee also treats as a "fact" that "Evans was a suspect in the 'Beasley Senior' case, and that this was "new information" for purposes of the habeas proceeding. (Referee's Report at p. 11) That the referee erred in treating both of these examples of Evans-related new evidence as of "minor impact" and excusable because not disclosed to the prosecutors betrays a fundamental misunderstanding both of the trial record and of the law regarding knowledge by investigating evidence of *Brady* material, which must be imputed to the prosecutors. (See pp. 168-169, *infra.*)

Fifth, the referee's findings do not go far enough since the referee misunderstood Question 2, and entirely failed to answer it. She completely failed to consider the bulk of the newly discovered evidence indicative of petitioner not having been a participant in the charged offense. Petitioner will therefore marshal the relevant evidence, apply the legal standard to the evidence, and answer Question 2 in its entirety.

A. THE RICHARDSON EVIDENCE

The newly available [64] Richardson evidence is credible. Indeed, its credibility was unchallenged at the reference hearing. Richardson's credibility was also accepted by the California Department of Corrections, the prosecuting agency in this case. As noted in the J. S. Ballatore report, **[12 WORDS REDACTED] [CITATION REDACTED]**

The Richardson evidence far surpasses the "capable of being believed" test. The evidence is faultless. Every other piece of evidence, coming from all corners, agrees with it, either in whole, or in part. The hearing testimony of Rhinehart and Woodard corroborates it. The Willis declaration corroborates it. The Willis identification of the Fourth Co-Conspirator corroborates it. Even the District Attorney's list of those involved in the conspiracy corroborates the authenticity of the Richardson list of ten. (A full discussion of the Richardson evidence is set forth in the Question 1 discussion, at pp. 65-71, *supra.*)

The Richardson evidence also answers everything that is puzzling or disturbing about the evidence in this case. It explains

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64 Inasmuch as the Richardson evidence could not be used in 1989, it is certainly "newly discovered" in the Due Process of Law sense: It would be utterly unfair to Jarvis Masters to have this evidence, yet not be allowed to use it. The Richardson evidence, in any case, is admissible, for purposes of Question 2, under *In re Hall* (1981) 30 Cal.3d 408, 420 because "it assists in establishing (Masters') innocence." The Richardson evidence is also admissible for Question 1.

why Willis gave a description of Richardson when asked to describe Masters. It also explains why the DA investigators told Willis and Evans that they "needed all three," or needed more against Masters They knew that there was a hole in the evidence against Masters. That is the reason why the two kites were fabricated.

By logic and reason, the answer to Question 2 can only be "Yes."

B. THE EVANS EVIDENCE

The Evans evidence also requires a "Yes" answer to Question 2. Evans was one of the three legs of the State's case. By the referee's finding that Evans lied in 1989, and by the undisputed evidence that he lied about his work for James Hahn as an informant, that leg has now been removed.

C. THE KITE EVIDENCE

An abundance of new evidence has now come forward regarding the two kites, and every aspect of this evidence is indicative of innocence and capable of being believed. Dr. Leonard testified convincingly that the kites were more likely authored by someone other than Jarvis Masters (Referee's Report at pp. 14-15), and Willis has repeatedly admitted this. Indeed, petitioner offered to prove that Willis admitted that evidence to prove Masters' innocence was hidden in his TV set. (16 RHRT 849-850) Thus, again, by logic and reason, Question 2 can only be answered with a "Yes."

D. THE PRECISE UNANIMITY OF THE RHINEHART/ RICHARDSON/WOODARD/WILLIS EVIDENCE

The referee classified all the prison witnesses as having lied about something, and chose to ignore their testimony. Yet she pointed out nothing specifically. In addition, her focus seemed to be directed to disagreements between witnesses over broader questions about the BGF and the Burchfield attack, while no attention was given to the unanimity of agreement about details concerning Jarvis Masters' innocence.

Thus, the referee pointed out that prison witnesses were not in agreement about the members of the BGF Super Commission (i.e., not the C-Section group of four planners), whether there was a back-up plan, and Redmond's role. (Referee's Report at pp. 7-8) Yet none of these details have anything to do with Jarvis Masters' guilt or innocence.

The referee's lack of focus may stem from her failure to read the record, and her refusal to allow proposed findings of fact and briefing. [65] She got many of her facts wrong. For example, she believed that witness Welvie Johnson was housed in C-Section at the time of the attack. (Referee's Report at p. 7) He was not. He was in Alameda County Jail. (7 RHRT 366-367) She also failed to realize that Masters was charged with being a member of the C-Section BGF "Commission" and an architect of the plan.

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[65] See "Settled Statement Re: Off-the-Record Discussions between Counsel and the Court on or about January 21, 2011," filed in the Marin County Superior Court on December 19, 2011, and filed herein on February 1, 2012; 15 RHRT 828.

The referee also failed to weigh the credibility of the prison witnesses. She provided no specifics about alleged false statements, and ignored the unanimity of their testimony on all matters exonerating Jarvis Masters.

By any measure, Michael Rhinehart's testimony was *capable of being believed*. According to the State's evidence, he opposed the plan to attack Burchfield. (Pet. Ex. 57; 1 PHRT 7012, 7014 (64, 67)) Prior to his appearance in court on January 10, 2011, he had not seen Jarvis Masters for over 25 years. (5 RHRT 312)

Rhinehart has never testified about the attack on Burchfield, and it was clearly against his interest to testify. By now testifying he exposed himself to the death penalty for participating in the planned attack. (5 RHRT 308) The question, in any case, is not even whether Rhinehart's testimony, standing alone, is capable of being believed. The question is whether the body of Rhinehart/ Richardson/ Willis/Woodard evidence put forward by petitioner in this proceeding is capable of being believed. *Not whether it is true or false. But only whether it is capable of being believed.*

This evidence is so exactly on point and highly consistent that it is summarized by three charts and understood quickly and easily. Those charts can be found at pages 82 to 84, *supra*.

The remarkable consistency of the evidence cannot be explained away, by suggesting that Richardson, Rhinehart, Woodard, and Willis met and exchanged notes before providing their statements. Richardson, Rhinehart, Woodard, and Willis were not in communication with each other. Their evidence came forward at

entirely different times and under entirely different circumstances. Indeed, nothing – except Masters' innocence – can explain the fact that Richardson, who admitted his role as one of the four planners, precisely matches Willis' physical description of the Fourth Co-Conspirator.

By logic and reason, Question 2 can only be answered "Yes."

E. THE EVIDENCE IN THE RECORD THAT THE CONSPIRATORS WOULD NOT HAVE PASSED THE WEAPON UP AND DOWN BETWEEN THE SECOND AND FOURTH TIERS TO SHARPEN THE WEAPON IS CREDIBLE

Petitioner offered evidence that the murder weapon that was manufactured on the second tier was not sent to the fourth tier and then dropped down from the fourth tier to the second tier (as Willis testified at trial), but was instead passed along the second tier. This evidence tended to refute the State's position that Jarvis Masters, who was housed on the fourth tier, sharpened the weapon. (5 RHRT 321-323; 41 RT 11210) To support this claim, prison witnesses Lawrence Woodard, Michael Rhinehart, and Welvie Johnson all testified that having the weapon travel back and forth between the second tier and the fourth tier would be illogical, unnecessary, and a security risk.

The court ruled, however that the testimony of the prisoners did not "compel the conclusion that the prisoners chose the low risk method of passing the weapon":

> Petitioner claims that there is newly discovered evidence proving that the murder weapon was not dropped from the fourth tier to the second tier, as was argued at trial, but was "passed down the line." In support of this argument, several inmates testified that it

> would make no sense to drop a weapon down the tier because of the increased risk and danger.
>
> 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. [66] (Referee's Report at p. 14)

While there was disagreement as to whether a back-up plan existed, if it in fact existed, a backup plan would not necessarily mean that inmates on an upper tier had a weapon manufactured on a lower tier. According to the State's witnesses at the 1989 trial, many stabbing instruments were secreted throughout Carson section. (43 RT 11517; 44 RT 11592, 11598-600, 11613; 46 RT 12009, 12010, 12012, 12015; 52 RT 12682, 12701; 54 RT 13031-33, 13038-39, 55 RT 13188; 56 RT 13412) Indeed, Willis admitted he had possessed a collection of hacksaw blades. (54 RT 12997)

By any measure, moreover, the referee applied the wrong legal standard. The question for the referee was not whether she was "convinced" that the BGF would not have passed the weapon from the second tier to the fourth tier, and back down to the second tier. (Referee's Report at p. 14) Nor was the question whether the evidence "compel[led] the conclusion that the prisoners in fact chose the low-risk method of passing the weapon." (*Id.*) The question was

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[66] The Referee observed by way of footnote that if the BGF did in fact have a back-up plan to murder Sgt. Burchfield, "It would have required inmates on both the upper and lower tiers to have a spearing weapon available to do the deed." (Referee's Report at p. 14, n. 8)

instead whether the evidence offered by petitioner was "capable of being believed."

The testimony of Lawrence Woodard, Michael Rhinehart, and Welvie Johnson on this issue was both logical and reasonable. As the person who organized the plan, Lawrence Woodard testified that he did not, and would not have had the weapon go back and forth between the second tier and the fourth tier. As Woodard put it:

> A. So many things can go wrong. So many things can go wrong. Number one, the weapon can come off the line, which is a fish line we pass things back and forth, which is a string, a strong string you would tie things on. The weapon can come off the string. Number two, people can see it being passed back and forth. Number four, why would I have it come to the forth tier? I didn't need to see it.
>
> Q. So a weapon made out of metal makes noise?
>
> A. Quite a lot of noise.
>
> Q. So going up – over, up, and across, would also be a security issue, wouldn't it, for you guys?
>
> A. Not only that, but it – I had no reason to send a weapon to any tier. Beyond the tier it was on, that is.
>
> (4 RHRT 234:12-26)

Welvie Johnson corroborated Woodard's assessment. Until he debriefed and began working for the State, Welvie Johnson was among the three highest ranking officers in the BGF structure in California. (7 RHRT 361) Indeed, in 1985, at the time the weapon was passed, he was the BGF "Shot Caller" at San Quentin. (7 RHRT 362; **[REDACTED CITATION]** Asked about whether a weapon would have been sent up from the second tier to the fourth tier prior to

being used, Johnson stated that it would be a total breach of security:

> Q. If, for instance, BGF, generally, was going to do a hit, say, on a tier, and produce a weapon, would there be reasons why, if you were going to have a weapon on a second tier, you would want to send that weapon up to the fourth tier prior to it being used?
>
> A. No. That would be –
>
> Q. Why not?
>
> A. That would be – that would be a total breach of security because you would have to go past enemy elements, risk the fact of losing the weapon, and all kind of stuff. (7 RHRT 378:11-21)

Michael Rhinehart, who was housed on the second tier (6 RHRT 340) testified that he had knowledge of how the weapon got to Johnson. The weapon stock came from Carruthers, who was on one side of him, and the individual who was on the other side of him was supposed to sharpen it, and then make the spear and send it on to Johnson, who was on that side. (5 RHRT 320:27-321:7; 52 RT 12748, 12761, 12762) To his knowledge, the weapon never left the second tier. (5 RHRT 321:13-15)

The weapon stock originated off the bed brace in Carruthers' cell. (5 RHRT 322; 52 RT 12748, 12761, 12762; 1CT 237-243, Ballatore report) From there it went to Vaughn or Ingram to sharpen. (*Id.*) At Rhinehart's direction, Carruthers made a spear. (6 RHRT 331) The completed weapon then went to Johnson who carried out the attack. (*Id.*)

All of this occurred on the second tier, and Michael Rhinehart was in the center where he could observe things being fish-lined

back and forth in front of him. Rhinehart was located in cell 10. Ingram and Vaughn were located in cells 12 and 16 on one side of him, while Andre Johnson and Carruthers were located on cells 2 and 8 on the other side of him. (6 RHRT 340)

That the weapon stock originated from Carruthers' bed brace, and that Vaughn and/or Ingram were involved in sharpening it is amply corroborated. (52 RT 12748, 12761, 12762, 12763; 1CT 237-243 (Carruthers and Ingram) This was also Woodard's testimony at the evidentiary hearing. (4 RHRT 226) Michael Rhinehart also corroborated this fact. (6 RHRT 338-339, 342)

Willis also testified that Vaughn had exceptional skills in sharpening weapons. When Willis and Vaughn were housed together in D-section, Willis frequently relied upon Vaughn for sharpening weapons to be used in hits. (11 PHRT 8969-8970 (1974-1975), 8972 (1977)) Rhinehart also corroborated this. (6 RHRT 332)

Willis' February 23, 2001 declaration itself confirms that Vaughn (Chicken Swoop) and perhaps Ingram were knife sharpeners. (Pet. Ex. 22 ¶ 14) As Willis noted, Vaughn "was good at it, and I said he should make a knife to use for Burchfield." (*Id.*) Masters was not involved in making the weapon. (Pet. Ex. 22 ¶¶ 13, 14)

Given that (1) the weapon stock came from the second tier, (2) the weapon stock was manufactured on the same tier, (3) the best sharpener was on the second tier, (4) the weapon was sharpened on the second tier, (5) the weapon was finally assembled and made into a spear on the second tier, and (6) the finally assembled weapon

and spear were delivered to Andre Johnson on the second tier, there was no reason why the weapon needed to leave the second tier. Given the evident security risks associated with transporting the weapon from the second tier up to and across the fourth tier and then back down to the second tier, the testimony of Lawrence Woodard, Michael Rhinehart, and Welvie Johnson that the weapon never left the second tier was both logical and reasonable. While this testimony did not, as the referee put it, "compel the conclusion that the prisoners chose the low risk method of passing the weapon," the testimony was clearly capable of being believed.

By logic and reason, Question 2 can only be answered with a "Yes."

F. THE WILLIS DECLARATION IS CAPABLE OF BEING BELIEVED

Relying upon what she believed was her "scant ability to discern" whether Willis was lying now or lied when he testified at the 1989 trial, the referee found that she could not find by a preponderance of evidence that Willis' February 23, 2001 declaration was true. Under Question 2, however, the question is different. The question is whether the Willis declaration is *capable of being believed*.

By any measure, the Willis declaration is capable of being believed. Yet, surprisingly, and unexplainedly, the referee did not address this fundamental question. This failure to address the most obvious question concerning the most important witness again underscores the referee's lack of understanding of the questions posed by this Court.

The referee correctly noted that Willis' position has vacillated wildly over time. We have Willis when he first came forward in 1985. And we have many conflicting positions taken by Willis during the course of the preliminary hearing. [67] We have Willis' position at the trial in 1989. Finally, we have both Willis' position as set forth in his February 23, 2001 declaration, as corroborated by the testimony of three investigators, and two inmates (Julie Cader and Darrell Wright) and Willis' telephone statements to counsel for respondent on June 30, 2010, which are contradicted by other evidence.

For simplicity's sake, we devote ourselves to three principal faces of Willis: (1) Willis' February 23, 2001 Declaration, (2) Willis' 1989 Testimony, and (3) Willis' June 30, 2010 Telephone Conversation with the Attorney General.

In order to evaluate whether Willis' February 23, 2001 declaration is capable of being believed, petitioner will compare its credibility with the credibility of Willis' 1989 testimony, and the credibility of Willis' telephone statements to the Attorney General.

1. Willis' February 23, 2001 Declaration

(a) Willis' February 23, 2001 declaration Is corroborated by overwhelming Evidence in the record

Rufus Willis' February 23, 2001 Declaration (Pet. Ex. 22) is founded on verifiable facts. As the following chart demonstrates,

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[67] By counsel's estimate, Willis offered at least five different versions of his story during the course of the preliminary hearing. See, e.g., pp. 126-132, *infra*. Indeed, his position sometimes changes from minute to minute.

most of the facts are corroborated by the trial and preliminary hearing record.

Chart 5: RUFUS WILLIS' FEBRUARY 23, 2001 DECLARATION IS CORROBORATED BY OVERWHELMING EVIDENCE IN THE RECORD [68]

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
1	After Sgt. Burchfield's death, "I was desperate to . . . get out of prison."	Willis' letter to the Warden dated June 11, 1985, People's Ex.193-A (Pet. Ex. 55) 10 PHRT 8800 (1809) 26 PHRT 11186 (4125) 27 PHRT 11384 - 11385 (4320-21) 52 RT 12650-12651 54 RT 13062 54 RT 13063 54 RT 13064 55 RT 13174 55 RT 13175
2	"When I first contacted the authorities, I wrote a letter to the Warden. Then I talked with Sgt. Woodford and Lt. Spangler, who both told me that if I admitted I was the one who wrote it, I would be released from prison if a cooperated with the prosecution."	People's 193A is Willis' letter to the Warden, dated June 11, 1985, in which Willis agrees to provide information "if I can get released out of prison for my testimony." (Pet. Ex. 55)
3	"I was taken to the prison hospital to meet with the authorities."	54 RT 13062

[68] See Demonstrative Exhibit: Rufus Willis' February 23, 201 Declaration Is Corroborated by Overwhelming Evidence in the Record, filed January 27, 2011, and mailed to this Court on March 12, 2012.

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
3	"I met numerous times with the District Attorney's investigator, Numark, who promised me that if I testified for the prosecution, I would be released after the trial was over."	54 RT 13062 - 13064 55 RT 13171, 13174 - 13175
3	"I worked with him to create evidence for the arrest of . . . . Masters, on the expectation that I would be released for my cooperation."	9 PHRT 8657 (1670), 8680 (1693); 10 PHRT 8805 (1814)
3	"I was in the Sonoma County Jail when D.A. Berberian came to see me. Numark had told me not to tell Mr. Berberian that he had promised me my release. Numark said to me, 'This is our secret.' .... Mr. Numark had told me to keep quiet about his offers to me."	54 RT 13065 55 RT 13169 - 13170
4	"The D.A.'s office did not rescind my release deal until I had already accumulated evidence for them against Masters and the other two defendants, under the direction of Numark."	57 PHRT 11407 - 11408 (4343 - 4344) 57 PHRT 11415 (4351)

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
5	"Initially, I did not say Masters voted for the killing of Burchfield, because he wasn't involved."	(a) Mr. Numark's June 20, 1985 report filed herein as Pet. Ex. 57 (Discovery page 6395) states: "WILLIS said there was no real vote as WOODARD was his superior ...." (p. 2) (b) Willis' letter to the Warden leaves Masters out (People's Ex.193-A, filed herein as Pet. Ex. 55) 54 RT 13090 (c) Willis' memo to Numark, Discovery pages 555-556 (in reverse order), [K4(5)], advises Numark of what questions to ask Johnson, "Swoop" (Vaughn), "Gomasze" (Gomez), Richardson, and "Redman" (Redmond), how to trap Carruthers, and discusses a messages delivered to Woodard, but Masters' name is only mentioned in passing.
5	"Numark wanted to implicate Masters."	9 PHRT 8657 (1670) 11 PHRT 8988 (1993) 10 PHRT 8805 (1814) 54 RT 13088 54 RT 13090

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
6	"Masters had nothing to do with the planning of the Burchfield killing. It all started with Redmond and Woodard.."	On page 2 of the June 20, 1985 report by Mr. Numark regarding his interview with Willis, Numark states that the plan to kill Burchfield came down from Redmond and was communicated by Redmond through Richardson to Woodard, and Woodard sent a kite to Willis. (Pet. Ex. 57, at p. 2, Discovery p. 6395) Woodard then communicated this order on Friday, June 7, 1985, during a yard meeting. Willis stated "that there was no real vote, as Woodard was a superior ...." (*Id.*)
7	"I had more power than Masters."	52 RT 12690 52 RT 12691 52 RT 12697 52 RT 12701 52 RT 12730 - 12731 53 RT 12824 54 RT 12990 - 13000 54 RT 13006 - 13012 54 RT 13015 54 RT 13017 - 13018 55 RT 13213 65 RT 14898 - 14899 11 PHRT 8990 (1995), 8995 (2000), 8996 (2001)
9	"At first, I only remembered one meeting, right before, maybe the day before Burchfield was killed."	June 20, 1985 Report by Numark, Pet. Ex. 57. (Discovery page 6395) at page 2.

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
9	"Numark told me that my stories of what happened were not enough, and I had to get the members of the BGF to put something in writing, specifically from Masters and Johnson and Woodard."	9 PHRT 8657 (1670) 9 PHRT 8680 (1693) 10 PHRT 8805 (1814) 54 RT 13088 54 RT 13090
12	"The 'kite' that starts out, 'Oh, we to change codes for everyone, full alert, semi-alert' etc. was written by Masters under my orders as requested by Numark..... Part of that kite, I know, was written in conjunction with a kite Woodard sent, and parts of it are copied from a kite Woodard sent. At the top of it, about the codes, is from Woodard's kite, and other parts are also."	The forensic linguistic evaluation of Robert Leonard, Ph.D. 54 RT 13088 - 13089

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
12	"The entire kite refers to things that happened after Burchfield had been killed .... The kite is about the situation with metal and knives afterwards, not before Burchfield was killed. It refers to Andre Johnson – 'Dre' – being in the Adjustment Center, so it definitely is about what was going on after Burchfield was dead. It is not about the murder weapon. I do not know what the word 'Black' refers to. As far as I know, the Burchfield murder weapon was not a black, or a referred to as a black.... When I testified about my interpretation of this kite, I was conforming my answers to what I had previously told Numark in various interviews in which I gave various interpretations."	**According to Willis, Masters' first kite doesn't have any relevancy to this case.** **"[D]idn't have no relevancy to the – to the case." (12 PHRT 9236 - 9242 (2237 - 2243))** 4 RHRT 255; Paragraph 6 of Declaration of Lawrence Woodard, Exhibit 2 to Petition for Writ of Habeas Corpus, filed herein on January 7, 2005.
13	Masters was constantly criticized by Woodard and was removed from the Usalama position before the killing of Burchfield.	The testimony of Lawrence Woodard and Michael Rhinehart. (4 RHRT 222-223; 6 RHRT 332, 333, 336)

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
14	"The kite, that starts out, "Oh, we to change codes" was written after I met Numark. Though it seems to implicate Masters in making weapons, the truth was, when someone was needed to make a knife to use to attack Burchfield, Vaughn was chosen. I suggested Vaughn – "Chicken Swoop" – who I had known in Donner Section. I had been over Chick Swoop there and I'd torn off a pipe from a light conduit and sent it to Chicken Swoop and he had made knives from it. He was good at it, and I said he should make a knife to use for Burchfield."	11 PHRT 8969 - 8970 (1974 - 1975) 11 PHRT 8972 (1977)
15	"Numark looked at the 'Oh, we to change codes' kite and told me it was not enough to implicate Masters. He told me to go back and tell Masters to write about how certain events occurred."	9 PHRT 8657 (1670) 9 PHRT 8680 (1693) (The first interview with Numark was about whether Willis could get a report from Masters) 10 PHRT 8805 (1814) 54 RT 13088 54 RT 13090

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
15	Masters compiled the second kite from many reports Willis had written and sent to him.	(a) Forensic Linguistic Evaluation of Robert Leonard, Ph.D., to be heard. (b) **Willis testified that he sent the request for the Usalama report, the second kite and got it back in five minutes. (PHRT 8658 - 8659 (1671 - 1672)) This is only consistent with copying.** (c) Willis testified that kites were frequently written by several different individuals as a cover-up (54 RT 13086-13087) (d) The BGF leadership never wanted their handwriting on anything. (59 RT 13917) (e) Willis had others writing kites for him. (65 RT 14905) (f) Willis described himself as a BGF transcriber (44 RT 11749 - 11750) (Officer Arzate testimony) (g) The trial court noted that one of the kites was an obvious transcription. (55 RT 13297) (h) Willis: Masters could have been killed for not turning in a report to Willis. (40 PHRT 13437 (6308) (i) Willis: It was especially important to follow orders during a time of strife. (40 PHRT 13434 (6305))

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
15	"Masters had no way of knowing the information in the Usalaama Report on his own, because he was on the fourth tier."	41 RT 11210; 6 RHRT 340; paragraph 7 of Declaration of Lawrence Woodard, Exhibit 2 to Petition for Writ of Habeas Corpus, filed herein on January 7, 2005
15	The report where is says "Somo – Johnson – was recommended by A-1, who is me, and approved by U-1, who is Masters, that's just 'bullshit'. Masters had no say-so to approve anything."	(a) Masters was below Willis in rank. (52 RT 12676, 12730 - 12731; 54 RT 13008) (b) The June 20, 1985 report by Numark states that the killing of Burchfield was ordered by Redmond, and that his order was passed to Woodard, and that Woodard gave the order on the last yard day on June 7, 1985. According to this report, "WOODARD said to have 'Little Askari' (JOHNSON) make the hit." (Pet. Ex. 57 (D 6395)) (c) At the preliminary hearing, Willis testified that Woodard suggested Andre Johnson for the hit. (29 PHRT 11433 - 11434 (4365-4366) At the trial, Willis also testified that he recommended Andre Johnson for the attack on Burchfield (53 RT 12741, 12744)
16	"I was the one who compiles Sgt. Burchfield's schedule on the Daily Reports of the BGF members under me."	27 PHRT 11333 - 11334 (4269 - 4270)

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
17	"Before I went to the police, I destroyed a lot of old kites in my cell, perhaps hundreds of them, many from Masters. They could have contained information that might have helped Masters' defense. I had reported on every meeting and action that took place prior to Burchfield's death. The destroyed kites would have shown the minor role played by Masters, and the fact that there were no kites about Masters sharpening weapons or ordering anyone else to do so."	54 RT 13091 54 RT 13093 - 13094
18	Masters opposed the hit of Sgt. Burchfield.	Testimony of Lawrence Woodard and testimony of Michael Rhinehart. (4 RHRT 222-224; 5 RHRT 319, 324)
19	"After I got the kites from Masters for Numark, I was moved to the Adjustment Center in order to get writings from Andre Johnson. This time, Numark wrote out what I was to get from Johnson in a question form."	53 RT 12903-12910

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
20	"After Mr. Berberian told me I had no deal at all, I wanted to stop cooperating and not testify. But he said if I did not testify as to what I had already told them, he would cut me loose completely and return me right to San Quentin. This was a death threat, because he knew and I knew I would be killed immediately."	See 27 PHRT 11407-11408 (4343-4344)
20	"I felt I had no choice but to testify and to say what Numark and Berberian wanted ...."	27 PHRT 11408 (4344) 27 PHRT 11415 (4351)
21	"When asked if there were any threats against me, I testified no because I knew if I said yes, I would no longer be protected and I'd be put in San Quentin and killed."	See 27 PHRT 11407-11408 (4343 - 4344)
22	"My objective had changed, by the time I testified, from getting out of prison to staying alive."	27 PHRT 11408 (4344) 28 PHRT 11415 (4351)

Para-graph	Paragraphs of Willis' February 23, 2001 Declaration	Record Corroboration
27	"I knew, before and during Masters' trial, that there was a lot of information that the BGF would never allow to come out. They would not allow Masters to really defend himself by talking about the real roles played by his co-defendants or by other people who played a role. For example, even if he knew Chicken Swoop sharpened the knife, he could not tell. If he had, he'd have been killed. Woodard was really running the trial."	(a) Testimony of Lawrence Woodard (4 RHRT 229-231) (b) Pet. Ex. 9 (Settled Statement And Order Re: Defense In-Camera Hearings on 7/5/89")

(b) Willis' declaration is corroborated by the testimony of investigators Melody Ermachild and Pam Siller which the referee found to be uncoerced

Rufus Willis met with defense investigators Melody Ermachild and Pam Siller on February 8, 2001, and February 23, 2001. (10 RHRT 557-558; 11 RHRT 596-602; Pet. Exs. 28, 29) At the time, Willis was housed in a Utah penitentiary in Draper, Utah. (11 RHRT 580) During the course of the two meetings, Willis executed declarations admitting that he had lied at the 1989 trial, and that Jarvis Masters was completely innocent. (See, Pet. Exs. 22, 29) The referee found that these meetings involved no coercion. (Referee's Report at p. 9)

(c) Willis' declaration is corroborated by his letter of apology to Jarvis Masters

In addition to executing the two declarations which exonerated Jarvis Masters, Rufus Willis wrote a letter of apology to Masters. (Pet. Ex. 30; 11 RHRT 596) *The letter was not solicited by investigators Ermachild and Siller, and was instead, totally Willis' idea* . (11 RHRT 596) In his letter, Willis told Jarvis Masters that he apologized "for all the pain I've caused you and your family," and asked for Masters' forgiveness. (Pet. Ex. 30)

(d) Willis' declaration is corroborated by the testimony of investigator Chris Reynolds

In May 2010, Rufus Willis met with defense investigator Chris Reynolds at the federal institution where he was then housed. (10 RHRT 530-531) Willis again repeatedly and unqualifiedly admitted that he lied at the 1989 trial and stated that Jarvis Masters was completely innocent. During the course of the meeting, Reynolds went through the February 23, 2001 declaration with Willis, line by line, and except for a few minor matters, verified its complete accuracy. (10 RHRT 532-543; Pet. Ex. 21, 26)

(e) Willis' declaration is corroborated by the testimony of Julie Cader and Darrell Wright

In 1987, Julie Cader was an inmate and trustee at the Marin County Jail. (68 RT 15279-80) Willis, who was being housed there (68 RT 15280), told Cader that he had made a deal under which he would serve eight years in prison. (68 RT 15280) He said he "would

do whatever he had to make sure he wouldn't spend the rest of his life in prison." (68 RT 15281)

In 1988, Willis was transferred to a prison in Carson City, Nevada. While there, Willis told fellow inmate Darrell Wright that although he was serving a life sentence, he had come up with a plan to get out of prison. (70 RT 15512, 15519-21)

(f) Willis had no motivation to lie in 2001 when he spoke to Melody Ermachild and Pam Siller and executed declarations, when he wrote a letter of apology to Jarvis Masters, and when he spoke freely with investigator Chris Reynolds in 2010

This argument is set forth in petitioner's discussion of Question 1, at pages 80-81, *supra*.

(g) Willis' May 22, 2005 letter to petitioner's counsel, and his admission to petitioner's counsel and respondent's counsel corroborate his declaration

This argument is set forth in petitioner's discussion of Question 1, at pages 75-76, 80-81, *supra*, pages 124, 132, 141-142, *infra*.

(h) Willis' declaration is corroborated by the testimony of Michael Rhinehart and Lawrence Woodard, and the precise unanimity of the Rhinehart, Woodard, Richardson, and Willis evidence on all matters concerning Jarvis Masters

This argument is set forth in petitioner's discussion of Question 1, at pages 81-84, *supra*.

(i) Willis' statements that the kites were not authored by Jarvis Masters are corroborated by Dr. Leonard's testimony, which the referee accepted

This argument is set forth in petitioner's discussion of Question 1, at pages 62-64, *supra*.

(j) Willis' declaration is against his penal interest

Willis' 2001 declarations and his statements to defense investigators are clearly against his penal interest. Willis has admitted that he was intimately involved in the murder of Sgt. Burchfield. While he testified under a grant of immunity, his admission that he lied breaches and therefore voids his immunity agreement, which required that he testify truthfully. (Pet. Ex. 20 at p. 1) He is now subject to the death penalty.

Willis' multiple admissions that he lied also interfere with his chances of ever obtaining parole. As part of the deal for his trial testimony, the District Attorney agreed to make his cooperation in the Burchfield murder case known to the Parole Board. (*Id.* at 3) Admitting that he lied when he testified for the State in 1989 clearly jeopardizes his chance of ever obtaining parole.

2. Willis' 1989 Testimony Is Impeached and Completely Undermined

Unlike Willis' February 23, 2001 declaration, which is heavily corroborated, Willis' 1989 testimony is impeached by his voluntary and uncoerced 2001 and 2010 recantations, by his 2001 letter of apology, by the Richardson evidence, by the referee's effective

finding that Willis lied about the kites, by the referee's finding that Willis is a chronic liar, by the precise uniformity of the Rhinehart/ Richardson/Woodard/Willis exculpatory evidence, by Willis' motivation to lie to secure his release from prison, and by the lies he was told by the State, first to get him to name someone, and then to get something in writing from that person.

Willis' 1989 testimony is also contradicted by many of his earlier statements to authorities. Thus, Willis' June 12, 1985 letter to the Warden, does not mention Masters. (People's Ex. 193A) Masters was first mentioned on June 20, 1985, *after* DA investigator Numark offered his release in exchange for naming co-conspirators. (See pp. 144-147, *infra.*)

Willis' June 20, 1985 version of events, moreover, is markedly different from Willis' trial testimony. Thus, on June 20, 1985, Willis told Numark that the murder was the product of one yard meeting, held on June 7, 1985, the day before the murder. (Pet. Ex. 57; Pet. Ex. 22 at ¶9) At trial, however, Willis testified that the murder plan was developed over the course of four meetings. (52 RT 12747, 12759)

Significantly, Willis' 2001 declaration explains these discrepancies. "Initially, I did not say Masters voted for the killing of Burchfield because he was not involved. When I talked to Mr. Gasser [the DA investigator], he told me that there isn't any way that all this was planned at one meeting." (Petitioner's Ex. 22 at ¶ 5) "Numark wanted to implicate Masters." (*Id.*) "At first I only remembered one meeting, right before, maybe the day before

Burchfield was killed." (*Id.* at ¶ 9) "Numark told me that my stories of what happened were not enough, and I had to get the members of the BGF to put something in writing, specifically, from Masters and Johnson and Woodard." (*Id.*)

Willis' 1989 testimony is also undermined by his June 30, 2010 telephone statements to respondent's counsel. While Willis recants his exoneration of Masters, many of his statements contradict his 1989 testimony, and many of his statements impeach the integrity of his trial testimony. (See, 126-132, *infra*.) Thus, Willis stated that when he told District Attorney Berberian that he would not testify without a deal for his release, Berberian threatened to throw him back in San Quentin, where his life would be in jeopardy. (Resp. Ex. II at 27) Significantly, Willis refused to talk about many subjects that might incriminate him. This, by itself, means that some, if not all, of Willis' 1989 testimony was a fabrication.

3. Willis' June 30, 2010 Telephone Conversation with the Attorney General

The June 30, 2010, Rufus Willis telephone conversation with respondent's counsel, Alice Lustre and Glenn Pruden, was recorded. Over petitioner's objection, a DVD of the conversation was admitted as Resp. Ex. HH, and a transcript of the DVD was admitted as Resp. Ex. II. (14 RHRT 774)

The conversation with Willis, its recording, and the referee's admission of this hearsay recording and transcript into evidence are unique in many respects. The conversation is replete with leading questions by respondent's counsel, and many of Willis' answers are

totally lacking in foundation. (Resp. Ex. II at pp. 6:20-27, 7:19-28, 13:6-14, 19:6-9) While Willis was questioned about his declaration, he was never provided a copy of it. (*Id.* at 2:16-21) This stands in marked contrast to investigator Chris Reynolds' May 2010 interview with Willis where Willis was provided with a copy of his February 23, 2011 declaration, and Reynolds went through the declaration line by line with Willis, obtaining Willis' affirmation of practically everything in his declaration. (10 RHRT 532-543)

Significantly, Willis refused to answer the most important questions that were asked him: Whether what he told the District Attorney was truthful, whether someone told him what to say, and questions relating to kites hidden in his television set. (Resp. Ex. II at 27:19-23, 28:14-24, 36:6-10) This stands in marked contrast to Willis' February 8 and February 23, 2001 interviews with investigators Melody Ermachild and Pam Siller, and his 2010 interview with investigator Chris Reynolds, where Willis spoke freely, and answered all of the questions that were asked him. (10 RHRT 531-532, 550-51)

Willis' communications with the Attorney General, moreover, were tainted by the fact that he was still looking for favors from the state. (Resp. Ex. II at p. 41; 14 RHRT 780-782) Petitioner's investigators, by contrast, had nothing to offer Willis. Indeed, Willis' admissions were clearly against his penal interest.

Despite these many flaws, two remarkable things about this conversation and this evidence stand out. On the one hand, Willis provides stunning details of the threats and promises that were made

to obtain his cooperation and his testimony. These details are fully corroborated by other evidence, and are set forth in full in our discussion of Question 3.

Yet what is perhaps most remarkable about the June 30, 2010 conversation with Willis is that his accusations against Jarvis Masters, and his version of the Burchfield killing are entirely made from whole cloth. Petitioner demonstrates this below by posing nine questions about the Burchfield killing, demonstrating the remarkable differences between Willis' June 30, 2010 version of events, and his prior versions of his story. [69]

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[69] These are not the only differences between Willis' June 30, 2010 version of events and his 1989 testimony. For example, Willis' June 30, 2010 version said Masters was responsible for building a levee to erase the evidence. (Resp. Ex. II at 17:27-18:10) This is an entirely new accusation. It was not alleged in 1985, at the Preliminary Hearing, or at the trial. This simply underscores the fact that the June 30, 2010 version of Willis' story is made from whole cloth.

1. **How many BGF yard meetings were there concerning the hit on Sgt. Burchfield?**

(a) The Willis June 30, 2010 version: six to seven.

(Resp. Ex. II at 9:23-10:23)

(b) Other Willis versions:

1	2	3	4	5
June 20, 1985 version (Numark memo, Pet. Ex. 57)	8 PHRT 8493 (1511)	8 PHRT 8493 (1511)	27 PHRT 11360-11361 (4296-4297) 52 RT 12759	12 PHRT 9258 (2259)

"At first, I only remembered one meeting, right before, maybe the day before Burchfield was killed. When I talked to Mr. Gasser [the DA investigator] he told me that there isn't any way all of this was planned at one meeting."

(Pet. Ex. 22 at ¶ 9)

2. Who picked Andre Johnson for the move?

(a) The Willis June 30, 2010 version: Jarvis Masters.

(b) Other Willis versions:

Willis picked Johnson	Woodard picked Johnson	Redmond picked Johnson	Redmond never chose anyone	Doesn't know
52 RT 12741, 12744	8 PHRT 8488 (1506) 8 PHRT 8489-8490 (1507-1508) 27 PHRT 11362 (4298) (5th Meeting) 27 PHRT 11380, 11407-11408 28 PHRT 11433-11434 (4365-4366) 52 RT 12750 June 20, 1985 version (Numark memo, Pet. Ex. 57)	8 PHRT 8505-8506 (at first meeting)	27 PHRT 11380	27 PHRT 11353 (4289)

3. Did Willis oppose the selection of Andre Johnson?

(a) The Willis June 30, 2010 version:

He opposed the selection of Andre Johnson. (Resp. Ex. II at 18:12-13; 19:14-15)

(b) Other Willis versions:

- He recommended Andre Johnson. (52 RT 12741, 12744)
- He agreed to the plan. (9 PHRT 8671-8672 (1684-1685))

4. Did anyone oppose the plan?

(a) The Willis June 30, 2010 version:

Willis opposed the plan, and no one else opposed it. (Resp. Ex. II 18:14; 19:23)

(b) Other Willis versions:

- Rhinehart opposed the plan. (June 20, 1985 Numark memo, Pet. Ex. 57)
- Rhinehart opposed the move. (1 PHRT 7012, 7014 (64, 67))
- Willis agreed to the plan. (9 PHRT 8671-8672 (1684-1685))
- Willis recommended Andre Johnson. (52 RT 12741, 12744)
- Masters opposed the plan. (Pet. Ex. 22 at ¶ 18)

According to Harold Richardson's 1986 reporting, and Rufus Willis' June 20, 1985 statements, the plan to kill Sgt. Burchfield came from BGF Captain Willie Redmond. (1CT 238; Pet. Ex. 57)

5. Was Redmond present in C-Section at the time of the Burchfield murder?

(a) The Willis June 30, 2010 version:

Redmond was there at the time of the hit, and even after the hit. (Resp. Ex. II at 20:7-15)

(b) Other Willis versions:

- Redmond left the section. (28 PHRT 11493-11496 (4425-28))
- Redmond left the section after the second of at least four meetings, before the plan to target Burchfield was agreed upon. (52 RT 12747, 12759-12760)
- Richardson went on a visit and saw Redmond in the visiting area, and received the instructions from Redmond. (27 PHRT 11376 (4312); Pet. Ex. 57)

6. When and how did Redmond target Burchfield for the hit?

(a) The Willis June 30, 2010 version:

Burchfield was picked at the second of five to six meetings. (Resp. Ex II 10, 11)

(b) Other Willis versions:

- The plan to kill Burchfield came from Redmond, which was communicated to Richardson and by Richardson to Woodard, and by kite from Woodard to Willis (June 20, 1985 Numark memo, Pet. Ex. 57)
- The instructions came by letter from North Block. (Resp. Ex. II at 7:26-28)

7. Did a letter from Redmond come via Masters?

(a) The Willis June 30, 2010 version:

Yes. (Resp. Ex. II at 7:27)

(b) Other Willis versions:

- The plan to kill Burchfield came from Redmond, which was communicated to Richardson, and by Richardson to Woodard, and by kite from Woodard to Willis. (June 20, 1985 Numark memo, Pet. Ex. 57)

8. Did Redmond ask for a vote on the plan to kill Burchfield?

(a) The Willis June 30, 2010 version:

Redmond "looked for a vote." (Resp. Ex. II at 18:12-14)

(b) Other Willis versions:

- There was no real vote. *Woodard* gave the orders at a June 7, 1985 yard meeting attended by Rhinehart, Masters, Woodard, and Willis, based on instructions received from Redmond one to two weeks earlier in the visiting area. (June 20, 1985 Numark memo, Pet. Ex. 57)
- Redmond had already left C-Section. (28 PHRT 11493-11496 (4425-28); 52 RT 12747, 12759-12761)

9. Did Jarvis Masters select the code word for alerting BGF members that Burchfield was on the second tier on the evening of the hit?

(a) The Willis June 30, 2010 version:

He thinks Jarvis Masters picked the code word which was "Solid Gold." (Resp. Ex. II at 15:18-20)

(b) Other Willis versions:

- He does not think a code word was discussed.
- He does not recall "Solid Gold." (12 PHRT 9276-9277 (2277:2- 2278:21))

4. The Willis Declaration Is Capable of Being Believed

By any measure, Willis' February 23, 2001 declaration is capable of being believed. It is far more capable of being believed than either his 1989 testimony or his June 30, 2010 version of the facts.

Willis' June 30, 2010 statements to the Attorney General are contrary to both his 1989 testimony and his testimony at the preliminary hearing, and many statements are contrary to his very first version of the facts. Willis also refused to answer the most important questions that were asked him: whether he told the truth and whether he was told what to say. (Resp. Ex. 11 at 27:19-23, 28:14-24, 36:6-10) Willis, moreover, was clearly looking for favors, as he always has when he communicates with the government. (Resp. Ex. II at p. 41; 14 RHRT 780-782)

Willis' February 23, 2001 declaration also has many more indications of trustworthiness than his 1989 testimony. While Willis' 2001 declaration exposes him to the death penalty, his State testimony was the result of a deal in favor of his penal interest. While Willis' declaration was found by the referee to be the product of a friendly and uncoercive meeting, it is undisputed in the record that the DA investigator lied to Willis, and promised his early release to get the two Masters kites. While Willis' declaration is corroborated by Dr. Leonard's testimony, which the referee accepted, Willis' 1989 testimony is refuted by Dr. Leonard's findings. While Willis' 2001 declaration is corroborated by many of his earliest statements to authorities, his 1989 testimony contradicts many of his earliest statements to authorities, and his statements to two fellow inmates. While Willis' 2010 statements to the Attorney General contradict his prior statements, Willis verified the truth of practically every line of his 2001 declaration nine years later when he spoke with investigatory Chris Reynolds. Finally, the detailed Harold Richardson evidence, the Willis' mis-identification of Masters evidence, and the precise uniformity of the Richardson/Rhinehart/Woodard/Willis exculpatory evidence, all support the conclusion that Willis lied in 1989.

The weight of the evidence is so overwhelmingly in favor of Willis' credibility of his February 23, 2001 declaration that if one were to conclude that his declaration is not capable of being believed, then one would also need to conclude that Willis' 1989 testimony was not capable of being believed. If that is the case, then Jarvis Masters should be freed immediately.

CONCLUSIONS

The referee's Question 2 findings against Jarvis Masters are not entitled to deference. Misinterpreting Question 2, mis-applying the law, and imposing materiality requirements outside of both her assigned role and the law, the referee committed legal error. The referee also failed to consider the bulk of the evidence bearing on Question 2, and failed to weigh the evidence. *Estate of Larson* (1980) 106 Cal.App.3d 560, 567.

By any rational measure, there is newly discovered evidence indicative of petitioner not having been a participant in the charged offense, and substantial other evidence, not presented to the trial court which assists the trier of fact in establishing Jarvis Masters' innocence:

1. The credibility of the Richardson evidence was unchallenged at the Reference Hearing. The evidence is faultless. Every other piece of evidence, coming from all corners, agrees with it.
2. The referee found that Evans lied at trial.
3. The referee found that Dr. Leonard's testimony that Jarvis Masters did not author the kites was convincing. This means that the centerpiece of the State's case against Jarvis Masters is based upon a lie.
4. By any measure, Michael Rhinehart's testimony is capable of being believed. Rhinehart's testimony exposed him to the death penalty.

5. The precise unanimity of the Rhinehart/Richardson/ Woodard/Willis exoneration evidence is remarkable. This far surpasses the credible evidence requirement.
6. The evidence in the record that the conspirators would not have passed the weapon up and down between the second and fourth tiers to sharpen the weapon is capable of being believed.
7. The Willis February 23, 2001 declaration is clearly capable of being believed. If it is not capable of being believed, then one would also need to conclude that Willis' 1989 testimony is not capable of being believed.

By logic and reason, Question 2 can only be answered with a "Yes."

Question 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, (YES) and, if so, how?***

The referee ruled that Willis was willing to do anything to get out of prison. (Referee's Report at p. 8) Yet, in ruling on Question 3, the referee ruled that there was no evidence of "undisclosed promises or threats made to Rufus Willis" and that "[h]is new claim of undisclosed prosecutorial promises or threats is unsubstantiated."

> There is no evidence of undisclosed promises or threats made to Rufus Willis by Numark, Berberian or Kamena. . . . 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 benefitted him, not because he was threatened or coerced.
>
> From a review of the record and from this court's contact with Willis, the Referee finds that Mr. Willis is manipulative and untrustworthy. His new claim of undisclosed prosecutorial promises or threats is unsubstantiated. (Referee's Report at pp. 15-16)

Again, the referee misunderstood the question, and committed legal error. Question 3 is not about "evidence of *undisclosed* promises or threats" (*emphasis added*) or new claims of *undisclosed* promises or threats. Question 3 is instead about whether there were

any promises or threats made to Rufus Willis, and whether his trial testimony was affected.

If there is one central unchanged fact in this case in the quarter century it has been pending, it is the fact that promises and threats were made to Rufus Willis. If there is one troublesome fact in this case that is *uncontested* by both the Marin County District Attorney and the Attorney General of California, that again is the fact that threats and promises were made to Rufus Willis. And if there is one abiding fact about Rufus Willis that we can mark on his forehead for all to see, it is the fact that Rufus Willis wanted something for his testimony. As the referee put it, Willis would do anything to save his hide, and has admitted so. (Report at p. 8)

The State has never disputed the fact that Willis was promised an early release for his testimony. Indeed, at the reference hearing, the State introduced Willis' June 30, 2010 statement that promises and threats were made by the Marin County District Attorney, Edward Berberian. [70]

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[70] While the fact that threats and promises were made to obtain Willis' statements, and testimony has always been undisputed, the details have changed over time. Willis' February 23, 2001 declaration, nonetheless, is fairly close to his earlier versions. (See pp. 108-119, *infra.*) Thus, Willis states that he was coerced into testifying by the prosecutor's refusal to honor a prior agreement that he would be released from prison if he testified. (Pet. Ex. 22 at ¶3) In 2010, he admitted both to petitioner's investigator, and to Respondent's counsel that Mr. Berberian threatened his life, if he did not testify, and promised his release if he did testify. (10 PHRT 532-534; Resp. Ex. II at 27) Willis also added a detail not previously known: Numark promised him that he had communicated with the San

(continued...)

Willis made his position clear the very first day he came forward. His June 11, 1985 letter to the Warden offered to provide the Warden with "all the information you could possible [*sic*] need" if he can be assured that "I can get released out of prison for my testimony." (Pet. Ex. 55)

A. THE JUNE 20, 1985 DEAL

The deal was sealed on June 20, 1985, when Willis was brought to the hospital at San Quentin. DA Investigator Numark assured Willis that he would be released a few years after the trial:

Q. When you came into the hospital, you made it clear to Mr. Numark that before you said anything you want assurance, you wanted assurance that you would be released at a certain time, right?

A. To the best of my recollection, when I entered the room I told him that if the demands that I have stated forth in the letter, that if he couldn't deal with those, then I didn't have nothing to say to him.

Q. And the demands you were talking about, and you have stated to Mr. Numark, were release from prison after a trial, right?

A. That's one of them, yes.

Q. And in that regard, you said you thought you'd served enough time, five or six years?

A. That's correct.

Q. And he agreed with that. He said you're young?

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[70](...continued)
Bernardino DA who assured him that no one would oppose his parole. (Resp. Ex. II at 23:10-14) ***Something else, however, has also changed: petitioner now has evidence that the promises and threats were prejudicial.***

A. That's correct.

Q. You've served enough time, right?

A. That's correct.

Q. He told you you'll get out within a couple of years, right?

A. No. I'm the one who requested that.

Q. You said you wanted to be out within a couple of years?

A. I told him I was willing to do a couple of years.

Q. That would mean about June of '87, right?

A. Would you repeat the question?

Q. Sure. If you said two years, it would translate into about June, June of '87?

A. Well, I was talking about two years after the trial.

(54 RT 13062:13-13063:16)

Each time he saw Numark, Willis wanted to make sure that the deal was still in order. Numark continued to assure him that he would be released. (55 RT 13174:13-15, 13174:27-13175:1)

Numark, nonetheless, told Willis that "he didn't have anything on Masters," and asked Willis if could get Masters to put something in writing. (9 PHRT 8657:21 (1670), 8658:1-2 (1671), 10 PHRT 8805:19-23 (1814)) Numark asked Willis if he "could get a report of some kind from Masters." (9 PHRT 8680:8-10 (1693)) Willis assured Numark, "that would be in my property when I left C-section." (9 PHRT 8680:10-11 (1693))

Willis performed dutifully. He went back to C-section from the hospital, "wrote Masters a kite, and requested that he forward the Usalama Report. . . ." (9 PHRT 8658:14-15 (1671))

Numark, nonetheless, told Willis that he should not bring up anything about any deals in front of the District Attorney. (54 RT 13065:23-26; 55 RT 13170:4-6,20-23) **Indeed, when Mr. Berberian brought up the subject of deals, Mr. Numark, who was sitting behind Mr. Berberian, gave Willis a signal that he should not say anything about the deal.** [71] (54 RT 13066:5-18; 26 PHRT 11209:21-11210:3 (4148-4149))

Numark also told Willis that his original deal would take place after the trial even though it was not in writing and even though Mr. Berberian was not agreeing to it:

> Q. He also told you that your original deal would take place after the trial and that your original request would be granted, isn't that true?
>
> A. That correct.
>
> Q. Even though it wasn't in writing?
>
> A. That's correct.
>
> Q. And even though Mr. Berberian was not agreeing to it?
>
> A. That also correct
>
> (55 RT 13171:1-9)

Willis testified at the preliminary hearing that at a certain point he realized that Numark did not have the authority to make any deals with him. By that time, it was too late to, "back out of it." (27 PHRT 11407:11-15 (4343)) Willis believed that if he backed out he would be put back in prison and possibly set up by the Department of

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[71] Significantly, Bobby Evans testified that Hahn told Evans to keep their relationship secret. (Evans deposition at p. 57)

Corrections. (27 PHRT 11407:16-27 (4343), 11408: 15-17 (4344); 29 PHRT 11415:22-25 (4551))

B. THERE IS REPEATED CONFIRMATION OF THE DEAL WITH THE DISTRICT ATTORNEY

Willis' February 23, 2001 declaration simply reconfirmed this story. (Pet. Ex. 22 at ¶¶ 1-5)

> "I worked with him [Numark] to create evidence for the arrest of Woodard and Johnson and Masters, under the expectation that I would be released for my cooperation. . . . Numark wanted to implicate Masters. Numark was interested in anyone who I could say was at any meetings in the yard prior to Burchfield's killing." (Pet. Ex. 22 at ¶ 5)

Willis reconfirmed these facts when he met with investigator Chris Reynolds in May 2010. (10 RHRT 532-543) He also told Reynolds that the District Attorney threatened to put him back in San Quentin if he didn't testify, and he took that as a death threat. (*Id.* at 543)

Willis again confirmed the promises and threats that were made to him, when he spoke to respondent's counsel on June 30, 2010. (Resp. Ex. II at 21-27) Willis repeatedly told the Attorney General that Numark assured him that everything that they had promised would be handled after he testified. (Resp. Ex. II at 3:20-21) Willis also said that Numark told him that he had communicated with the District Attorney for San Bernardino County, where Willis had been convicted, and the District Attorney's office assured him that there would be nobody opposing his parole when he went to the Parole Board. (Resp. Ex. II at 23:10-14)

Again Willis stated that Numark told him not to tell Mr. Berberian anything. (*Id.* at 24:2-3) "He said everything had been taken care of." (*Id.* at 24:6) "He said, 'They (the San Bernardino DA) will not oppose your parole once you go to the Board.'" (*Id.* at 12:21-22) He was also assured that someone from the Marin County District Attorney's office would be there at the Board to speak on his behalf. (*Id.* at 25:8-12)

A problem arose, however, when Willis said something to Berberian about the deal with Numark there. Berberian said, "Look, I'm not offering any deal." (*Id.* at 26:17-18) That's when Berberian and Numark stepped out of the room, and that was the last time he saw Mr. Numark. (*Id.* at 26:25-26)

At that point, Willis told Berberian that he would not testify. Berberian said, "Well, I tell you what, I'd throw your ass back in San Quentin." (*Id.* at 27:5) But when Willis made it clear that he still would not testify, Berberian assured Willis that he would get what was promised him "when this case is over." (*Id.* at 27:12)

What is perhaps one of the more significant facts about this proceeding is that respondent, who introduced a record of this telephone conversation, chose not to call Mr. Berberian to deny Willis' accusations against Berberian, made first to investigator Chris Reynolds in May 2010, and later to attorneys Lustre and Pruden on June 30, 2010. As a matter of law, the failure to challenge or dispute these accusations, twice made by their own witness, constitutes an adoptive admission that these accusations, as well as all of the earlier accusations made by Willis against the District Attorney's

office, are true. *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 524, rev. den. (Apr. 13, 2011) (Where defendant relied on testimony during arbitration, plaintiff could rely on the testimony as an adoptive admission under Evidence Code section 1221.); *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 88; *Keller v. Key system Transit Lines* (1954) 129 Cal.App.2d 593, 596-597; *Alicia R. v. Timothy M.* (1994) 29 Cal.App.4th 1232.

This result follow from the "universal principle of human conduct, which leads us to repel an unfounded imputation, or claim. *Nightlife Partners v. City of Beverly Hills, supra*, 108 Cal.App.4th at 88. "[H]uman experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing." *Keller v. Key System Transit Lines, supra*, 129 Cal.App.2d at 596-597. This rule applies with even greater force where a party repeats the statement "without challenging it." *Alicia R. v. Timothy M., supra*, 29 Cal.App.4th at 667. Given the seriousness of Willis' allegations – that a Deputy District Attorney and his staff threatened a witness with a *de facto* death sentence, and promised his release if he cooperated – it is inconceivable that respondent would *not* ask Mr. Berberian the simple question – "Did you threaten to send Mr. Willis back to San Quentin if he did not testify, and promise his release if he testified?" – unless the allegations were true. Given the fact that respondent themselves offered the evidence of Willis' statements, after they were already in evidence, an adoptive admission is established. *Alicia R. v. Timothy M., supra,* 29 Cal.App.4th at 667.

This result also follows from general principles of burden shifting. While petitioner had the burden of production of evidence in this hearing, when he produced evidence on a specific question of fact the burden shifted to respondent. *Evidence Code* section 550(a); *In re Cudjo* (1999) 20 Cal.4th 673, 687. Thus, when a respondent does not present any factual dispute to petitioner's evidence, the court may only disregard petitioner's evidence when it is rebutted by evidence already contained in the record or on credibility grounds. See, *In re Serrano* (1995) 10 Cal.4th 447, 455-456. In the instant case, petitioner satisfied his burden of producing evidence on this issue with Mr. Reynolds testimony that Willis told him that Berberian threatened to send him back to San Quentin if he didn't testify. Not only did the State not dispute this evidence, it offered its own evidence to corroborate Reynold's testimony, and the respondent offered additional evidence that Berberian offered to release Willis if he testified. No rebuttal evidence was offered. Respondent is therefore bound by the state of the record.

The Attorney General cannot have it both ways, simply by calling Willis a liar. We have already established that Willis' 1989 testimony is at least half false. If Willis' June 30, 2010 statements are also half false, then nothing he has ever said should be believed by this Court or any courts and Jarvis Master should be freed.

C. HOW WILLIS WAS AFFECTED BY THESE PROMISES AND THREATS

How was Willis affected by the State's threats and promises? Again, the basic facts are undisputed in the record. Willis only spoke

about the murder *after* Numark agreed to the terms of his release. (8 PHRT 8538 (1556); 10 PHRT 8800 (1809)) Willis re-stated his terms, and Numark agreed to them, but only so long as Willis could corroborate his story. (10 PHRT 8801 (1810))

It is undisputed that the first mention of Jarvis Masters was at this June 20, 1985 meeting at San Quentin's Neumiller Hospital. (54 RT 13109) *Inasmuch as Willis testified he only spoke about the murder after Numark agreed to the terms of his release, this means that he only spoke about Masters after Numark agreed to the terms of his release.*

After Willis was promised his release and he spoke about Masters, Numark said that he did not have enough to corroborate Masters' involvement. (10 PHRT 8805 (1814)) Numark therefore asked Willis to get something in writing from Jarvis Masters. (9 PHRT 8659 (1670)) According to Willis' trial testimony, both of the kites were created *after* he spoke to Numark:

> "I went, talked to Numark, and he explained to me that he needed something more detailed. I came back. I wrote Masters a letter. He sent me back the exhibit you just removed [the first kite]. I wrote him another letter, and told him more specific that I wanted Usalama Report surrounding the incident of Sgt. Burchfield. He sent this letter back here. . . ."

Willis was next asked:

> "That would mean that you, that you got both this 150-C [the first kite] and that 159-C [the second kite] after you talked to Mr. Numark?"

Willis answered:

> "That's correct."
> (54 RT 13088-13089)

Willis confirmed this for a second time:

"Q: So you got both of these notes after the hospital where you spoke with Charles Numark?"

"A: That's correct."
(54 RT 13090)

While the record indicates that both kites were received after the deal with Numark was struck (or re-confirmed) the evidence also suggests that there may have been more than one meeting. Thus, Willis states that the first kite did not have anything to do with the Burchfield murder, and Numark asked Willis to get something better in writing. (9 PHRT 8657 (1670); 9 PHRT 8680 (1693); 10 PHRT 8805 (1814); 12 PHRT 9236-1942 (2237-2243); Pet. Ex. 22 at ¶¶ 12, 15; 54 RT 13088, 13090) If both kites were produced after a meeting at the hospital, and the first kite was deemed unsatisfactory at a meeting at the hospital, at least two meetings are suggested. [72]

Yet the record is absolutely clear about the most important detail: Willis acted with lightning speed after he struck or re-confirmed a deal for his release. According to Willis' uncontested 1987 testimony, ten minutes after he got back to his cell, he sent

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[72] Numark only reports one meeting at the hospital, i.e., on June 20, 1985. (Pet. Ex. 57) If Willis trial testimony is correct – that both kites were created after he spoke to Numark – and Numark expressed his dissatisfaction with the second kite (Pet. Ex. 22 at ¶ 15), it would suggest that Numark failed to report an earlier meting. Given the fact that Numark's June 20 memo intentionally avoids the subjects of his (1) instructions to Willis to get something in writing from Masters and (2) the deal he provided Willis, it is reasonably possible that Numark did not want to report the fact that there was an earlier meeting.

Masters a kite asking for a report in writing, and it took Masters only five minutes to send him a report. [73] (9 PHRT 8657, 8659, 8680 (1670, 1672 - 1673, 1693; 10 PHRT 8810: 15-18 (1819); Pet. Ex. 22 at ¶ 3, 9, 15; 54 RT 13062) Thus the Usalama report – the centerpiece of the State's case against Jarvis Masters – is clearly the product of a secret and unlawful deal. (73 RT 16033, 16070; 74 RT 16341)

In this way, Willis was now locked in from the outset. Going backwards, as he clearly tried to do, meant putting his life at risk, and exposing himself to the death penalty. Testifying represented his only chance of obtaining what had been promised by agents of the State of California.

By logic and reason, the answer to Question 3 can only be "Yes."

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[73] The timing also supports the conclusion that the Usalama report was a transcription. It might have been physically possible for someone to copy a one page document in slightly more than five minutes. But it would not have been humanly possible to read Willis' kite, and compose and write the Usalama report in five minutes.

Question 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? YES. If so, what are those promises, threats or facts?***

The evidence at the reference hearing, largely uncontested, proves that James Hahn, and thus the prosecution, illegally withheld *"facts concerning"* Bobby Evans' extensive relationship with Hahn, and other police agencies, as a snitch in the period leading up to his 1989 arrest. The truth – and contrary to what Evans, Hahn, and the prosecution presented to the defense, the trial judge, and the jury – was that Hahn and Oakland Police Intelligence Unit agent James Moore, had anywhere from 20-50 prior contacts with Evans and were running him as a snitch from the time that Evans got out of San Quentin in 1986 to the time of his 1989 arrest. (3 RHRT 190, 193; 5/14/10 Deposition of Bobby Evans, at pp. 54-55)[74] Evans, moreover, was the prime suspect in a brutal murder, both when he came forward against Masters, and when he testified, and this fact, again, was not disclosed to the defense.

The referee dealt with these facts summarily, finding,

> "As discussed above, Evans did have more extensive contacts with Hahn than was testified to at trial. However, Berberian and Kamena had no way of knowing about those contacts, as Hahn did not work in

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[74] The Evans deposition is Petitioner's Exhibit 58.

> Marin and did not disclose the information to the Marin prosecutors." (Referee's Report at p. 16)

The referee made a similar finding regarding the fact that Bobby Evans was a suspect in the Beasley, Sr. murder:

> "The fact that Evans was a suspect in the "Beasley Senior" case is "new information" for the purpose of the habeas proceeding. Had the prosecution known of it at the time of the trial, it would have been required to disclose it as *Brady* material. However, the Marin prosecution team was unaware of this information and therefore had no ability to disclose it." (Referee's Report at p. 11)

The referee explained this finding with the following footnote:

> "It is unclear to the Referee how the Marin prosecution team reasonably could have known that Evans was as [*sic*] an uncharged suspect in a San Francisco homicide investigation. Petitioner argues that Hahn should have told the Marin prosecutors, but Hahn did not work in San Francisco and did not have a role in the Beasley Senior investigation." (Referee's Report at p. 11, n. 7)

The referee's findings, however, turn a blind eye to both the facts and the law. It is undisputed in the record that Hahn's office was in Marin County and was close to the District Attorney's Office. (See pp. 174-176, *infra*.) More important, as a member of the Investigation and Prosecution team, and as a member of the principal investigating agency, the Department of Corrections, Hahn's knowledge *must* be imputed to the prosecution. *Kyles v. Whitely* (1995) 514 U.S. 419, 437; *Barnett v. Superior Court* (2010) 50 Cal.4th 890, 902-903; *In re Brown* (1998) 17 Cal.4th 873, 879 . (Discussed *infra* at pp. 168-169, 174) This renders the actual knowledge of Berberian and Kamena irrelevant.

We shall begin with the Bobby Evans evidence that was not disclosed:

(1) The "facts concerning" Bobby Evans' pre-existing and significant contacts with James Hahn, the Oakland police, the Bureau of Narcotics Enforcement (BNE), and the Bureau of Alcohol, Tobacco, and Firearms (ATF);

(2) The facts that Bobby Evans was the prime suspect in the brutal murder of James Beasley, Sr, both when he came forward and at the time of his testimony, as well as the fact that the investigation ceased once he came forward.

We shall then discuss what James Hahn knew, and why Hahn's knowledge must be imputed to the prosecution. Finally, we shall discuss the importance of the undisclosed facts concerning Bobby Evans to these proceedings, and the referee's unwarranted materiality findings.

A. THE BOBBY EVANS EVIDENCE THAT SHOULD HAVE BEEN DISCLOSED

1. Bobby Evans' and James Hahn's Trial Testimony and Discovery Produced by the Prosecution Massively Understated Evans' Relationship as a Snitch with Law Enforcement and, in Particular, with CDC Agent James Hahn

(a) What the trial jury heard

Evans was arrested on May 12, 1989, and charged with armed robbery with two prior felonies. On June 1, 1989, he pled guilty to the reduced charge of attempted robbery, with no allegations of prior felonies. This meant a 16-month sentence on the underlying charge, and one year for the parole violation. The deal, however, needed to

be accepted by the Superior Court sentencing judge, and sentencing was set for July 27, 1989. (58 RT 13828; 59 RT 13862, 13904-13905, 13926, 13927, 13929; People's Ex. 211) At the time of his testimony, he had still not been sentenced. (59 RT 13884) Evans told the jury that he expected to be released on May 9, 1990, one year after his arrest. (59 RT 13983-13984)

Testifying at trial without an apparent grant of immunity, Evans claimed that he had not been promised anything and he expected no reduction in his sentence. (58 RT 13672) Neither did he have any anticipation of receiving anything for his testimony. (58 RT 13673) Hahn had simply told him that he would assist in his protection and help him "down the line." (58 RT 13799, 13832; 59 RT 13931) Helping him "down the line," however, meant protection. (58 RT 13815)

Evans' testimony was corroborated by State documentation. During pre-trial discovery the prosecution furnished defense counsel with a memorandum from agent Hahn in which he denied that any promises were made and noted that Evans' safety would be "taken care of by the Department of Corrections." (Masters' Ex.1230)

Evans testified that he had only worked with Hahn on one prior occasion, when he provided Hahn with information on a dirty cop. (58 RT 13832, 13834-13836, 13838; 59 RT 13985)

(b) What the trial judge heard but kept from the jury (and the defense)

At a hearing held while the jury was still deliberating, Hahn and two Alameda County Deputy District Attorneys were called, and it was disclosed that Hahn was instrumental in securing Evans' early release. (See, e.g., 78 RT 16898, 16945-16948, 16957; 79 RT 17024; People's Ex. 268.) This subject is fully discussed below at pp. 172-173, *infra.* The judge, however, denied the defense motion on the ground that there was no evidence that Hahn *promised* Evans early release, and that no inferences could be drawn from the fact that Hahn secured Evans' early release. (79 RT 17090-17092)

During the hearing, John Costain, Evans' attorney, testified *in camera*, that Evans told him that both his 16-month sentence and his *Morrissey* (parole violation) time would be "taken care of." (Unsealed RT of January 5, 1990 at pp. 2-4) The judge, however, kept this information from the defense. (79 RT 17046-17047)

Meanwhile, the State withheld from the judge, the defense, and the jury the fact that Bobby Evans was a professional informant, the fact that Evans was the prime suspect in the brutal murder of James Beasley, Sr., both when he came forward and when he testified, and evidence that the investigation into Bobby Evans' involvement in the murder was suspended after Evans came forward.

(c) The defense was not informed of "*facts concerning*" Bobby Evans' pre-existing and significant contacts with James Hahn, the Oakland police, BNE, and ATF, as a government informant

The evidence at the reference hearing, largely uncontested, proves that James Hahn, and thus the prosecution, illegally withheld *"facts concerning"* Bobby Evans' extensive relationship with Hahn, and other police agencies, as a snitch during the years prior to his 1989 arrest. The truth – and contrary to what Evans, Hahn, and the prosecution presented to the defense, the trial judge, and the jury – was that Hahn and/or his partner, Oakland Police Intelligence Unit agent James Moore, had anywhere from 30-50 prior contacts with Evans, and were running him as a snitch from the time that Evans got out of San Quentin in 1986 to the time of his 1989 arrest, and that Evans was well paid for his work.[75] (3 RHRT 190, 193; 5/14/10 Deposition of Bobby Evans (Pet. Ex 58), at pp. 54-55)

Most of these facts are already set forth at pages 57-60, *supra*, in conjunction with our discussion of Question 1. In lieu of setting them forth again, the information is summarized on Chart 6, on the following page.

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[75] Evans testified that his "gun buy" and "dope buy" work for the ATF was lucrative. Sometimes he got $1,000, and sometimes $300, depending on how many guns, or how much dope he would buy. (Evans deposition at 57) He was also paid for his BNE work. (*Id.* at 58-59) He told his correctional counselor in 2002 that he was paid $500 a week by BNE. (Pet. Ex. 68)

CHART 6: THE JURY WERE MISLED

WHAT THE JURY WERE TOLD	THE UNCONTESTED FACTS
1. Prior to coming forward, the relationship between Bobby Evans and James Hahn was almost entirely adversarial. Hahn had kicked his mother's door down in 1986 with 14 other officers, and identified him in 1987, at the Oakland Police Department, after he had been arrested. He then violated Evans and sent him back to prison. (58 RT 13800-13801; 59 RT 13972-13973)	1. Evans' working relationship with Hahn began after Hahn kicked his mother's door down. (Evans Deposition Pet. Ex. 58) at p. 51) 2. Evans became an informant to keep himself from getting arrested. (*People v. Bailey* at p. 14, Pet. Ex. 66)
2. Evans did not provide any information on either of these occasions. (58 RT 13801, 13837-13838)	3. From that day forward, up until the time of his May 12, 1989 arrest, Hahn and/or his partner James Moore had anywhere from 30-50 contacts with Evans and were running him as a snitch. (3 RHRT 165, 190, 193; Evans Deposition at pp. 54-56)
3. The only time he had worked with Hahn was in May, 1988 when he gave Hahn information on a dirty cop. (58 RT 13832, 13834-13836, 13838; 59 RT 13985)	4. During this period, Evans was also working with "a lot of Oakland police officers," the California Bureau of Narcotics Enforcement (BNE), and the federal Bureau of Alcohol, Tobacco and Firearms (ATF). (8 RHRT 448-450, 457)
	4. Hahn set up the ATF work. Evans did "gun buys." Sometimes he got $1,000, and sometimes he got $300, depending on how many guns, or how much dope he would buy. (Evans Deposition at 457)

(d) The state failed to disclose that Bobby Evans was the prime police suspect in the murder of James Beasley, Sr. at the time of his 1989 testimony

Not only were the jury not told that Bobby Evans was a professional informant. They were also not told that Evans was the prime suspect in a murder investigation at the time of his testimony.

The San Francisco Police Department turned up a number of names in conjunction with their investigation of the August 17, 1988 murder of James Beasley, Sr. in San Francisco. While many names came up, only a few were pursued, and only Bobby Evans was pursued in depth.

[REDACTED PARAGRAPH]

(1) *Ronald Nalls*

[REDACTED PARAGRAPH and FOOTNOTE] [76]

(2) *Gregory Smith*

[REDACTED PARAGRAPHS]

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[76] **[REDACTED FOOTNOTE]**

[REDACTED PARAGRAPHS]

[REDACTED PARAGRAPH and FOOTNOTE] [77]

(3) *Bobby Evans*

[REDACTED PARAGRAPHS]

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[77] [REDACTED FOOTNOTE]

[REDACTED PARAGRAPHS and FOOTNOTE] [78]

[78] [REDACTED FOOTNOTE]

[REDACTED PARAGRAPHS and FOOTNOTE] [79]

[79] [REDACTED FOOTNOTE]

[REDACTED PARAGRAPHS]

Thus, when Bobby Evans came forward to testify against Jarvis Masters in June 1989, and when Evans testified in October 1989, Bobby Evans was not just the prime suspect in the murder of James Beasley, Sr. He was the only suspect still under consideration. **[REDACTED SENTENCE]** Yet, not a single word of this was disclosed to the defense, or to the jury who asked for and obtained a Bobby Evans read-back shortly before they found Jarvis Masters guilty. (78 RT 16903, 17093)

[REDACTED PARAGRAPHS]

Thus, when Bobby Evans came forward to testify against Jarvis Masters in June 1989, and when Evans testified in October 1989, Bobby Evans was not just the prime suspect in the murder of James Beasley, Sr. He was the only suspect still under consideration. **[REDACTED SENTENCE]** Yet, not a single word of this was disclosed to the defense, or to the jury who asked for and obtained a Bobby Evans read-back shortly before they found Jarvis Masters guilty. (78 RT 16903, 17093)

(e) The State failed to disclose evidence that the SFPD murder investigation of Bobby Evans abruptly ended after Evans came forward in the Burchfield case

[REDACTED PARAGRAPH and FOOTNOTE] [80]

81

Admittedly, this does not *prove* that the murder investigation was dropped as part of a deal with Bobby Evans, or that the investigation was suspended so that Bobby Evans could be a witness for the prosecution. Nonetheless, the fact remains that had the State disclosed that Bobby Evans was a prime suspect in the

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80 **[REDACTED FOOTNOTE]**

81 The handwritten notes of federal officers who interviewed Bobby Evans on March 1, 1990, concerning his work for James Beasley, Jr. suggest that Bobby Evans may have admitted that he killed James Beasley, Sr. Thus, one of the officers who wrote down Evans' account of his work for James Beasley, Jr. wrote down what appears to be an admission that he "killed Jas Beas." (Pet. Ex. 59) If this is correct, it would suggest that Evans believed that he had assurances that he would not be prosecuted.

Beasley, Sr. investigation, the State would have had to explain the unexplainable: Why the Beasley, Sr. murder investigation was apparently suspended when Bobby Evans came forward. Whatever the explanation, Bobby Evans' presence in the case would have become toxic to the prosecution.

(f) Hahn knew that Bobby Evans was a professional informant. He knew that Evans was a suspect in the James Beasley murder. Keeping close track of Evans was his job.

Hahn knew that Bobby Evans was a professional informant because Hahn was Bobby Evans' handler. Hahn and his partner Jim Moore had used Evans as a snitch for two and a half years, and had also farmed him out for the use of the Oakland Police Department, BNE, and ATF. The hearing evidence makes clear that Hahn must have known, and did know, that Evans was a suspect in the Beasley case.

It was Hahn's job to keep close track of Evans, first because it was his job to track, identify, and arrest BGF members, and conduct surveillance of them (8 RHRT 427), and foremost because as Hahn testified, it was his job to keep track of Bobby Evans. (8 RHRT 459) The Beasley murder case, moreover, was big news. Everyone was talking about it. As Hahn himself put it, "It was all over the news." (8 RHRT 454)

Everyone around Hahn and close to Hahn participated in some way in the Beasley, Sr. investigation. Robert Conner, the boss of James Moore, Hahn's partner, testified that he received information that he passed on to the SFPD investigators that Bobby

Evans killed Beasley, Sr. (3 RHRT 170-171) Conner was in almost daily contact with James Hahn. (3 RHRT 164) Thus, Conner testified that he was sure that he told James Hahn that Evans was a suspect in the Beasley murder. (3 RHRT 181-182) [82] Hahn's senior officer was also involved. (**[REDACTED CITATION]**, and James Hahn's June 22, 1989 report, at Pet. Ex. 59. See *infra* at p. 166.)

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82 Hahn's hearing testimony on this point was ambiguous, but then, his testimony throughout the hearing – at least in answer to petitioner's questions – consisted mostly of his not remembering. (*See, e.g.,* 8 RHRT 438-441, 444-452, 454-463, 466-467) So, too, with this: He just couldn't remember when or from whom he found out about Evans being a suspect in the murder.

> "I really have no recollection. I don't know when, where, and who. It could have been Conners, it could have been Jim Moore, it could have been San Francisco Police Department, and it could have been one of the feds." (8 RHRT 454-455)

Nevertheless, on further prompting by petitioner's counsel, Hahn admitted that in the normal course of business, if an Oakland police officer had information that one of Hahn's gang parolees might be a suspect in a murder, he would have heard about it. While that did not trigger a recollection that Conner actually told him, he did remember getting a call from an SFPD investigator, asking questions about Evans. (8 RHRT 459) "But whether it was after, like you say, Conners (sic) told me, or Jim Moore told me, or whatever, I just have no recollection at all." (8 RHRT 460)

Neither, conveniently, did Hahn recall whether or not he passed this information on to the Marin County District Attorney when he provided Evans to them as a witness in the Burchfield matter. (8 RHRT 460) But whether he did or did not is of not importance, as the information, as noted below, must be imputed to the District Attorney.

Conner's testimony is heavily corroborated by the SFPD investigation file.

[REDACTED SENTENCES]

[REDACTED PARAGRAPHS]

[REDACTED FOOTNOTE] [83]

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[83] **[REDACTED FOOTNOTE]**

[REDACTED PARAGRAPHS]

[REDACTED FOOTNOTES] [84] [85]

Who is Phil Bruccoleri? Bruccoleri is James Hahn's senior officer at the SSU "Bay Area" office in San Rafael. (See James Hahn's June 22, 1989 report at Pet. Ex. 59; a copy is attached to this brief.)

Thus, on the very day that a headline case was broken wide open, on the day that Bobby Evans was identified as the murderer, the three people who were closest to James Hahn – Hahn's senior officer, Hahn's partner, and a third officer, Robert Conner, who communicated with Hahn almost daily – were listed as individuals who had either provided information, or who were to be contacted. (**[REDACTED CITATION]**) And Robert Conner, who was on this list,

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[84] **[REDACTED FOOTNOTE]**

[85] **[REDACTED FOOTNOTE]**

specifically recalls that he told Hahn that Bobby Evans was a suspect in the Beasley, Sr. murder case. (3 RHRT 181-182)

By any measure, petitioner has satisfied his burden of proving by a preponderance of the evidence that Hahn knew that Bobby Evans was a suspect in the Beasley, Sr. murder investigation.

That this evidence was exculpatory is clear, and the referee so found. (Referee's Report at p. 11) If the defense and the trial court had been informed by the prosecution that Evans was, as recently as May, 1989 a primary suspect in a murder, counsel would have been appointed for Evans and no doubt advised him to assert his right against self-incrimination. And if he had asserted that right, his testimony would have been precluded, or stricken as soon as defense counsel began to question him about the Beasley murder. And if he had not asserted that right – as inconceivable as that might be – the value of his testimony would have been destroyed. The referee clearly did not understand this.

B. AS A MEMBER OF THE PROSECUTION AND INVESTIGATIVE TEAM AND AS AN INVESTIGATOR FOR ONE OF THE INVESTIGATIVE AGENCIES, HAHN'S KNOWLEDGE MUST BE IMPUTED TO THE PROSECUTION FOR *BRADY* PURPOSES

The referee displays an extraordinary misunderstanding of the law regarding *Brady* claims. She acknowledges the factual predicate of petitioner's claim, and then dismisses it's importance:

> As discussed above, Evans did have more extensive contacts with Hahn than was testified to at trial. However, Berberian and Kamena had no way of knowing about those contacts, as Hahn did not work in Marin and did not disclose the information to the Marin prosecutors. (Referee's Report at p. 16)

Notwithstanding the referee's mistaken premise regarding the location of Hahn's office – which was in Marin County (see below at pp. 174-175) – the referee's conclusions speak only to the portion of Reference Question 4 referring to what the prosecutors *were* aware of. It says nothing about what they *should have been* aware of.

At least a part of Question 4 goes directly to the *Brady* issue:

> Were there . . . *facts* concerning guilt phase prosecution witness Bobby Evans's relationship with law enforcement agencies of which Deputy District Attorneys Berberian and Kamena . . . should have been . . . aware, but that were not disclosed to the defense? If so, what are those . . . *facts*? (Emphasis added)

As related above, petitioner's evidence proves that, in fact, Evans had a far more extensive relationship with Hahn than the defense or jury knew. The referee indicates no disagreement with or doubt about petitioner's evidence on this subject; rather, she ignores the law in minimizing it's impact, as well as leaping to a conclusion about its materiality.

The law here is clear. The scope of the disclosure obligation,

> extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge "any favorable evidence known to the others acting on the government's behalf . . . ." ([*Kyles v. Whitley* (1995) 514 U.S. 419] at p. 437]) Courts have thus consistently "decline[d] 'to draw a distinction between different agencies under the same government, focusing instead upon the "prosecution team" which includes both investigative and prosecutorial personnel.'" (Citation)

In re Brown (1998) 17 Cal.4th 873, 879.

As this Court affirmed more recently,

> ' . . . any favorable evidence known to the others acting on the government's behalf is imputed to the prosecution. "The individual prosecutor is presumed to have knowledge of all information gathered *in connection with the government's investigation*." ' (*In re*

Brown, supra, at p. 879, italics added, quoting *U.S. v. Payne* (2d Cir. 1995) 63 F.3d 1200, 1208.)

Barnett v. Superior Court (2010) 50 Cal.4th 890, 902-903.

C. CDC WAS AN INVESTIGATION AND PROSECUTION AGENCY IN THIS CASE, AND JAMES HAHN WAS A MEMBER OF THE INVESTIGATION AND PROSECUTION TEAM

The California Department of Corrections was one of the prosecuting agencies in this case. Two of CDC's investigative arms were involved in the investigation: (1) the Investigations Unit at San Quentin, which conducted investigations inside the prison. (See, e.g., 14 PHRT 9529 (2520) *et seq.*) and (2) San Quentin's SSU (Special Services Unit), which conducted investigations outside the prison, and specifically James Hahn. (12 RHRT 687-688)

Edward Berberian, the District Attorney who prosecuted Masters admitted that his own office, "as well as the Investigations Unit out at San Quentin State Prison" were prosecuting agencies in this case. (3 RHRT 152:28-153:3) Berberian, moreover, testified that James Hahn was involved in the case, and "worked on the case." (3 RHRT 153:19, 154:23-25) DA Investigator Gasser, moreover, testified that Hahn was the only SSU agent that he worked in the Burchfield case. (12 RHRT 688:4-7)

James Hahn, a member of San Quentin's Special Services Unit, was one of the first investigators on the case. He had a major role in the prosecution. In addition to working directly with District Attorney investigator Gasser, he developed and worked with many witnesses and potential witnesses.

Hahn worked with gang members, both within prison and outside of prison. (8 RHRT 417-419) It was his job to track, identify, and arrest BGF members, and conduct surveillance of them. (8 RHRT 427) On occasion, he would put people in prison for parole violations when they actually had not committed a parole violation. In his own words, that was his job. (8 RHRT 420)

1. Hahn's Work with Welvie Johnson

While Hahn could not recall whether Rufus Willis gave him any information, he sought and/or obtained information from many other witnesses in this case. He was in regular contact with Welvie Johnson, a member of the BGF Super Commission in 1985. (7 RHRT 364, 381) According to Johnson, Hahn tried to get him to talk regarding the Burchfield case, and offered benefits for testifying in the Burchfield case on several occasions. (7 RHRT 381-383) Hahn admitted that he was in regular contact with Welvie Johnson, and probably interviewed him regarding the Burchfield case. (8 RHRT 456) As Hahn put it, every time he talked to the gang members he asked them about crimes committed by the gang. (*Id.*) Since the Burchfield murder was a major event, he tried to elicit from all sources anything that might help the Burchfield case. (8 RHRT 456-457)

2. Hahn's Work with Donald Carruthers

Hahn also worked closely with Donald Carruthers, BGF Carson-Section inmate who told Hahn that he was a conspirator in the killing of Sgt. Burchfield. (8 RHRT 437) Carruthers' information proved true. Indeed, the weapon used to kill Sgt. Burchfield came

from Carruthers' bed brace. (1CT 237-243; 4 RHRT 226; 52 RT 12748, 12761-12763; 6 RHRT 339)

3. Hahn's Work with Bobby Evans

Hahn's greatest contribution was Bobby Evans, who contacted Hahn for his help after he was arrested for armed robbery. According to Evans, Hahn said he would help Evans if he provided information regarding the Burchfield murder. (Deposition of Bobby Evans at 103:15-104:4) After an agreement was reached, Hahn brought Evans to the Marin County District Attorney's Office. (*Id.* at 61-68)

4. Hahn's Work with David Gasser

District Attorney investigator David Gasser testified that he had "lots of contact" with James Hahn "during the course of the Burchfield case." (12 RHRT 648) Hahn also acknowledged that he had ongoing contact with Gasser (8 RHRT 455 - 458) This contact took place during the last several years of the investigation, and beginning as early as March 24, 1987. (12 RHRT 648-649) Gasser also worked with Jim Moore, Hahn's OPD partner. (12 RHRT 654)

5. Hahn's Wrap-Around Involvement with his Burchfield Witnesses

Gasser's notes provide an example of Hahn's wrap-around involvement with his witnesses and his intense working style in the Burchfield case. After Donald Carruthers came forward, Hahn drove him to the airport and sent him to Texas to stay with Carruthers' sister. Hahn did this "quickley [*sic*] and bypassed rules." A decision

was also made that "if Carruthers is brought back to CA. he is going to be housed at Vacaville in the S wing with Willis." (Pet. Ex. 37 at pp. "H00682-683")

According to Gasser's notes, both Hahn and parole agent Rick Manuel interviewed Carruthers at the Contra Costa County Jail, apparently after Manuel took him into custody. (Pet. Ex. 37 at "H00682-683") Reports were thereafter typed up by Hahn who signed Manuel's name to them. Manuel felt that "he was taken advantage of by SSU" in having to write the reports." After Manuel complained, Hahn "told Manuel to cooperate." (*Id.* at H00682, 683, 686)

Hahn took care of his witnesses and their families. Thus, when Gasser told Hahn that he received a phone call from Donald Carruthers that someone was at his mother's house, and that he was "scared for his mother," Hahn said he would call Mrs. Carruthers "and work out the problem." (*Id.* at H00686)

Hahn provided even more extensive wrap-around services for Bobby Evans, who was being prosecuted by the Alameda County District Attorney for armed robbery.

Alameda County Deputy DA Giuntini was Hahn's point man. Hahn would contact Giuntini, and Giuntini would contact Deputy Denny, who was prosecuting Evans. Sometimes Hahn contacted Denny directly, as he did to see whether he could get Evans released on November 9, 1989. (78 RT 16936, 16941, 16942, 16944, 16947, 16958; 79 RT 17015, 17024) When a November release did not seem possible, Hahn set his sights on having Evans released after the Marin case finished. (78 RT 958)

The plan worked like clockwork. The Masters case was submitted to the jury on December 12, 1989. (75 RT 16413) Hahn immediately contacted Giuntini, and on December 13, Giuntini personally contacted Denny to get Evans released for time served. (78 RT 16947) That very day, Evans was placed on felony probation and released by Alameda County. (78 RT 16945-16948, 16957; 79 RT 17024)

Hahn wasted no time in getting Evans released from his parole. On December 14, 1989, a Saturday, Hahn wrote a letter to the Board of Prison Terms, recommending that Evans be immediately freed. (People's Ex. 268) As a result of his letter, Evans was released on January 3, 1990. (78 RT 16898) In this way, Evans served less than seven months on a 16-month sentence, in connection with crimes that could have led to an 18-year prison term. (78 RT 16880, 16891; Evans Deposition at 62:6-10)

It is also undisputed that Hahn worked closely with Evans from the day he came forward. He admitted to eight or nine meetings or telephone conversations with Evans between June 14, 1989 and September 25, 1989. (79 RT 17012-17013) In addition to everything else he did for or with Evans, he transported him, addressed Evans' concerns about his mothers' safety, and worked with DA Investigator Gasser on a witness protection program for Evans. (79 RT 17025-17026, 17029; Pet. Ex. 42; Masters' Ex. 1230)

6. Hahn's and CDC Were Investigation and Prosecuting Agents

Given James Hahn's intense involvement in this case – as an investigator, as a rule bender, as a witness handler, as someone

who coerced cooperation when persuasion did not work, as a carrot and stick" man, as a witness concierge service, as someone who put witnesses together (Willis and Carruthers), and as problem fixer – he was clearly a member of the investigation and prosecution team. He was also an acting agent of CDC, an investigating and prosecuting agent in this case.

Accordingly, under the law, the information that Hahn had regarding Bobby Evans, and the facts that he should have know as Bobby Evans' handler are imputed to the prosecution, and are deemed *Brady* material. Thus, under *Kyles v. Whitley, supra*, 514 U.S. at 437; *Barnett v. Superior Court, supra*, 50 Cal.4th at 902-903; and *In re Brown, supra*, 17 Cal.4th 873 at 879, the defense was entitled to know, about Evans' pre-existing and significant contacts with his handler, James Hahn, and with the Oakland Police Department, BNE, and ATF, as a government informant. The defense were also entitled to know that Bobby Evans was the prime police suspect in the murder of James Beasley, Sr., both the day he came forward, and at the time he testified. Either one of these facts alone would have had a devastating impact on Evans' testimony.

D. THE REFEREE SOUGHT TO MINIMIZE THE IMPORTANCE OF THE *BRADY* MATERIAL "BECAUSE HAHN DID NOT WORK IN MARIN"

In seeking to minimize the importance of the *Brady* material which was not disclosed, the referee stated that "Hahn did not work in Marin and did not disclose the information to the Marin prosecutors." While the record is silent as to the physical address of Mr. Hahn' desk and files, he testified that he was an employee of

"the Special Services Unit of San Quentin," a prison famously located in Marin County. (8 RHRT 416:21-24) Welvie Johnson's testimony that Hahn's office was in Marin, and Bobby Evans' testimony that Hahn "worked in Marin County" was also undisputed. (Evans Deposition at 55:14-15; 7 RHRT 347) Hahn's partner, James Moore, also testified that Hahn's office was in Marin. (3 RHRT 200)

Mr. Berberian, the District Attorney who prosecuted Masters, also testified that Hahn's office was located in Marin County, but not at the prison itself. (3 RHRT 155; 8 RHRT 423) The record, indeed, suggests that Hahn's office and the District Attorney's office were within walking distance of each other. (8 RHRT 442:20-22) The physical location of Mr. Hahn's office, however, is utterly irrelevant to this proceeding since Hahn, as a matter of fact and as a matter of law, was an investigative officer in this case.

E. THE REFEREE SOUGHT TO MINIMIZE THE IMPORTANCE OF THE FACT THAT BOBBY EVANS WAS A SUSPECT IN THE BEASLEY, SR. MURDER INVESTIGATION

The referee also sought to minimize the importance of the fact that Bobby Evans was a suspect in the Beasley, Sr. murder investigation:

> "Evans was only an uncharged suspect and no one, not Evans or anyone else, was ever charged in connection with the "Beasley Senior" case. Moreover, Evans said at this deposition that he had no involvement with the murder. Given all the criminal acts that Evans admitted to during trial – kidnapping, robbery, killing – the additional information that he was an *uncharged* suspect in a murder he denied doing would likely have been immaterial.
>
> Most importantly, petitioner's trial lawyer stage 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." (Referee's Report at pp. 11-12)

The referee's decision misses the point. The fact that Evans was uncharged after everything in the file pointed to his being the murderer of James Beasley, Sr., and the fact that the investigation was apparently suspended after he came forward, does not nullify the information. Had this information been revealed to the jury, it would have been toxic for the prosecution.

The fact that Evans denied, at his deposition, the fact that he brutally murdered James Beasley, Sr. at close range, is hardly relevant. Why would he admit such a heinous crime? The fact that the jury learned about other acts of violence by Bobby Evans is irrelevant to the issue. The question is: What would the jury think, had they known that he came forward after he was identified as the murderer of James Beasley, Sr., and what would they think had they known that he was testifying for the State while he was under investigation for murder? The truth is, it would not have gotten that far. Bobby Evans would not have testified, and the District Attorney would not have wanted to have him on their side. He would have destroyed the State's credibility.

F. THE FACTS CONCERNING BOBBY EVANS' RELATIONSHIP WITH LAW ENFORCEMENT AGENCIES, AND THE FACT THAT HE WAS A SUSPECT IN THE BEASLEY MURDER INVESTIGATION WERE MATERIAL

The referee also sought to minimize the significance of the facts concerning Bobby Evans' relationship with law enforcement agencies:

> "The Referee cannot conclude that the evidence of these contacts between Evans and Hahn was substantially material. Masters' lawyer knew Evans was a snitch, and he argued at length about Evans' lack of reliability. . . ." (Referee's Report at pp. 16-17)

To begin with, while the relationship between Bobby Evans and James Hahn was significant and longstanding, it only represents a portion of the relevant *Brady* material. Bobby Evans was also an informant for the Oakland Police Department, BNE, and ATF, and was involved in approximately 50 to 60 gun buy operations for ATF for which he was paid handsome sums. He was also well paid for his BNE work. The *Brady* material also includes the fact that Bobby Evans was the prime suspect is a San Francisco murder when he came forward and while he was on the witness stand in 1989.

The fact that "Masters' lawyer knew Evans was a snitch and argued at length about Evans' lack of reliability" does not mean that the warehouse of information that was withheld from the defense was immaterial. It is one thing to argue to the jury that Bobby Evans cannot be relied upon because he had been a snitch on a few occasions. It is yet another thing to *prove* that Bobby Evans was a professional informant. That he had up to 50 or 60 contacts with Hahn and Moore prior to coming forward. That he had a regular working relationship with the Oakland Police Department. That Hahn had set him up with the federal bureau of Alcohol, Tobacco and Firearms, and that Evans had done 50 or 60 gun buy operations, and had made tens of thousands of dollars doing this work. That Evans was the prime suspect in a brutal murder when he came forward and while he was on the witness stand. That the investigation stopped in its tracks when Evans came forward.

We know that the jury convicted Jarvis Masters shortly after hearing a read-back of Evans' testimony. (78 RT 16903; 79 RT 17093) Quite likely, they heard defense arguments regarding Bobby Evans and wanted facts instead of rhetoric. Quite likely, after listening to the defense argument and then reading the facts, the jury may have asked themselves "Where's the beef?" Had they heard the true facts about Bobby Evans, they would not have needed a read-back because they would have known that Bobby Evans' testimony was utterly untrustworthy. Indeed, had the true facts been disclosed, Bobby Evans could not have been called as a witness and Jarvis Masters would most likely be a free man today.

By logic and reason, the answer to Question 4 can only be "Yes."

Question 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?***

The referee failed to consider the bulk of the evidence on this question. Thus, for the reasons set forth below, the referee's finding on Question 6 carries no legal weight (*Estate of Larson* (1980) 106 Cal.App.3d 560,567), and this Court should independently weigh the evidence and find in petitioner's favor.

The referee correctly noted that petitioner did not produce any evidence that promises or threats were made to Evans by Mr. Numark, Ms. Kamena, and/or Mr. Berberian. (Report at p. 17) Petitioner instead offered "evidence that promises, threats, were made to Mr. Evans by Mr. Hahn that affected his testimony." (16 RHRT 851:13-19) The referee, however, did not address the bulk of this evidence, and instead, only addressed evidence regarding the Beasley, Sr. murder:

> At the hearing, petitioner's counsel argued that Evans had been a suspect in the Beasley Senior murder in San Francisco in 1989, and that after Evans testified, the Beasley Senior murder investigation ended. The theory is that Hahn must have promised Evans he'd make the murder charge disappear if Evans would implicate Masters. However, the Referee does not find that this claim was substantiated by Masters. (Referee's Report at 17)

A. THE SUSPENSION OF THE BEASLEY MURDER INVESTIGATION

The Beasley, Sr. murder evidence is extremely troubling. Bobby Evans was the prime suspect in the brutal murder of James Beasley, Sr. on the day he came forward to testify against Jarvis Masters. Sgt. Conner testified that James Hahn knew that Evans was a suspect. (3 RHRT 170-171, 181-182) Inasmuch as it was Hahn's role to keep close track of all things concerning Evans, it would be inconceivable that Hahn would not know about the police investigation. (8 RHRT 459) Indeed, Officer Conner's testimony that he knew about the investigation, that he was in almost daily contact with Hahn, and that he told Hahn about it is undisputed in the record. (3 RHRT 164, 170-171, 181-182) (See pp. 164-165, *supra*)

While there is no direct evidence that Hahn promised that the Beasley murder investigation would go away, the undisputed fact is that it unexplainedly did go away when Bobby Evans came forward. [86] Hahn's involvement in this process certainly represents one of the most plausible explanations. [87]

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[86] By May 10, 1989, everything pointed to Bobby Evans as the murderer. **([REDACTED CITATION])** Evans came forward shortly thereafter. There is no further record of any investigation of Bobby Evans.

[87] While Bobby Evans denied that he knew about the investigation, his testimony need not be accepted at face value. *The issue of what Bobby Evans knew, in any case, would have been a matter for the jury to decide.* Given the weight of the evidence collected by the San Francisco Police Department, Evans would have wanted the murder investigation to go away, and would have been inclined to cooperate in any way he possibly could, to curry favor, to make it go

(continued...)

The James Beasley murder, in any case, represents only a very small portion of petitioner's evidence in conjunction with Question 6.

B. EVANS' TESTIMONY REGARDING PROMISES AND EXPECTATIONS OF BENEFITS

At a minimum, the evidence preponderates that either explicit benefits were promised Bobby Evans, or an implied promise was made based on longstanding working relationships.

Bobby Evans testified that promises (and threats) were made to him by SSU Officer James Hahn and Oakland Police Department Officer Jim Moore. Thus, after Evans was arrested for armed robbery, he called Hahn and said, "I need your help. You know, could you help me out?" (Evans Deposition at 61:23-24) Hahn told him, "I'll come down and talk to you in a couple days and we'll see what we can do. There's some people that may want to talk to you." (*Id.* 61:24-62:2) When Hahn came down, Evans told him he would do anything he wanted, "because I know I'm facing, like, about 18 years if I go back to prison." (*Id.* at 62:8-10) This was *before* Evans entered a plea. (*Id.* at 62:19-25)

Hahn told Evans that the District Attorney of Marin County wanted to talk to him about the Burchfield murder. (*Id.* at 63:4-5) Evans asked what he was going to get out of it, and Hahn told him that he would not go to prison. (*Id.* at 63:10-13) As a result, Evans

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[87](...continued)
away. Evans, moreover, testified that he was threatened with prosecution for murder if he did not testify. (Evans Deposition at 71-72, 111-112)

entered a plea to attempted robbery, something that would get him less than 16 months. (*Id.* at 64:8-12)

Evans dealt with three people: SSU Officer James Hahn, Oakland Police Department Jim Moore, and DA Investigator Gasser. (*Id.* at 9-11) According to Evans, both Gasser and Hahn told him what to say. (*Id.* at 66:10-14, 78:4-19, 100:22-24) While Evans said that he did not know anything about Masters being involved, Gasser repeatedly told him "We need all three." (*Id.* at 65:16-22, 106:5-13)

At some point prior to the trial, Evans expressed a change of heart about testifying. (*Id.* at 69:24-70:14; 59 RT 13883:6-23) Evans thought they were playing games. The District Attorney said there were no promises. (*Id.* at 99) Hahn, on the other hand, told him not talk about the deal with the District Attorney. [88] (*Id.* at 78)

According to Evans, when he reneged he was threatened with prosecution for murder, armed robbery, kidnaping, and even RICO charges. (*Id.* at 111; Pet. Ex. 66, 68) He was told he would be charged in the Burchfield case itself since he was a high ranking member of the BGF Commission. (*Id.* at 72, 73) He was also threatened with prosecution for two armed robberies and a kidnaping. (*Id.* at 74, 111)

Evans admitted that he could have been found guilty in these cases. (*Id.* at 73-74) So, Evans agreed to testify, because he did

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[88] It is undisputed that Numark told Willis exactly same thing. (Resp. Ex. II 23, 24, 26)

not want to go to prison for the rest of his life, for things he did, and for things he did not do. (*Id.* at 73:11- 74:12)

C. EVANS' TESTIMONY IS CORROBORATED

The referee found that Evans is a liar. Yet, Evans' Reference Hearing testimony that he expected benefits for his lies is heavily corroborated by credible other evidence which the referee did not even discuss. Indeed, the referee, despite repeated promptings, failed to rule on the admissibility of critical corroboration evidence. (See pp. 189-203, *infra.*) Having failed to weigh and consider all the relevant evidence, the referee's findings on Question 6 are not entitled to deference. *Estate of Larson* (1980) 106 Cal.App.3d 560, 567.

A previously sealed January 5, 1990 transcript clearly corroborates Evans' claim that he expected benefits for his testimony. Attorney John Costain, who represented Evans in the 1989 Alameda County armed robbery prosecution, testified that Evans was not worried about his 16-month State prison sentence because he felt that it was going to be taken care of. (Unsealed RT of January 5, 1990 testimony of John Costain at pp. 2-4.) Evans also made it very clear to Costain that he felt that his *Morrissey* time was also going to be taken care of by the Department of Corrections. [89]

Evans' 2010 testimony that he expected benefits for his testimony is also directly corroborated by his testimony under oath in

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[89] This is an apparent reference to *Morrissey v. Brewer* (1972) 408 U.S. 471 (due process requires hearings prior to parole revocations).

1996 and 1998 proceedings. Thus, on April 25-26, 1996, in Yolo County preliminary examination proceedings in *People v. Williams*, Evans testified that he was not prosecuted for 15 to 20 shootings because he was "granted immunity in Court, in State Court, for testifying on a prison murder" of a prison guard at San Quentin. (*People v. Williams,* Yolo County Superior Court case no. 95-8640; Pet. Ex. 67)

Two years later, on June 10, 1998, in Yolo County Superior Court proceedings in *People v. Bailey*, Evans testified that he got probation on his April 1989 Alameda County felony charges as a result of having testified "in a prison homicide" of a prison guard, "a sergeant," and for testifying for the federal government on a large drug case. (*People v. Bailey,* Yolo County Superior Court case no. 98-0029; Pet. Ex. 66) Evans also testified that he was in the process of being indicted under the RICO Act when he decided to break the BGF oath and testify against the BGF. (*Id.* at 14)

Evans' 2010 testimony is further corroborated by his statements to his correctional counselor when he was admitted to prison in 2002. Evans told his CDCR correctional counselor that following the Sgt. Burchfield murder he was facing charges under the RICO Act, and that in exchange for his cooperation the authorities dropped the charges:

> "During the interview Inmate Evans confirmed that he was leader, or *the leader*, of the Black Guerilla Family. Evans stated that following the Sgt. Burchfield murder at San Quentin in 1985 that he was facing charges under the RICO act. In exchange for his cooperation the authorities dropped the charges." (Pet. Ex. 68)

Significantly, he told his counselor in 2002 that his work as an informant started 16 years earlier, i.e., 1986. (*Id.*) Both James Hahn and Bobby Evans testified that their relationship began that year, when Hahn broke down the door of his mother's house. (58 RT 138; 8 RHRT 434, 448-449; Evans Deposition at p. 51) In his testimony in *People v. Bailey*, Evans added another important detail: he began working as an informant (i.e., in 1986) to keep himself from getting arrested. (*People v. Bailey*, Pet. Ex. 66 at p. 14) *Thus, his 1998 Bailey testimony and his statements to his correctional counselor in 2002 precisely match his Reference Hearing testimony.*

While Evans' credibility when he testified both in 1989 and 2010 are certainly at issue, he had no reason or motive to lie when he spoke to his attorney John Costain. He also had no reason or motive to lie in the 1996 Yolo County preliminary hearing proceedings in *People v. Williams*. He also had not reason or motive to lie in the June 10, 1998 Superior Court proceedings in *People v. Bailey*. (Pet. Ex. 66) And he had no reason or motive to lie when he was interviewed by his correctional counselor in 2002. (Pet. Ex. 68)

It also bears noting that Bobby Evans' testimony bears a disturbing resemblance to the story told by Rufus Willis. Evans testified that he told his handlers that Masters was not involved, yet DA Investigator Gasser told him that "We want all three." (Evans Deposition at 65:16-22, 106:5-13) Willis was told essentially the same thing by DA Investigator Charles Numark. He wanted Willis to get something on Masters because he had nothing on him. "Numark wanted to implicate Masters" (Pet. Ex. 22, ¶ 5), he wanted Willis to

get a report from him. (9 PHRT 8657:21(1670), 8658:1-2 (1671), 8680:8-10 (1693); 10 PHRT 8805:19-23 (1814)) He wanted to get all three. (Pet. Ex. 22, ¶ 9) [90]

It is also uncontested that Hahn came through on his promise. Evans, a career criminal, was facing up to 18 years in State Prison for armed robbery when he placed the telephone call to James Hahn. (Evans Deposition at 62:6-10) *Through Hahn's intercession, Evans did less than seven months, about one-fortieth of what he could have received on the armed robbery charges.* (78 RT 16880, 16891, 16945-16948, 16957; 79 RT 27024) This is in addition to any benefits he may have received on potential murder, shooting, kidnaping, and RICO charges. (Evans Deposition at 73-74; Pet. Exs. 66, 67, 68)

D. THE LONGSTANDING INFORMANT RELATIONSHIP CREATED A REASONABLE EXPECTATION OF BENEFITS

Even if it be assumed that there were no explicit promises or threats made to Bobby Evans, either in conjunction with the forty-fold reduction of his prison term, or in conjunction with manifold other potential charges, the fact remains that the longstanding relationship between Evans and Hahn created an expectation in Evans' mind that

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[90] There are also other parallels. Promises were made to both Evans and Willis by someone other than the District Attorney. Numark told Willis not to tell the DA (54 RT 13066: 5-18; 26 PHRT 11209-11210. Hahn told Evans to keep their relationship a secret (Evans deposition at 78) Thus, while John Costain's testimony suggests that Evans expected benefits, he did not tell his attorney (Costain) that Hahn promised to help him. (Unsealed RT of January 5, 1990, Testimony of John Costain at pp. 2-4).

benefits were being provided for his testimony. Bobby Evans was a professional snitch, both before and after the trial in this matter, and the nature of the relationship is that a snitch relies on his handlers for money, favors, and protection from prosecution.

A professional informant always expects benefits for his testimony. As Bobby Evans put it:

> "I was going by peoples I had already dealt with in the past, that had work [*sic*] deals out for me that I knew would tell the truth and keep the truth as a truth and that was Jim Hahn and Jim Moore." (Evans Deposition at 99:14-17)

Jim Moore also testified that money was sometimes paid Evans. (3 RHRT 193, 196, 197, 199) Evans also received substantial sums of money from BNE and ATF, which Hahn set up. (Evans Deposition at 57; Pet. Ex. 68) Such a long-term relationship inevitably builds a relationship of dependency, so that explicit promises are superfluous. The snitch knows that his well-being is dependent on satisfying his handlers – here, Hahn and Moore. Evans put it differently, but equally as tellingly: He knew that as long as he fed Hahn information, he would not be sent back to prison:

> Well, to my advantage, I was able to stay out on the streets longer than I could normally stay out 'cause they had promised to put me back in prison each 30 days, after I was on the streets, they was saying they were going to put me back in prison for something. (Deposition of Bobby Evans, at p. 51)

Keeping Evans "out on the streets longer" was the bedrock premise of the working relationship between Bobby Evans and James Hahn. That is the reason that Evans began working as a

snitch for Hahn after Hahn broke down his mother's door in 1986. (Pet. Ex. 66, 68)

When Evans was arrested in 1989, of course, his situation became even more dire, and he needed more than just monetary handouts and not being sent back for a parole violation. He was facing up to 18 years on the armed robbery charge (Evans Deposition at 62:6-10). That is why he contacted James Hahn. The fact that he received less than seven months, instead of 18 years, speaks loudly.

Finally, we have the fact, found by the referee, that Bobby Evans lied. Other things being equal, Bobby Evans, a professional snitch who always looks to his handler for some kind of deal, would not have lied against someone he had never met and did not know unless he expected something in exchange.

Thus, the evidence preponderates that either an explicit promise was made to Bobby Evans – as Bobby Evans testified in 1996, 1998, and 2010, and as he told his Correctional Counselor in 2002 – or an implied promise was created based upon a longstanding – secret – working relationship, and this promise, or these promises, influenced his decision to testify falsely against a man he had never met.

By logic and reason, the answer to Question 6 can only be "Yes."

X. THE REFEREE MADE EVIDENTIARY ERRORS, TO PETITIONER'S DETRIMENT

A. THE REFEREE FAILED TO RULE ON THE ADMISSIBILITY OF BOBBY EVANS' PRIOR CONSISTENT TESTIMONY WHICH SHOULD HAVE BEEN ADMITTED

Petitioner sought admission of the relevant transcripts of testimony that Bobby Evans gave as a witness in two other cases, and a relevant CDCR record of his statement to his correctional counselor. Despite repeated requests, the referee failed to rule on the admissibility of these three instances of prior consistent testimony.

1. Procedural History of the Prior Consistent Statement Issue

The issue was first broached on October 29, 2010, at a hearing on respondent's *in limine* motion to exclude Evans' prior testimony and statements. The referee ruled that she would address the issue during trial. (12 RHRT 639-640) [91]

Once trial was underway, on January 20, 2011, petitioner's hearing counsel, Mr. Andrian, directed the Court's attention to respondent's pending motion to exclude Evans' prior consistent statements. *Id.* The next day, the issue was argued and petitioner's counsel, Mr. Baxter, requested a ruling on the issue, but the Court

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[91] See also "Declaration of Joseph Baxter in Support of Motion for Reconsideration and/or Clarification of the Court's Ruling on Respondent's Motion to Preclude Evidence of Prior Consistent Statements by Bobby Evans," filed January 27, 2011 in the Marin Count Superior Court, at ¶ 4. A file-stamped copy of the motion and declaration was mailed to this Court on March 12, 2012.

took the matter under submission. (15 RHRT 804-805, 811-825) After a short recess, the Court ruled that the statements were not admissible as prior sworn statements, but it appeared that the Court had not yet ruled on whether the evidence was admissible as prior consistent statements. Accordingly, on January 27, 2011, petitioner filed a Motion for Reconsideration and/or Clarification of The Court's Ruling on Respondent's Motion to Preclude Evidence of Prior Inconsistent Statements by Bobby Evans. The motion, *inter alia*, requested an opportunity to recall Mr. Evans, in the event the referee ruled that further testimony would be required to lay the foundation for the admissibility of the evidence. [92] Without addressing the motion, the referee indicated that the matter was still under submission. (16 RHRT 836)

Having brought the matter to the referee's attention at least three times, petitioner assumed that the referee would address the issue in her report. Nonetheless, the referee's report makes no ruling on the matter and entirely ignores the issue.

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[92] Petitioner's Motion Petitioner's Motion for Reconsideration and/or Clarification of the Court's Ruling on Respondent's Motion to Preclude Evidence of Prior Consistent Statements by Bobby Evans at 2:14-15, 3:6-11; Declaration of Joseph Baxter in Support of Motion for Reconsideration and/or Clarification of the Court's Ruling on Respondent's Motion to Preclude Evidence of Prior Consistent Statements by Bobby Evans at ¶¶ 10-11, filed in the Marin County Superior Court on January 27, 2011. A copy of the motion and declaration was mailed to this Court on March 12, 2012.

2. The Prior Consistent Statements

(a) Bobby Evans' 1996 and 1998 testimony under oath

Evans testified under oath in two unrelated judicial proceedings about the benefits he received for testifying against Masters: On April 25-26, 1996, in Yolo County preliminary examination proceedings in *People v. Williams*, Case No. 95-8640; and on June 10, 1998, in Yolo County Superior Court proceedings in *People v. Bailey*, No. 98-0029. Bobby Evans testified that:

(a) He was not prosecuted for 15 to 20 shootings because he was "granted immunity in Court, in State Court for testifying on a prison murder" of a prison guard at San Quentin. (*People v. Williams*, pp. 321-323, 326) (Pet. Ex. 67); [93]

(b) He received probation on his April 1989 Alameda County felony charges as a result of having testified "in a prison homicide" of a prison guard, "a Sergeant" —

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[93] Exhibits 66 and 67 are condensed versions of the relevant portions of the *Bailey* and *Williams* transcripts. To the extent that the referee or respondent might request or require more complete copies of the transcripts, more complete copies were attached to the Declaration of Joseph Baxter in Support of Motion for Reconsideration and/or Clarification of the Court's Ruling on Respondent's Motion to Preclude Evidence of Prior Consistent Statements by Bobby Evans, filed in the Marin County Superior Court on January 27, 2011. A copy of the motion and declaration was mailed to this Court on March 12, 2012. Copies were also included as Exhibits 16 and 18 in the Appendix to the Petition for Writ of Habeas Corpus, filed herein on January 7, 2005. Petitioner's counsel also possesses complete transcripts of Mr. Evans' testimony in the proceedings.

undoubtedly this case — and for testifying for the federal government on a large drug case (*People v. Bailey*, pp. 8-9) (Pet. Ex. 66); [94]

(c) He was in the process of being indicted under the RICO Act when he decided to break the BGF oath and testify against the BGF. (*People v. Bailey*, p. 14) (Pet. Ex. 66); [94] and

(d) He initially became an informant to escape prosecution. (*People v. Bailey*, p. 14) (Pet. Ex. 66.) [94]

(b) Evans' statement to his correctional counselor when he was admitted to prison in 2002

In 2002, in an interview with his CDCR Correctional Counselor, Evans stated that following the Sgt. Burchfield murder at San Quentin in 1985 that he was facing charges under the RICO Act. In exchange for his cooperation the authorities dropped the charges. Evans claimed that he had spent 6-7 years of the last 16 years, i.e., since 1986, as a police informant for the B&E [*sic*] Task Force and was paid up to $500 per week for his services. (Pet. Ex. 68)

3. Evans' Prior Consistent Statements Are Admissible under Evidence Code Sections 1236 and 791(b) and the "Negative Evidence" Exception

Evidence Code section 1236 provides an exception to the prohibition of hearsay for statements previously made by the witness consistent with the testimony at the hearing so long as such

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[94] See footnote 93, *supra.*

statements are offered in compliance with Evidence Code section 791. Prior consistent statements offered under Sections 1236 and 791 are admissible not only to rehabilitate the credibility of a witness but also for the truth of the matter asserted. Evid. Code § 1236, Comment; *People v. Chavez* (1980) 26 Cal.3d 334, 353-354.

As will be demonstrated below, Evans' prior statements should be admissible because (1) respondent's cross-examination of Evans satisfied the requirements of Section 791(b), (2) the cross-examination invoked the "negative evidence" exception, and (3) because the statements are independently reliable.

(a) Admissibility under Evidence Code section 791

In pertinent part, Section 791 provides as follows:

> Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
> . . . .
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

In addition to an express or implied charge having been made of recent fabrication or improper motive or bias, the courts have established an additional method under which prior consistent statements are admissible. Where the timing requirements of section 791(b) are not met, admissibility is still proper where a charge of recent fabrication is made by negative evidence, through an implication that a witness did not speak of the matter or make a

report at a presumably natural time. *People v. Williams* (2002) 102 Cal.App.4th 995, 1011–1012.

The prior consistent statements at issue here are admissible under both the recent fabrication or the negative evidence exceptions.

(i) The implied charge of recent fabrication

An implied charge of recent fabrication, bias or improper motive can be found where a witness is cross-examined regarding his current testimony in such a way that the cross-examining attorney implies a recent fabrication, bias or improper motive. *People v. Hillhouse* (2002) 27 Cal.4th 469, 492 (consistent statements predating a witness' plea agreement were admissible where defense counsel's cross-examination of the witness regarding the plea agreement "cast doubt on [the witness'] credibility").

Establishing an "implied charge" does not require that a specific improper motive be proven to exist; it is enough for the cross-examination attorney to suggest a possible improper motive through his questioning. For example, where "defense questioning clearly intimated that [the witness] might receive a penal benefit for testifying for the prosecution," the Court found that "the defense impliedly charged" an improper motive even though the witness "denied being offered such an inducement." *People v. Bunyard* (1988) 45 Cal.3d 1189, 1208-1209. The *Bunyard* Court held that "The mere asking of questions may raise an implied charge of improper motive even though the receipt of penal benefit is denied." *Id.,* citing *People v. Pic'l*

(1981) 114 Cal.App.3d 824, 863, disapproved of on other grounds in *People v. Kimble* (1988) 44 Cal. 3d 480, 498.

Moreover, in situations in which several years have past between the witness' testimony and the prior inconsistent statements during which time a number of events have occurred that might have created an improper motive, a prior consistent statement is admissible "if it was made before the existence of any one or more of the biases or motives that . . . may have influenced the witness's testimony." *People v. Noguera* (1992) 4 Cal.4th 509, 629 (tape recorded interview of an interview with law enforcement admitted where the witness could have had motive to lie both before and after the interview).

(ii) The negative evidence exception

The "negative evidence" exception to the temporal requirements of section 791 is invoked where the charge of fabrication stems from the allegation "that the witness did not speak of the matter before when it would have been natural to speak," or "the witness's silence is alleged to be inconsistent with trial testimony," and the prior statement effectively rebuts the claim of prior silence when it would have been natural to speak. *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012 (internal quotes omitted), quoting *People v. Manson* (1976) 61 Cal.App.3d 102, 132.

> Different considerations come into play when a charge of recent fabrication is made *by negative evidence* that the witness did not speak of the matter before when it would have been natural to speak. His silence then is urged as inconsistent with his utterances at the trial. The evidence of consistent statements at that point becomes proper because the supposed fact of not speaking formerly, from which we are to infer a recent

> contrivance of the story, is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story.
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> *People v. Gentry* (1969) 270 Cal.App.2d 462, 473-47 (internal quotations omitted). Accord, *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012 (emphasis in original) (Given negative nature of counsel's impeachment, the timing of the proffered prior consistent statement loses significance), quoting *People v. Manson* (1976) 61 Cal.App.3d 102, 132.

This Court has followed and cited the *Gentry* holding, stating that "Where cross-examination concerning failure to report an incident implies a later fabrication, evidence that the incident was reported shortly after its occurrence is admissible." *People v. Edelbacher* (1989) 47 Cal.3d 983, 1013.

(b) The cross-examination of Mr. Evans

In Evans' cross-examination, counsel for the prosecution, Ms. Lustre, brought out testimony that Evans had periodically met and talked with petitioner's counsel, Mr. Baxter, for a period of several years both when he was in and out of prison. (Evans Deposition at 116 - 121) The cross-examination then proceeded as follows:

Q [Ms. Lustre]: Okay. At what point did you decide to tell Mr. Baxter that you lied on the stand in this case?

A [Mr. Evans]: Probably it might have been about maybe as I got out of prison this time.

Q: Okay, so that you have been in 2008?

A: Yeah. About 2008, 2009, somewhere around there.

Q: Okay. And what made you decide suddenly to tell Mr. Baxter after all of these years that you committed perjury in a capital case?

A: 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. I want to clear my mind. I want to – I'm in the church now. I go to church and different things like that.

And like I told a lot of lies of peoples, you know. I hurt a lot of peoples. Peoples been hurting 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.

Q: Okay. But you didn't try - you haven't contacted Mr. Berberian to say "Mr. Berberian, I lied in that case. You know, Mr. Hahn made me lie and I'm really sorry and I need to clear this up?

A: Well, for one, I don't know how to contact neither one of them individuals.

JUDGE DURYEE: Say that again.

THE WITNESS: I don't know how to contact neither one of them.

MS. LUSTRE: You don't know how to contact the District Attorney?

A: No, I didn't.

Q: Okay. So if Mr. Baxter hadn't ever found you, you would never have unburdened yourself 'cause you don't know how to contact anybody?

A: Well, I didn't know how to contact - I didn't even know how to contact him at first. He contacted –

Q: That's my question: If he hadn't ever come to you, you would have just kept this to yourself?

A: No. Eventually I believe I would have found a way to contact him 'cause, like I said, I wanted to clear my conscious on a lot of things, you know.

(Evans Deposition, at 121-123)

(c) Respondent's cross-examination implied a recent fabrication

Ms. Lustre's cross-examination of Evans clearly implied a recent fabrication. Ms. Lustre spent considerable time reviewing the

various contacts Evans had with Mr. Baxter, leading up to the question: "Okay. And what made you decide suddenly to tell Mr. Baxter after all of these years that you committed perjury in a capital case?" (*Id.* at 121) This question and those that followed had a decidedly accusatory tone and expressed Ms. Lustre's clear distrust for Evans' testimony generally, and specifically, the timing of his disclosure to Mr. Baxter, 2008.

Thus, Ms. Lustre's expressed disbelief in Evans' 2010 testimony and focus on 2008 in the cross-examination suggested that respondent's position that Evans' testimony was fabricated and/or that he had an improper motive that arose in 2008, and subsequent to the 1996, 1998, and 2002 statements.[95] (*Id.* at 116 – 123) Section 791(b)'s requirements, that there was an "implied charge" that Evans' testimony had been "recently fabricated" and/or "influenced by bias or improper motive" and that the improper motive (or at least one of any number of motives) arose after the consistent statement, are therefore satisfied. *People v. Noguera* (1992) 4 Cal.4th 509, 629.

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[95] In its motion *in limine*, respondent attempted some Monday-morning quarterbacking, specifying, for the first time, that it had not made a charge of recent fabrication and that any motivation for fabrication predated the 1996, 1998, and 2002 statements (at some unspecified time). Motion *In Limine* to Preclude Evidence of Prior Consistent Statements by Bobby Evans, filed Aug. 20, 2010, at p. 2.) However, the inquiry as to whether an allegation of fabrication or improper motive was made turns on – and only on – the substance of the *actual cross-examination*, not respondent's intent later or even at the time. *People v. Ainsworth* (1988) 45 Cal.3d 984, 1013-15, grant of habeas corpus affirmed by Ainsw*orth v. Woodford* (9th Cir. 2001) 268 F.3d 868.

(d) The cross-examination also levied an implied charge of recent fabrication by negative evidence

The prior consistent statements are also properly admitted under the "negative evidence" exception. In cross-examination, respondent pointedly and repeatedly asked Evans why, if he was feeling guilty about his past deeds, he did not come clean to the District Attorney but talked only to petitioner's counsel. (Evans Deposition at 121-123) This line of questioning, delving into what respondent implied was a silence (to the District Attorney) when it would have been natural to report (when he reported his misdeeds to petitioner's counsel) rendered the genesis of the alleged improper motive irrelevant and opened the door to admission of statements consistent with the current testimony. *People v. Edelbacher* (1989) 47 Cal.3d 983, 1013; *People v. Williams* (2002) 102 Cal.App.4th 995, 1011–1012; *People v. Gentry* (1969) 270 Cal. App. 2d 462, 473-474.

4. Bobby Evans' Prior Consistent Statements Should Also Be Admitted Because They Satisfy the Basic Requirements of All Exceptions to the Hearsay Rule: They Are Inherently Reliable and Do Not Violate the Confrontation Clause

Over and above the specific statutory hearsay exceptions through which Evans' prior statements should gain admission, the statements should be admitted because they satisfy the general criteria for a hearsay exception: they are inherently trustworthy and do not present a confrontation clause problem.

> Because the rule excluding hearsay is based on these particular difficulties in assessing the credibility of statements made outside the jury's presence, the focus of the rule's several exceptions is also on the reliability of the out-of-court declaration. Thus, the various hearsay exceptions generally reflect situations in which

> circumstances affording some assurance of trustworthiness compensate for the absence of the oath, cross-examination, and jury observation.
>
> *People v. Cudjo* (1993) 6 Cal. 4th 585, 608, emphasis added, citing *Chambers v. Mississippi (1973)* 410 U.S. 28, 298–299.

"The reasoning behind such exceptions is that experience has shown that there are situations where it is impossible or impractical to present an actual witness, yet the proffered necessary evidence is inherently trustworthy under the circumstances. (5 Wigmore, Evidence (Chadbourn rev. 1974) § 1420, p. 251; McCormick on Evidence (3d ed. 1984) § 253, p. 753.)" *In re Michael G.* (1993) 19 Cal.App.4th 1674, 1677 (Inherent reliability found in a manufacturer's warning label because the court reasoned that there are no devious reasons to provide such a notice).

Thus, even if a court does not believe that the statements at issue fit neatly into one of the statutory hearsay exceptions, a court is not required to slavishly follow the Evidence Code where an exception is necessary to "work out particular problems." Recommendation Proposing an Evidence Code (Jan. 1965) 7 Cal. Revision Com. Rep. (1965) pp. 1, 34. Rather, "the code permits courts to work toward greater admissibility of evidence but does not permit the courts to develop additional exclusionary rules." *Id.* This license is grounded in the Evidence Code section 1200(b), which states that "Except as provided by law, hearsay evidence is inadmissible," and Section 160, which defines "law" to include "constitutional, statutory, and decisional law." Thus, "the language of Evidence Code section 1200, read in light of Evidence Code section 160, and the comments thereon, makes clear that one source of

exceptions to the hearsay rule is from judicial decisions." *In re Cindy L.* (1997) 17 Cal.4th 15, 26-28 (affirming the lower court's creation of a new "child dependency exception" to the hearsay rule, where there was a need for the exception, the statements had inherent reliability, the child was available to testify, or unavailable and there was some corroborating evidence, and the interested parties were provided notice of the testimony).

Bobby Evans' prior statements present a compelling case for a hearsay exception. Evans, a convicted criminal and professional informant, testified as a witness for the State of California in a criminal matter and years later, after being released from prison, formally recanted his testimony, stating that he had perjured himself in exchange for favorable treatment by the State. Such a scenario certainly is not unique. A recent law review comment provided the following statistics:

> Snitches heavily populate the landscape of wrongful convictions. In their classic study of 350 erroneous convictions in potentially capital cases, Bedau and Radelet found "[p]erjury by prosecution witness[es]" to be a cause in 117 cases--the single largest categorical cause. Accomplice, informant, or jailhouse snitch testimony accounted for thirty-five of these wrongful convictions. Snitches were present in 21% of the sixty-two wrongful convictions exposed by DNA tests studied by Dwyer, Neufeld, and Scheck. Snitches appear in 45.9% of the wrongful capital murder convictions documented by Northwestern University School of Law's Center on Wrongful Convictions, making snitches the leading contributor. Samuel Gross identified false testimony by jailhouse snitches and their kin in almost half of the wrongful murder convictions he studied.
>
> Carl N. Hammarskjold, *Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather Than Circumstantial, Evidence Contributes to Wrongful Convictions* (2011) 45 U.S.F. L. Rev. 1103, 1108-09.

One can think of any number of reasons, some of which apply here, that it would be in the interests of an inmate or an accused awaiting trial to testify for the State and ingratiate himself to the District Attorney or prison administration. But, outside of a recantation prior to testifying to avoid a "snitch" label, there are few possible self-serving justifications to recant false testimony or to report wrongdoing by the State relating to the false testimony.

Evans' prior statements are consistent with his recent testimony in this case even though they were made prior to Masters' habeas petition and completely independent of any Masters litigation. When Evans made the prior statements, he had nothing to gain from reporting the circumstances that led to his trial testimony against Masters. Evans will not return to favor with the BGF because he has already been labeled a snitch, and the other suspects in the murder were also BGF members. Admitting that he perjured himself will not help Evans in his own case or in other cases in which he is testifying for the state. To the contrary, an admission of perjury further damages his credibility. Damaging the State's case against Masters, and in doing so effectively pointing the finger at certain officials for improper conduct, certainly will not curry favor with the prison, law enforcement, or the Attorney General's office. In fact, if he were "unavailable," Evans' statements would likely be admissible as declarations against interest under Evidence Code section 1230.

It is also important to remember that the prior statements at issue are consistent with Mr. Evans' May 14, 2010 testimony, which he gave out of prison, on parole, and off drugs for the first time in 40

years. (Evans Deposition at 28-29) Significantly, on each of the known occasions that Evans has discussed his Masters trial testimony, other than at the 1989 trial, Evans has always maintained that he offered his testimony as part of a deal with the prosecution.

This consistency is both precise and longstanding. John Costain's sealed 1990 testimony suggested that Evans was expecting benefits from his testimony. (of January 5, 1990, 2-4) Everything that Evans has said since then precisely matches and fits together. Thus, Evans' 1996 *Williams* testimony referred to the shootings that Evans admitted to during the penalty phases testimony. (Pet. Ex. 67) Evans' 1998 *Bailey* testimony, admits that he became an informant to avoid prosecution. (Pet. Ex. 66) Evans' 1996 *Williams* testimony, his 1998 *Bailey* testimony, and his 2002 interview with his correctional counselor all refer to the deal for his testimony in the *Burchfield* case. (Pet. Exs. 66, 67, 68) Evans' 2002 statements to his prison counselor date his informant work back to 1986. (Pet. Ex. 68) This precisely matches the reference hearing testimony of both Bobby Evans and James Hahn. (Evans Deposition at p. 51; 8 RHRT 434, 448-449)

Petitioner's Exhibits 66, 67, and 68 should therefore be admitted.

B. THE COURT'S REFUSAL TO ALLOW PETITIONER TO PRESENT COMPETENT, RELEVANT, AND MATERIAL EVIDENCE REGARDING THE KITES HIDDEN IN WILLIS' TELEVISION VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND CONSTITUTED AN ABUSE OF DISCRETION

1. Procedural and Factual Background

As previously discussed, Rufus Willis was a key witness in the case against petitioner, and subsequent to the Masters trial has become a critical witness in his defense by unequivocally recanting his testimony and providing explanation for his false testimony. Subsequent to the letters, discussions, and declarations in which he recanted his trial testimony, Willis had a telephone interview with counsel for respondent, Ms. Lustre and Mr. Pruden, in which Willis re-recanted on some issues, but also refused to answer some of their questions. Petitioner objected to the admission of the transcripts of the interview as a violation of his right to confrontation.

Mr. Willis' asserted his Fifth Amendment right and refused to testify in the instant proceedings. (9 RHRT 490-503) Based on Willis' de facto unavailability, petitioner provided Willis' 2001 declarations and other evidence of his recantation. (Pet. Exs. 21-30)

On the morning of January 21, 2011, the referee stated her intention to complete witness testimony, save for the anticipated testimony of petitioner's expert witness the following month, so that the matter could proceed to argument. (14 RHRT 723) In the housekeeping discussion between the parties' respective counsel and the referee at the start of the day, petitioner's counsel, Mr. Andrian, informed the court that petitioner planned to put on Mr. Reynolds

and/or Mr. Baxter, if necessary, regarding specific issues related to outcome of pending motions and rulings on exhibit admissions, and that any such testimony would be brief. (14 RHRT 721, 722, 726)

Later that morning, respondent offered in evidence the recording and transcript of respondent's telephone interview with Willis. (14 RHRT 774, Resp. Exs. HH & II) One of the questions that Willis refused to answer was an inquiry of the meaning of the "Hint-Hint" postscript in his 2005 letter to Mr. Baxter. (Resp. Ex. II at 36) Petitioner objected to the transcripts, arguing that the evidence was testimonial and thus violated the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36. (*Id.* at 778-780) The referee deferred her ruling and stated that she would allow briefing on the issue. (*Id.* at 780)

Shortly thereafter, before wrapping up for the day, Mr. Andrian attempted to call Mr. Baxter to address the issue of Willis' statements regarding the TV evidence, but the referee would not let him speak:

> The Court: All right. So we're done with the presentation?
>
> *Mr. Andrian: Well, your honor, there is one issue.*
>
> *The Court: Please don't interrupt me.*
>
> Mr. Andrian: I'm sorry.
>
> The Court: We're done with the presentation of evidence today. I will hear argument on this matter next Thursday, January 27, beginning at 10:00 a.m. There are a few evidentiary issues which I will consider that morning before argument.
>
> (*Id.* at 790)

Based on the referee's statements that she would hear a few evidentiary issues before argument and also not necessarily having a need for Mr. Baxter's testimony if the Willis interview transcript was

not admitted, Mr. Andrian waited until the next court day to call Mr. Baxter.

On January 27, while tying up loose ends before hearing the first part of the parties' arguments, the Court admitted the Willis interview transcripts. (16 RHRT 849) In response, Mr. Andrian requested that he be allowed to call Mr. Baxter "briefly" to "discuss the circumstances of his interview with Mr. Willis and his description of what went on with the TV, to impeach." (*Id.* at 849-850) The referee refused: "I'm not going to receive any more evidence. But I know that he said he hid a bunch of kites in his TV and his TV is now gone." (*Id.* at 850) Mr. Andrian responded by making an offer of proof about the subtle – yet critical – distinction: Mr. Baxter would testify that Willis told him that it was the kites created after the murder of Sgt. Burchfield that had been stored in and confiscated with Willis' television set. (*Id.*) Those kites included the kites that Masters was ordered to copy, or that he ordered him to do so. (*Id.*) The Court provided no specific response to the offer of proof and instead asked counsel if they were ready to argue. Petitioner proceeded with argument.

Despite the referee's refusal to hear brief and specific testimony from Mr. Baxter without providing any specific reasoning or ruling, just that she was not "going to receive any more evidence," it was not until April 8, 2011, more than two months later, after the testimony of petitioner's expert and the admission of 26 additional exhibits, that the Court received everything into evidence and declared the case submitted. (19 RHRT 1173)

2. Petitioner Had a Due Process Right to Present Mr. Baxter's Testimony on the TV Evidence Because the Evidence Was Competent, Relevant and Material Evidence That Supported His Defense Theory

When the Court refused to allow Mr. Baxter to testify on January 27, prior to the Court having received all evidence including lengthy testimony from petitioner's expert witness, petitioner's case in chief was still open. However, even if one argued that petitioner had rested (with the exception of Dr. Leonard's testimony) Mr. Baxter's testimony would constitute proper rebuttal evidence. Yet, no matter how Mr. Baxter's proffered testimony is classified, the referee's refusal to hear brief, highly relevant testimony, offered specifically in response to matters contained in the telephone interview transcript admitted over petitioner's objection, violated petitioner's right to due process, and constituted an abuse of discretion.

The right to present credible, relevant evidence is a due process right protected by the Fourteenth Amendment of the United States Constitution. "Arbitrarily cutting off the presentation of relevant evidence can render a trial fundamentally unfair and violate a party's due process rights." Cal. Civil Courtroom Hbook. Desktop Ref. (2011 ed.) § 30:5, citing, *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 294. Such a denial of this "fundamental right is almost always considered reversible error. 3 Witkin, Cal. Evid. (4th Ed. 2000) § 3, p. 28, citing, *Guardianship of Waite* (1939) 14 C.2d 727, 730. A defendant's right to "present his defense theory" is "fundamental," and "all of his pertinent evidence should be considered by the trier of fact." *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599, emphasis

added (failing to admit evidence that victim had once before falsely accused another man of rape was error but not reversible where evidence was overwhelming).

The situation here is similar to that in *Caldwell v. Caldwell*, in which an order denying a motion to modify a divorce decree to increase alimony was reversed on the basis that the trial court erred by failing to allow the wife to testify as to her daughter's needs. *Caldwell v. Caldwell* (1962) 204 Cal.App.2d 819, 820-821. When the wife was called to testify, the court refused to hear the testimony, stating that "'I understand she is just going to testify as to cause for more money,'" and indicating "that it did not desire to hear her, and, when counsel persisted, announced that the motion for increase was denied." *Id.*

The referee in this matter showed similar indifference with respect to the TV Evidence – "I know that he said he hid a bunch of kites in the TV and the TV is now gone." (16 RHRT 850)

In keeping with litigants' due process rights, Code of Civil Procedure section 607 "Order of Proceedings," dictates the Court's limited discretion with respect to the parties' rights to put on their cases. Section 607 provides, in pertinent part, as follows:

> When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:
>
> 1. The plaintiff may state the issue and his case;
>
> 2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;
>
> 3. The plaintiff must then produce the evidence on his part;

4. The defendant may then open his defense, if he has not done so previously;

5. The defendant may then produce the evidence on his part;

6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case...

Thus, while Section 607 provides the Court with discretion to change the order of proceedings "for special reasons" and allow additional, non-rebuttal evidence after one's case in chief has closed, neither it, nor any other statute, provides the discretion to limit non-cumulative relevant evidence.

> A party is entitled to have received in evidence and considered by the court, before findings are made, all competent, relevant and material evidence on any material issue. [citing cases] While it is within the sound discretion of the trial court to define the issues and direct the order of proof, the court may not act so as to preclude a party from adducing competent, material and relevant evidence which tends to prove or disprove any material issues.
>
> *In re Estate of Horman* (1968) 265 Cal.App.2d 796, 808-09.

Even if respondent were to argue that petitioner's case in chief had closed, petitioner, pursuant to Section 607, had the right to put on rebuttal evidence. Courts have discretion only over whether to admit additional evidence from a party's case-in-chief. *Lipman v. Ashburn* (1951) 106 Cal.App.2d 616, 620. *The court has no discretion as to whether to admit rebuttal evidence.* See, *Id.*; Code Civ. Proc. 607(6). True rebuttal evidence – evidence that responds directly to or is critical of evidence brought in the first instance by the opposing party – is always admissible as a matter of due process right and as set forth by Section 607. *Id.*

If the referee construed the end of the petitioner's evidentiary presentation on January 21, prior to hearing plaintiff's expert that next April, to be the close of petitioner's case in chief, then Mr. Baxter's testimony would be properly characterized as rebuttal evidence. "Rebuttal evidence is generally defined as evidence addressed to the evidence produced by the opposite party." *Edgar v. Workmen's Comp. Appeals Bd.* (1966) 246 Cal. App. 2d 660, 665. Rebuttal evidence is allowed as a matter of right to counter the opposing party's case-in-chief. See, *In re Brown* (1998) 17 Cal. 4th 873, 889. Respondent's admission of new evidence – the telephone interview transcript – entitled petitioner to admit relevant rebuttal evidence.

The evidence that petitioner sought to admit was highly relevant. During the telephone conversation admitted into evidence, Willis refused to answer a number of questions, including whether or not he had been truthful with the District Attorney, and the meaning of his postscript – "Why Masters' lawyers never looked through my property at San Quentin, Hint-Hint" in his letter to Mr. Baxter. (Pet. Ex. 25; Resp. II at 27:19-23. 36:6-10) The proffered testimony would have thrown light on Willis' refusal to answer these questions. Had Willis admitted to the Attorney General that the kites he had Masters copy were hidden in his television set, it would have meant that he manufactured false evidence against Jarvis Masters. It would have meant that Jarvis Masters was not the author of the two kites. It would have meant that his 1989 testimony was false. It would have meant that what he told the District Attorney was false. Thus, the proffered testimony was relevant to prove that the reason why Rufus Willis

refused to discuss the meaning of his postscript about his television property was because Willis did not want to incriminate himself, or get caught in his web of lies.

The proffered evidence therefore goes to the heart of petitioner's case. As the District Attorney put it, the two kites were "central" to the state's case. (73 RT 16033, 16070) Like a "chokechain" around Jarvis Masters' neck. (74 RT 16341) That is why petitioner should have been allowed to offer evidence on this subject.

While the referee had discretion to reorder the hearing of evidence for good cause, refusing to hear important relevant evidence, without explanation, simply because she was "not hearing any more evidence" that day, constitutes a clear abuse of discretion and denial of petitioner's due process rights. *In re Estate of Horman* (1968) 265 Cal.App.2d 796, 808-809 (Discretion should be exercised "in accordance with legal principles and in accordance with the ends of justice."); *People v. Brown* (2003) 31 Cal.4th 518, 534-535.

The only factor that the referee relied in refusing to hear the evidence was time. [96] (16 RHRT 850) Admittedly, it would have taken *some* time to take Mr. Baxter's examination. On the other hand,

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[96] While the referee asked Mr. Andrian whether he had more evidence to introduce, she would not even let him answer her question. (14 RHRT 790) In addition, the referee would not accept proposed findings of fact or briefing because, in her opinion, she already had enough to read. (15 RHRT 828; "Settled Statement Re: Off-the-Record Discussions between Counsel and the Court on or about January 21, 2011," filed in the Marin County Superior Court on December 19, 2011, and filed herein on February 1, 2012.

petitioner's counsel made it clear that the testimony would be short, and made an offer of proof limited to the one specific issue - what Willis told Mr. Baxter about the "Hint-Hint" letter. Also strongly weighing in favor of admission were the following far more compelling factors: petitioner's life was at stake; the proffered testimony was highly probative in that it concerned the kites allegedly authored by petitioner, which were critical to the State's case against petitioner; the testimony was not cumulative; and petitioner's case in chief was still open.

Therefore, whether the point at which the referee refused to allow Mr. Baxter to testify is characterized as before or after petitioner's case-in-chief, Mr. Baxter's testimony should have been admitted as a matter of due process, and the referee's refusal to admit the testimony constituted a clear abuse of discretion.

XI. THE STATE AND FEDERAL MATERIALITY STANDARDS FOR ISSUING THE WRIT OF HABEAS CORPUS

Habeas jurisprudence, like appellate jurisprudence, requires proof of prejudice for reversal. Thus, habeas relief is only provided where a violation of law or an error are deemed "material." Petitioner will therefore set forth the applicable state and federal standards of materiality. In the concluding section of this brief, petitioner will apply these standards to the evidence and record.

A. CALIFORNIA MATERIALITY STANDARDS FOR THE GRANTING OF THE WRIT

This Court's habeas jurisdiction draws a distinction between claims of false evidence and claims of actual innocence. Claims of false evidence are directed to the integrity of the State's case. Claims of actual innocence, on the other had, presume the integrity of the State's case, and its procedural fairness, and focus instead on the question of whether an innocent man has been found guilty.

1. Claims of False Evidence

Claims of false evidence are governed by Penal Code section 1473, subdivision (b)(1), which provides that "A writ of habeas corpus may be prosecuted for . . . false evidence that is substantially material or probative on the issue of guilt. . . ." Subdivision (c), in turn, provides that "Any allegation that the prosecution knew or should have known of the false nature of the evidence . . . is immaterial to the prosecution of a writ of habeas corpus brought pursuant to subdivision (b)."

False evidence is deemed "substantially material or probative" within the meaning of section 1473 when there is a "reasonable probability" that, had the false evidence not been introduced, the result would have been different. *In re Sassounian* (1995) 9 Cal.4th 535, 546. As this Court stated in *In re Roberts* (2003) 29 Cal.4th 726, 741-742,

> "The requisite 'reasonable probability' is a chance great enough, under the totality of circumstances, to undermine our confidence in the outcome. [Citations] The petitioner is not required to show that the prosecution knew or should have known that the testimony was false. (§ 1473, subd. (c); *People v. Marshall* (1996) 13 Cal.4th 799, 830)"

Under this standard the petitioner need not prove that the error or violation of petitioner's rights more than likely affected the outcome. One need only prove with reasonable probability that it *could have* or *may have* affected the outcome:

> "False evidence is 'substantially material or probative' if it is 'of such significance that it may have affected the outcome,' in the sense that '*with reasonable probability* it *could have* affected the outcome. . . .' (*In re Wright* (1978) 78 Cal.App.3d 788, 814"
>
> *In re Malone* (1996) 12 Cal.4th 935, 965 (Emphasis is original)

2. Claims of Newly Discovered Evidence

In the case of newly discovered evidence going to actual innocence, the burden is different, because it presumes the integrity of the State's case. Thus, newly discovered evidence of actual innocence must cast "fundamental doubt on the accuracy and reliability of the proceedings" such that, for the guilt phase, it "undermine[s] the entire prosecution case and point[s] unerringly to

innocence or reduced culpability." *In re Lawley* (2008) 42 Cal.4th 1231, 1239, quoting *In re Hall* (1981) 30 Cal.3d at p. 417.

3. Questions 1, 3, 4 and 6

Inasmuch as Question 1 is directed to the issue of "false evidence," the "reasonable probability"/"undermine confidence in the outcome" standard clearly applies to Question 1. For State law purposes, this standard would also appear to apply to Questions 3, 4, and 6, since these questions are also directed to the integrity of the State's case and its procedural fairness.

4. Question 2

This Court's February 14, 2007 Order to Show Cause did not accept the recommendation of dissenting Justices that the Order to Show Cause should issue on the additional ground that newly presented evidence establishes that petitioner is actually innocent, and that his execution would violate the federal Constitution. Question 2, nonetheless, asked: "Is there newly discovered, credible evidence indicative of petitioner's not having been a participant in the charged offense."

Arguably, Question 2 requires petitioner to establish to the satisfaction of this Court that the evidence casts fundamental doubt on the accuracy or reliability of the proceedings, such that it points "unerringly to innocence or reduced culpability." *In re Lawley, supra*, 42 Cal.4th at 1239. As above noted, however, this higher standard presumes the integrity of the State's case. Thus, when a finding is

made that false evidence was introduced, the presumption of integrity no longer applies, and the "reasonable probability" standard of materiality should apply to all evidence, including newly discovered evidence of innocence. [97]

5. Cumulative Prejudice Must Be Evaluated

As always, prejudice must also be evaluated cumulatively, since cumulative errors create "a negative synergistic effect, rendering the degree of overall unfairness . . . more than that flowing from the sum of the individual errors." *People v. Hall* (1998) 17 Cal.4th 800, 847.

B. FEDERAL CONSTITUTIONAL MATERIALITY STANDARDS

Questions 1, 3, 4, and 6 also raise issues under the federal Constitution. As our discussions of Questions 3, 4, and 6 show, petitioner's constitutional rights were violated. Thus, federal constitutional standards of prejudice and materiality must also be evaluated in conjunction with Questions 3, 4, and 6.

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[97] In the same way, once the petitioner has presented newly discovered evidence, he may thereafter present "'any evidence not presented to the trial court and which is not merely cumulative in relation to evidence which was presented at trial' (citation) insofar as it assists in establishing his innocence." *In re Hall, supra*, 30 Cal. 3d 408, 420, cited with approval, *In re Lawley* (2008) 42 Cal.4th 1231, 1238.

1. Question 3 [98]

Petitioner, in the foregoing sections, has shown by a preponderance of the evidence that Willis's testimony involving Masters' involvement in the Burchfield murder was the result of inherently coercive circumstances. The State has never sought to counter this evidence; it remains uncontradicted.

"[T]he federal and California courts have consistently recognized that the 'admission at trial [of] improperly obtained statements which results in a fundamentally unfair trial violates a defendant's Fifth Amendment right to a fair trial. (Citations)'" *People v. Douglas* (1990) 50 Cal.3d 468,499.

> [A] defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." (*People v. Medina* (1974) 41 Cal.App.3d 438, 455.) Thus, when the accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police (*id.*, at p. 450), or that his testimony result in the defendant's conviction (*People v. Green* (1951) 102 Cal.App.2d 831, 837-839), the accomplice's testimony is "tainted beyond redemption" (*Rex v. Robinson* (1921) 30 B.C.R. 369) and its admission denies the defendant a fair trial. On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid. (Citations.)"
>
> *People v. Allen* (1986) 42 Cal. 3d 1222, 1251-1252

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[98] The State's use of false evidence also implicates federal Due Process considerations, since the use of false evidence impugns the integrity of the State's case. Thus, Due Process standards of prejudice must also be evaluated in conjunction with Question 1.

While Willis' immunity agreement (Petitioner's Exhibit 20) did not itself violate Due Process, the circumstances surrounding his testimony were inherently coercive. Investigator Numark told Willis that he would get a deal if he got the evidence to support his claims, and instructed him to obtain from Masters written evidence of Masters' guilt. Thereafter, when Willis said that he would not testify without a deal for his release, Mr. Berberian threatened to send him back to San Quentin – that is, place his life at risk – unless he testified.

Thus, it matters not that Willis' immunity agreement recited that he must be truthful; what matters is that Numark promised his release if he could get evidence on Masters, and that he manufactured such evidence fifteen minutes after he got back to his cell, and that Berberian threatened his life if he did not testify as promised.

In another context – an appeal of a trial court's denial of a motion to exclude coerced testimony – this Court explained that it "examined the entire record, and most particularly the record of the witness's trial testimony, to determine whether, in our view, 'admission of the [third party's] testimony deprived defendant of a fair trial." *People v. Badgett* (1995) 10 Cal.4th 300, 350 [bracketed material in original], quoting *People v. Douglas*, *supra*, 50 Cal.3d at 503. In addition, *Badgett* explained,

> The federal standard of review also seems to require the reviewing court to examine the record and make an independent determination whether admission of coerced testimony of a third party deprived the defendant of a fair trial. (See, e.g., *Wilcox v. Ford* (11th Cir.1987) 813 F.2d 1140, 1148, fn. 15.) *Id.* at 350-351.

Petitioner has shown, and respondent has not contradicted, that Willis's testimony as to petitioner was coerced, in violation of his Fifth Amendment rights to a fair trial. Yet the State's entire case rests on Willis's credibility at trial. The State cannot have it both ways. If it now claims that Willis is to be believed with regard to petitioner's guilt, then it must also accept the State's evidence regarding the coercion inherent in Mr. Berberian's threat to send Willis back to San Quentin, unprotected, if he did not testify.

Giglio v. United States sets forth the controlling standard of prejudice for false testimony arising out of inherently coercive circumstances: "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . .'" *Giglio v. United States* (1972) 405 U.S. 150, 154, quoting *Napue v. Illinois* (1959) 360 U.S. 264, 271. Petitioner has met that standard.

2. Question 6

As petitioner demonstrated in our discussion of Question 6, the evidence preponderates that either an explicit promise was made to Bobby Evans – as Bobby Evans testified in 1996, 1998, and 2010, and as he told his Correctional Counselor in 2002 – or an implied promise was created based upon a longstanding working relationship with James Hahn and other governmental authorities This promise, or these promises, created Evans' expectations and influenced his decision to testify falsely against a man he had never met.

Inasmuch as it is undisputed that Bobby Evans' testimony was false, the *Giglio v. United States* "reasonable likelihood" standard also applies to Question 6.

3. Question 4

The substantial *Brady* violations described in petitioner's discussion of Question 4, *supra*, are also of constitutional dimension. *Brady* itself found a Due Process violation in the withholding of evidence from the defense to which it was entitled. *Brady v. Maryland* (1963) 373 U.S. 83, 87.

In re Sassounian, *supra,* 9 Cal.4th at 544 sets forth the appropriate analysis, relying principally upon *United States v. Bagley* (1985) 473 U.S. 667, 685, *et seq.*: First, the withheld evidence was deemed "favorable" because it hurt the prosecution by impeaching one of its witnesses. Second, it was "material" because there is a reasonable probability that had it been disclosed to the defense, the result would have been different. Third, the requisite "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. "It is a probability assessed by considering the evidence in question under the totality of the relevant circumstances . . ." *Id.*

C. THE CONVERGENCE OF THE MATERIALITY STANDARDS

The federal and state materiality standards that apply to Questions 1, 3, 4, and 6 appear to converge into one nearly universal standard. Thus, the *Sassounian/Bagley* "reasonable

probability" standard that the outcome may have been affected appears to be the same as the *Giglio/Napue* "reasonable likelihood" standard. Yet, this is as it should be since both standards flow from *Brady* and its progeny. See, *Giglio v. United States* (1972) 405 U.S. 150, 154. These federal standards, moreover, are essentially the same as the *Sassounian* California standard for claims of false evidence. Thus, the only difference between state law claims and federal claims is that federal standards cannot be compromised or qualified in any way.

XII. THE WRIT OF HABEAS CORPUS SHOULD ISSUE

In light of the convergence of the federal and state standards of materiality, this Court's job is simplified. After resolving Questions 1, 2, 3, 4, and 6, this court need only ask two questions:

1. Whether the record and findings associated with affirmative answers to Questions 1, 2, 3, 4, and/or 6, undermine confidence in the outcome of the 1989 trial. For these purposes "undermine confidence" means there is a "reasonable probability" that the result could have or may have been different had the errors and/or violations of petitioner's rights not occurred. If the Court grants relief on this ground, the judgment and conviction should be vacated, and the case should be remanded to the Marin County Superior Court
2. Whether the record before this Court casts fundamental doubt on the accuracy and reliability of the 1989 trial such that it points unerringly to petitioner's innocence. If the Court makes this finding, then Jarvis Masters should be freed immediately.

Petitioner will address the second question first.

A. THE RECORD CASTS FUNDAMENTAL DOUBT ON PETITIONER'S GUILT AND POINTS UNERRINGLY TO HIS INNOCENCE

The State's case against Jarvis Masters rests upon three legs:

1. The testimony of Rufus Willis;

2. Two prison kites that were penned by Jarvis Masters; and

3. The corroborating testimony of Bobby Evans.

The referee's findings have removed two of those legs. The prosecution's case now rests entirely upon the testimony of Rufus Willis, a leg that is rotten to the core.

What is left of that leg? The testimony of a man found to be a chronic liar who would do anything or say anything to obtain his release, who we know most likely lied about the kites. All that we have left of the State's case is a recantation of a recantation which simultaneously tells us that his testimony was unlawfully coerced, in violation of petitioner's rights under the Due Process Clause of the United States Constitution. If we believe Willis' recantation of his recantation, then his entire testimony must be thrown out, and a new trial must be ordered. *People v. Allen* (1986) 42 Cal.3d 1222, 1251-1252. In every possible way, Rufus Willis' testimony is "tainted beyond redemption." *Id.*

Every single piece of evidence before this Court casts fundamental doubt on petitioner's guilt. The reliability of Harold Richardson's statements, both as reported by Jeanne Ballatore, and in Richardson's own handwriting, were not disputed by the Department of Corrections or respondent. Harold Richardson, who stated that he knew "all the details about the Burchfield murder," who identified ten C-section BGF members as having been involved in the hit, and omitted Masters. Harold Richardson, who identified four planners, and named himself in place of Jarvis Masters.

Willis' own testimony also compels the conclusion that Harold Richardson, not Jarvis Masters, was the fourth co-conspirator. Willis was able to give a precise description of the physical characteristics of the fourth co-conspirator, which by itself suggest that he knew this person well. But Willis' description precisely describes Harold Richardson, and does not fit Jarvis Masters.

The fact that Rufus Willis lied about the two kites also creates fundamental doubt about his entire testimony. The kites were the centerpiece of the State's case. (73 RT 16033, 16070) As the District Attorney viscerally put it, "the chokechain" around the defendants' necks that they could not shake. (74 RT 16341) If Willis' testimony regarding the very centerpiece of the State's case cannot be believed, how can anything that Willis says now be believed?

The referee found that Willis would do anything to secure his release. It is undisputed that the kites, which were found to be lies, arose out of a promise that Willis would be released. The State's case against Jarvis Masters rests entirely upon this tainted beyond redemption core. That, more than anything, casts fundamental doubt on Jarvis Masters' conviction.

Willis admitted to three investigators that he lied at trial, and so declared under penalty of perjury on two separate occasions. He went through his February 23, 2001 declaration line by line with investigator Chris Reynolds and affirmed the truth of practically every word in the declaration. If Willis cannot be believed when he goes through his declaration line by line, how can anything that Willis said at trial now be believed?

What did Rufus Willis do when he had absolutely nothing to gain? He wrote an unsolicited letter of apology to Jarvis Masters for all the pain that he had caused. If Willis' completely unsolicited letter cannot be believed, how can anything that Willis told the jury now be believed?

Harold Richardson, Michael Rhinehart, Lawrence Woodard, and Rufus Willis each came forward with their exoneration evidence at different times, and under different circumstances. Richardson came forward in 1986 and spoke only to the prison authorities, who believed what he said. Willis came forward in 2001, wrote a significant letter in 2005, and again came forward in 2010. Rhinehart spoke to no one, and only came forward in 2011. Woodard, who has been in solitary confinement for 25 years, also came forward in 2011. There is absolutely no evidence of any communication between these four completely isolated witnesses. Yet, in every important detail, the new evidence from these four witnesses is one and the same. Again, the evidence points unerringly to Jarvis Masters' innocence.

The shank evidence also points to Jarvis Masters' innocence. It is undisputed in the record that the weapon stock came from the second tier, that the stock was manufactured on the second tier, that the best sharpener was on the second tier, that the weapon was sharpened on the second tier, that the weapon was finally assembled and made into a spear on the second tier, and that the finally assembled spear was delivered to Andre Johnson on the

second tier, where he used it to stab Sgt. Burchfield. Given the heightened security risk associated with transporting the weapon from the second tier up to and across the fourth tier, past the cells of many additional non-BGF inmates, and then back down to the second tier, the testimony of Lawrence Woodard, Michael Rhinehart, and Welvie Johnson that the weapon never left the second tier was both logical and reasonable. Again, the evidence points to Jarvis Masters' innocence.

Willis was motivated to lie when he wrote a letter to the Warden and asked to be released, when he spoke to inspector Numark who promised his release if he could help him obtain evidence against someone, and when he testified. By contrast, he had no motivation to lie when he spoke to investigators Melody Ermachild, Pam Siller, and Chris Reynolds, and when he executed two declarations exonerating Jarvis Masters. Willis' recantation exposes him to the death penalty and jeopardizes his chance of ever obtaining his release by the Parole Board. Again, the evidence points unerringly to Jarvis Masters' innocence.

Melody Ermachild, Pam Siller, and Chris Reynolds were not the only ones who provided testimony about Willis' exoneration of Jarvis Masters. Even before trial, he admitted to inmates Julie Cader and Darrell Wright that he had made a deal to secure his release. Willis' May 22, 2005 letter to petitioner's counsel, and his admission that he hid the kites that he had Jarvis Masters copy in his TV set also unerringly points to Jarvis Masters' innocence.

Nothing remains of the State's case against Jarvis Masters. Every significant piece of post-trial evidence casts fundamental doubt upon Jarvis Masters' conviction and points unerringly to his innocence. The Writ of Habeas Corpus should therefore issue.

B. THE RECORD BEFORE THIS COURT UNDERMINES CONFIDENCE IN PETITIONER'S 1989 CONVICTION

While the second question focuses upon Jarvis Masters' innocence, the first question focuses upon how the evidence now before the Court would have affected the jury, had they heard it.

Consider what the jury would have done had they known what we now know. That Rufus Willis is a chronic liar who would say or do anything to be released. That he lied about the kites which were the centerpiece of the State' case against Jarvis Masters. That he freely admitted to two investigators that he lied at trial, that he executed two declarations under penalty of perjury admitting that he lied, and that nine years later he went over his most detailed and comprehensive declaration, line by line, with a third investigator and affirmed the truth of almost every word in his initial declaration. That he wrote an unsolicited letter of apology to Jarvis Masters. That he admits that he hid evidence exonerating Jarvis Masters in his television – evidence that since has been destroyed. That Willis' testimony against Masters, and the two kites, were the direct result of a June 20, 1985 deal that Willis made to obtain his release. That the District Attorney threatened Willis' life when Willis refused to testify. That the District Attorney promised his release if he testified.

That Harold Richardson – a reliable and neutral witness of all that happened when Sgt. Burchfield was murdered – identified the ten BGF members involved in the hit and left Masters out. That Richardson, who was one of the four members of the planning group, substituted himself for Jarvis Masters as a planner. That Richardson precisely matches Willis' description of Jarvis Masters. That Jarvis Masters does not match Willis' description.

That Harold Richardson, Michael Rhinehart, Lawrence Woodard, and Rufus Willis each came forward with evidence exonerating Jarvis Masters at different times. Yet in every important detail, the new evidence from these four witnesses is incredibly one and the same, pointing to Jarvis Masters' innocence.

That newly discovered shank evidence points to Jarvis Masters' innocence. That it is entirely unlikely that the weapon used to kill Sgt. Burchfield ever left the second tier. That Jarvis Masters never sharpened the weapon.

That Bobby Evans lied. That everything the jury were told about Bobby Evans was a lie, and everything he said about his relationship to governmental agencies was a lie. That his life, his occupation, and his freedom depended upon his putting people away for the government. That on the day he came forward, and on the day he testified, he was the prime suspect in a murder investigation. That after he came forward, the Bobby Evans investigation mysteriously ceased. That he expected to be released after he testified, and that after he testified his governmental handlers made his release happen with clockwork precision.

Is there any question about what the jury would have done, had they heard such a case? The matter is beyond question. By any measure, a reasonable probability exists that false evidence and violations of petitioner's rights under California law and the United States Constitution may have affected the outcome of the 1989 trial. *In re Sassounian* (2003) 9 Cal.4th 535, 546. The writ of habeas corpus should therefore issue.

Dated: January 2, 2012

Respectfully submitted,

JOSEPH BAXTER
RICHARD I. TARGOW
CHRIS ANDRIAN
JENNI KLOSE
Attorneys for
Defendant and Petitioner
JARVIS MASTERS

ATTACHMENT TO THE

EXCEPTIONS BRIEF AND

BRIEF ON THE MERITS

Attachment 1.	**[ATTACHMENT and FOOTNOTE REDACTED]** [1]
Attachment 2.	June 22, 1989 SSU report regarding Bobby Evans by James Hahn and P. ("Phil") J. Bruccolieri, a portion of Petitioner's Exhibit 59.

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[1] **[FOOTNOTE REDACTED]**

SSU REPORT

TO: JAMES ROWLAND, DIRECTOR DEPARTMENT OF CORRECTIONS P.O. BOX 942883 SACRAMENTO, CA 94283-0001 ATTN: L. M. DENTICI ASSISTANT DIRECTOR LAW ENFORCEMENT LIAISON	DEPARTMENT OF CORRECTIONS SPECIAL SERVICE UNIT-BAY AREA JAMES V. HAHN SPECIAL AGENT CLASSIFICATION: ARREST REPORT
DATE: JUNE 22, 1989	REPORT #: 03-013-89

SSU REPORT NUMBER: 03-013-89

SUBJECT: WELLS, Johnny R.
C-62562

ALSO REFER: GRIFFIN, Wayne
Non-CDC, Black Male Adult
Date of Birth May 16, 1966

RUSSEL, Charise
Non-CDC, Black Female Adult
Date of Birth April 1, 1971

CIRCUMSTANCES:

On June 19, 1989, reporting agent received confidential information from a reliable street source, indicating that Parolee Johnny Ray WELLS, C-62562, (Black Guerrilla Family member), was actively involved in illegal narcotics trafficking and extortion of other narcotics dealers in West Oakland.

The source further revealed that WELLS was operating out of 537 Chester Street, Oakland with several other known Black Guerrilla Family (BGF) associates.

On the morning of June 20, 1989, reporting agent and assisting Oakland Police Department officers, proceeded to the 537 Chester Street address. After a knock and announcement of intent by reporting agent per 844 P.C. and receiving no response forced entry through the front door was affected for fear that occupants would destroy evidence.

Parolee WELLS was detained, without incident, in the rear bedroom along with Ms. Charise RUSSEL. The other occupant of the house, Wayne GRIFFIN, a current Alameda County adult probationer, was detained in the front bedroom.

019758

Attachment 2

Pet. Ex 59

A subsequent search of WELLS' bedroom produced one hundred and four (104) balloons of suspected heroin (estimated street value of each balloon is $20.00), approximately one (1) ounce of suspected marijuana and three hundred forty dollars ($340.00) cash concealed under the mattress of the bed occupied by WELLS and Ms. RUSSEL.

All contraband was retained by Oakland Police Department for evidence.

All suspects were arrested, transported to Oakland City Jail and booked per following charges;

Johnny WELLS - Possession of controlled substance, possession of controlled substance for sale and parole violation

Charise RUSSEL - Possession of controlled substance and possession of controlled substance for sale

Wayne GRIFFIN - Violation of probation

A 3056 P.C., no bail, parole hold was placed on Parolee WELLS.

Parole Agent J. Ludwig was notified of WELLS' arrest.

CASE STATUS:

Special Service Unit interest is closed.

J. V. HAHN
Special Agent
Bay Area Office

P. J. BRUCCOLERI
Acting Senior Special Agent
Reviewed and Approved

DISTRIBUTION:

L. M. Dentici, Assistant Director, Law Enforcement Liaison Unit
R. Chun, Regional Parole Administrator, San Francisco
J. Ludwig, Parole Agent, Oakland Unit #1

019759

Pet. Ex 59

SOURCE OF INFORMATION

1. Bobby EVANS, C-15978

Pet. Ex. 59

PROOF OF SERVICE

I declare that:

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to the within action; my business address is 645 Fourth Street, Suite 205, Santa Rosa, California, 95404. On March 16, 2012, I served the within:

PETITIONER'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS [REDACTED]

on the following party(ies):

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Post Office Box C-35169
East Block
San Quentin, California 94974

x **BY MAIL**: I placed each such sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Santa Rosa, California, following ordinary business practices. I am readily familiar with the practice of this office for the processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited with the United States Postal Service the same day as it is placed for processing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 2, 2012, at Santa Rosa, California.

Ken Ward