In the Supreme Court of the State of California

In re

JARVIS MASTERS,

On Habeas Corpus

CAPITAL CASE

Case No. S130495

(Related Appeal No. S016883)

Appellate District, Case No.
Marin County Superior Court, Case No. 10467
The Honorable M. Lynn Duryee, Judge

RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT

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INTRODUCTION

Petitioner's brief seems to ignore the fact that this proceeding involves a collateral attack on a presumptively valid judgment where the burden of proof is on him. Instead, his argument more closely resembles a defense reasonable doubt attack on the state's original case, essentially rearguing theories, and in some instances evidence, that were presented at trial and rejected by the jury.

Because various portions of the evidence adduced at the hearing apply to more than one of the questions posed by the Court, respondent will address petitioner's assertions regarding the evidence by witness or type and then briefly address the impact upon the referee's findings as to the individual questions, in an effort to avoid unnecessary repetition.

STANDARD OF REVIEW

As set forth in respondent's opening brief, a final judgment of conviction is presumed valid. (*In re Clark* (1993) 5 Cal.4th 750, 764.) The burden of proof in habeas corpus proceedings challenging a conviction is on the petitioner to show by a preponderance of the evidence, facts that establish a basis for relief. (*In re Cox* (2003) 30 Cal.4th 974, 998; *In re Andrews* (2002) 28 Cal.4th 1234, 1252-1253; *In re Visciotti* (1996) 14 Cal.4th 325, 351, cert. denied (1997) 521 U.S. 1124.) "'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, and due process is not thereby offended.'" (*People v. Duvall* (1995) 9 Cal.4th 464, 474, quoting *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260 [emphasis in original].) This is particularly significant where, as here, key aspects of petitioner's proof rely on declarations and testimony given years after trial in which witnesses recant some portions of their trial

testimony, as such recantations have long been viewed with suspicion. (*In re Roberts* (2003) 29 Cal.4th 726, 742.)

I. THE REFEREE'S FINDINGS ARE ENTITLED TO DEFERENCE

Although petitioner acknowledges that he has the burden of proof, and that the general rule is that findings of the referee are entitled to deference, he seeks to dispense with the requisite deference, by claiming that the referee applied incorrect standard or failed to properly consider the evidence.

Petitioner asserts that no deference applies where the court fails to perform its function of weighing all of the evidence, and that *de novo* review is appropriate in such cases. The case relied upon, however, *Estate of Larson* (1980) 108 Cal.App.3d 560, 567, did not conduct *de novo* review, rather, the court simply ordered a remand to allow the trial court to make significant findings that were omitted. Similarly, in *Kemp Brothers Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1477-1478, the court found that the trial court relied on an erroneous legal ruling and therefore never did any factual findings on the issue in question. Likewise, remand was deemed appropriate where the trial court did not reach the relevant issue due to improper deeming of imputed income in a child support case also cited by petitioner. (*In re Marriage of Eggers* (2005) 131 Cal.App.4th 695.) As discussed under the specific headings below, none of these exceptions exist in this case, thus the requisite deference is appropriate. Even assuming, however, that this Court were to find some error in the referee's review of the nature described, remand rather than *de novo* review would be the appropriate remedy.

II. PETITIONER HAS FAILED TO DEMONSTRATE PREJUDICE UNDER EITHER STATE OR FEDERAL MATERIALITY STANDARDS

Petitioner correctly notes that habeas jurisprudence requires the establishment of prejudice before reversal of a conviction may be granted. Penal Code section 1473(b)(1) states that habeas relief may be granted only where the petitioner shows that substantially material or probative false evidence was introduced against him. This threshold has been defined as requiring petitioner to establish that there is a reasonable probability – one that undermines confidence in the outcome – that had the false evidence not been introduced, the result of the trial would have been different. (*In re Malone* (1996) 12 Cal.4th 935, 965.) While respondent does not dispute this standard, petitioner ignores the fact that application of this standard *presumes* an initial finding that false evidence was, in fact, produced. As discussed in detail below under the specific items of evidence, petitioner failed to reach that initial step. He cannot, therefore, establish that there is any reasonable probability of a different outcome. At best, he can show that there may have been additional impeachment evidence available. But, given the extensive and aggressive cross-examination of the key witnesses, and the impeachment evidence presented to the jury, he again cannot establish a reasonable probability of a differ outcome.

For newly discovered evidence, petitioner correctly notes that the burden is even higher. Such evidence must "completely undermine the entire structure of the case upon which the prosecution was based." (*In re Lawley* (2008) 42 Cal.4th 1231, 1240.) Again, a prerequisite to applying this standard presumes that the newly discovered evidence is credible. At least as to the testimony from various inmates, petitioner has not satisfied that threshold, and while Dr. Leonard's testimony – assuming it was properly before the court – was found to be convincing, given his inability

to speak to motive, it certainly does not "completely undermine" the state's case. Petitioner cannot satisfy this burden.

Petitioner also asserts that federal materiality standards apply as the petition contains claims that his federal constitutional rights were violated. Here again, petitioner is ignoring the referee's credibility findings and asking this Court to presume the truth of his allegations and the statements of the various inmates. For example, he asserts that he has shown that Willis's testimony was the result of inherently coercive circumstances, that the State has never sought to counter this evidence, and that it remains uncontradicted. (Petitioner's Brief, p. 217.) This ignores the fact that it was Willis who initiated the contact with authorities - even his 2001 declaration confirms that - and the sole evidence of "inherently coercive circumstances" are Willis's own statements. Given the referee's credibility findings as to Willis, this does not establish the existence of such circumstances, with or without additional evidence from the State. The same problem is inherent in petitioner's assertions as to Bobby Evans's testimony and alleged *Brady* violations, as they rest, almost entirely, upon statements made by Evans. To the extent that James Hahn, James Moore, and Robert Connor provided credible evidence of more extensive work by Evans as an informant, the referee correctly found that this was argued to the jury, albeit without additional specifics, and the existence of other impeachment, including the known instances of informant activity rendered the additional instances, particularly where they were unfruitful, immaterial for purposes of establishing prejudice.

ARGUMENT

I. THE REFEREE'S FINDINGS REGARDING RUFUS WILLIS'S CREDIBILITY ARE SUPPORTED BY THE RECORD, BUT DO NOT SUPPORT A FINDING THAT HIS DECLARATION SATISFIES PETITIONER'S BURDEN OF PROOF

A centerpiece of petitioner's case is the 2001 declaration of Rufus Willis, given to investigators working for petitioner, in which Willis declares that he lied at trial and that petitioner had no role in the murder of Sgt. Burchfield. This evidence relates to Questions 1, 2 and 3 of the reference order.

Rufus Willis initially refused to testify at the evidentiary hearing, asserting his Fifth Amendment right to remain silent. Based on that assertion, the referee found him to be unavailable. (9 RHRT 491-498.) When he later sought to revoke that assertion of privilege, the referee asked petitioner whether he wished to recall Willis or to rely upon the finding of unavailability. (10 RHRT 520.) Petitioner chose the latter course, submitting Willis's declaration signed in 2001, and the testimony of his various investigators regarding the taking of that declaration. Based on the evidence presented, the referee found Willis generally lacking in credibility. (Final Report.) Petitioner claims that this finding essentially equates to a finding that Willis lied at trial and therefore satisfies petitioner's burden of proof. Not so.

As this Court has specifically held, recantations are viewed with suspicion. (*In re Hall* (1981) 30 Cal.3d 408, 418; *In re Weber* (1974) 11 Cal.3d 703, 722.) Further, a claim of false testimony based on an inmate's declaration does not establish even a prima facie case of false testimony, much less proof of perjury, when the inmate subsequently recants and refuses to testify at an evidentiary hearing. (*In re Williams* (1994) 7 Cal.4th 572, 612; see also *Hysler v. Florida* (1942) 315 U.S. 411, 413 ["Mere

recantation of testimony" does not justify voiding a conviction on due process grounds.].)

On February 23, 2001, Rufus Willis signed a declaration prepared by Melody Ermachild. (Pet. Ex. 26.) This declaration was also attached as Exhibit 1 to the petition for habeas corpus. Ms. Ermachild testified that she and Pam Siller visited Willis in prison early 2001. (11 RHRT 590.) During this interview Ms. Ermachild took notes on their conversation (Pet. Ex. 28.) which she then reduced to an 11-page handwritten declaration that Willis signed that day. (Pet. Ex. 29; 11 RHRT 592-594.) Ms. Ermachild then returned to California where she prepared a typed version of the declaration. (Resp. Ex. S; 11 RHRT 600-601.) On February 23, 2001, Ms. Ermachild and Ms. Siller returned to the prison to obtain Willis's signature on the typed declaration. After reviewing it with him, Ms. Ermachild made changes on a computer brought for that purpose and the final version was printed out for signature. Ms. Ermachild made notes during that visit as well. (Pet. Ex. 33; 11 RHRT 601-604.)

Both Ms. Ermachild and Ms. Siller stated that their meetings with Willis were friendly and that he was cooperative. (10 RHRT 561; 11 RHRT 591, 603.) The referee found that there was no coercion (Final Report, p. 9), which petitioner asks this Court to parlay into a finding that the declaration is truthful. As discussed below, such an inference is not warranted on the record created in this case.

A. The Declaration (Pet. Ex. 26) is Petitioner's Distillation of The Interviews with Rufus Willis

While respondent does not dispute that Willis made the statements contained in the declaration, or statements very similar to those, there were other statements made by him during the interviews with Ms. Ermachild and Ms. Siller that either contradicted his recantation, or at least raised questions as to the credibility of his recantation. These statements,

however, were omitted from the declaration prepared and submitted by petitioner. Still other statements, both in the notes and in the declaration, contradict other evidence offered by petitioner. A number of the statements are itemized below.

Several statements are internally inconsistent with the recantation:

- Although Willis stated that he would not lie to Ms. Ermachild, he also said, "I didn't lie at the time – even if it cost me my life, I'd never lie." (Pet. Ex. 28, p. 2.)

- Willis told Ermachild that there were "definitely" three to four meetings before the hit. (Pet. Ex. 28, p. 4.) – the declaration states that he has never been able to recall how many meetings and implies that he said there was more than one only at the urging of David Gasser (Pet. Ex. 26, paras. 9 and 23.)

- When asked if the kites were copied or recopied, the notes reflect that Willis "didn't answer." (Pet. Ex. 28, p. 7.) – the handwritten declaration states that, "if I'd been asked if copied I would have said yes." (Pet. Ex. 29, p. 5.)

- The notes say Rufus Willis didn't write the kites. (Pet. Ex. 28, p. 7.)

- The notes state, "yes, it was already written up and he (JM) copied it under orders – (he equivocates) but no, nobody ever copied it." (Pet. Ex. 28, p. 13.)

- The notes reflect that the only information that would be rewritten was that of Masters or Willis before it was sent to Woody or Redmond. (Pet. Ex. 28, p. 8.)

- When asked why the police wanted proof from Masters, the notes reflect that Willis "doesn't answer – deflects." (Pet. Ex. 28, p. 9.)

- When asked why Masters would write the kites, the notes reflect that Willis hesitated and equivocated, then state, "because Woody was

staying on him (JM) (?)." (Pet. Ex. 28, p. 9.) – The final declaration says, in conjunction with discussing the preparation of the Usalama report, that Willis told Masters he would "keister" the report to the BGF leadership when Willis went to the AC and that would put Masters in good standing, but that it could not be in Willis's handwriting. (Pet. Ex. 26, p. 7.)

- When asked about the T-Bone kite, the notes indicate that Willis first claimed that Chicken Swoop sharpened the knife and sent it up to Masters. Then it says that is wrong and that the knife went to Woodard first, he didn't like it and sent it to Masters to fix. Then the notes contain a parenthetical entry that says, "later says this isn't true/right either." (Pet. Ex. 28, p. 10.)

- Willis said that Andre tried to sharpen a knife himself and that was the one that went to Masters, through Woodard, to make it better, but that was not the murder weapon. (Pet. Ex. 28, p. 18.)

- The knife used in the murder was from the bed of Chicken Swoop (Willis places him on the third tier) who sent it to Johnson, Lil Askari, through Woodard. (Pet. Ex. 28, p. 18.)

- During the second interview, it was noted that Willis rescinded the statement that Masters never saw or sharpened the knife, changing it to that he simply did not know if he did. (Pet. Ex. 33, p. 4.) The declaration ignores this change, saying in one place that Willis had no knowledge of Masters sharpening the knife (Pet. Ex. 26, para. 20), and in another that, based on his statements, Mr. Berberian should have known that Masters had no role in making the weapon. (Pet. Ex. 26, para. 3.)

- "Rhinehart was not in any of the meetings." (Pet. Ex. 28, p. 11.) – The notes from the second meeting between Ermachild and Willis includes Rhinehart in a list of those at the first meeting, before Masters became Usalama. (Pet. Ex. 33, p. 5.) The final declaration states that Rhinehart was also in meetings and that Willis did not

know why Numark chose Masters over Rhinehart. (Pet. Ex. 26, para. 5.)

- Notes from the second interview with Willis list Redmond, Willis, Masters, Rhinehart and Woodard as attending the first meeting. (Pet. Ex. 33, p. 5.) - The declaration states only, "I know Woodard and Redmond and myself were at the first meeting. I'm not sure about Masters. Masters was present at least once." (Pet. Ex. 26, para. 8.)

- Notes from the second interview with Willis state that Redmond wanted A1 & U1 to work on the plan, indicating that initially that referred to Willis and Rhinehart, but Masters later became U1. (Pet. Ex. 33, p. 5.)

- Richardson did not have a role. (Pet. Ex. 28, p. 12.)

- When Willis was asked about his description of Masters and possible confusion with Richardson, the notes reflect that Willis said, I remember it exactly – I don't know why I was confused – I was thinking of Woody or Rhinehart. I know him (JM) – I was on many yards with him. (Pet. Ex. 28, p. 13.)

- Willis did not know of anyone else who was threatened or rewarded. (Pet. Ex. 28, p. 16.)

- Willis initially refused to sign the declaration then agreed. (Pet. 28, p. 17.)

The various notes and drafts also contain statements supporting a finding that Masters did have some involvement in the murder:

- Willis could not recall the exact details of Masters's involvement. (Pet. Ex. 28, p. 5.)

- Masters did not play *the role portrayed* in court. (Pet. Ex. 29, p. 9.)

- Petitioner had knowledge of the plan, but no authority in the planning.[1] (Pet. Ex. 26, para. 8.)

- The kites that were destroyed would have shown the minor role played by Masters. (Pet. Ex. 26, para. 17.)

- In the final declaration, Willis added a note at a line that said Masters "did not play any part in the death of Sgt. Burchfield," correcting it to read, "not say any – to my knowledge." (Pet. Ex. 26, para. 31.)

Additional statements contradict evidence presented either at trial or during the reference hearing:

- Willis wrote a second kite asking for Woody and Redmond to be moved out of Carson section before he would talk to police. (Pet. Ex. 28, p. 4.) - Redmond, however, had been moved out of Carson section well before the murder.

- Willis's declaration and the notes from the interviews reaffirm that there was a backup plan involving an inmate named Gomez on an upper tier, contradicting Woodard and Rhinehart. (Pet. Ex. 26, p. 11.)

- Willis also talked about plans to form levees higher up that would cause flooding on the tiers, and for throwing out all weapons,[2] thereby hampering the investigation, although neither Woodard nor Rhinehart spoke of this aspect. (Pet. Ex. 26, p. 11.)

- Also, although Woodard's purported discipline of Masters – including stripping him of rank – occurred early in the planning stages, the interview notes from February 8, 2001 reflect that when Willis was told by Ms. Ermachild that Andre Johnson claimed Masters had been demoted, Willis's response was, "This could be true – could have happened while I was in D block." (Pet. Ex. 28, p. 17.)

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[1] In fact, this was handwritten as a correction to the typed version which stated that "Masters had nothing to do with planning" the murder.

[2] The flooding and throwing of weapons did occur and was testified to at the trial.

- Willis stated that Masters objected to the plan in a private conversation with Willis and that, had Masters tried to go against the plan he would have been killed, as "[n]on one could question Redmond." (Pet. Ex. 26, para. 18]

Contrary to petitioner's claim that the declaration is obviously credible as to the recantation, these omissions and contradictions certainly cast doubt upon it. Further, contrary to petitioner's assertion, there is evidence from which an inference of motive to lie can be found:

- In the initial interview, Willis stated that he would do everything he could to help petitioner. (Pet. Ex. 28, p. 2.)

- Willis expressed his disgust with the BGF and the way in which they would sacrifice soldiers like Masters and Johnson. (Pet. Ex. 28, p. 2.)

- Willis felt badly that his actions placed Masters on death row. (Pet. Ex. 28, pp. 15, 16.)

- An unexplained note in the margin of the interview notes says, "Pam help?" (Pet. Ex. 28, p. 8.)

- Willis was stabbed in Nevada. (Pet. Ex. 28, p. 14.)

- Willis stated that he had had problems due to inmates finding out about his testimony, although he claimed that he was not giving the declaration to clear his name with the BGF. (Pet. Ex. 26, paras. 34-35; Pet. Ex. 29, p. 10.)

- Willis stated that the BGF would kill him on sight, no matter what he did, for violating the codes by telling. (Pet. Ex. 28, p. 15.)

- Wills said he would have been better off minding his own business and "going to flow", he would have done this time anyway. (Pet. Ex. 28, p. 15.)

- In January 2005, petitioner's counsel wrote to Willis regarding the status of petitioner's case. The letter begins, "This is a letter both of thanks and of warning." After telling Willis that he is likely to be contacted by the District Attorney or the Department of Correction and telling him that he is not required to speak to them, the letter warns of threats that could be made against Willis by those authorities and asks him to contact counsel immediately. The letter further notes that counsel is "considering seeking a protective order from the Supreme Court," despite lacking any evidence at the time of the need for such an order. (Res. Ex. GG.)

- In May 2010, petitioner's counsel wrote to Willis regarding a pending visit to review the declaration. In that letter, counsel advised Willis that he wanted him to meet Chris [Reynolds], "since he might be able to answer some of the questions that you might have. He also has a lot of experience with parole boards." (Res. Ex. D.) – Other evidence offered by respondent demonstrates that Willis had repeatedly been denied parole despite pointing out the favorable testimony that had been provided in this case. (See, e.g., Res. Exs. Z, DD, GG.)

- The May 2010 letter also stated, "[it is important for you [sic] know the attorneys and investigators who will be protecting you." [3] (Res. Ex. D.)

Further, as the referee specifically found, the other inmates who were BGF members had a motive to lie based on that membership. Such a finding would apply equally to Willis. While at the time of trial, it may have been in the best interest of the BGF for three relatively minor

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[3] In addition to the issue of implying a need for protection, respondent questions the propriety of counsel telling a witness that he and his team are the ones who "will be protecting" him, when they represent petitioner, who has conflicting interests and, in fact, are asking the witness to admit to, or commit, perjury.

members to take the fall for an "unsanctioned" hit, 27 years later, it can reasonably be inferred that the goal of getting the sole member of the trio on death row off, if not out of prison entirely, might take priority.

B. Willis's Interview with Respondent's Counsel Casts Further Doubt on His Declaration And Supports The Referee's Findings Regarding His Lack of Credibility

Respondent submitted a digital recording and transcript[4] of a June 30, 2010, telephone conversation between Rufus Willis and counsel for respondent. (Res. Exs. HH & II.) Although petitioner asserts that this was done over objection, as the record reflects, petitioner initially raised an objection under *Crawford v. Washington* (2004) 541 U.S. 36, and the referee deferred ruling pending briefing by the parties on that case. In the interim, she allowed the presentation of the exhibits pending that ruling. Although respondent submitted a brief detailing *Crawford's* inapplicability to this scenario (Respondent's Brief in Opposition to Petitioner's Motion to Exclude, filed January 26, 2011), petitioner chose to forgo briefing, acknowledging that there was no case law supporting his position. (16 RHRT 840.) The referee properly admitted the evidence finding that *Crawford* did not apply and that the circumstances of Willis's various statements, recantations, and his taking the Fifth warranted admission. (16 RHRT 840, 847-848.)

In that conversation, Willis reaffirmed that he was truthful during his trial testimony. He also stated that, during the 2001 meeting, Ermachild and Siller asked him about things that he wasn't comfortable saying (Res.

[4] Respondent noted that the transcript was being provided solely for ease of reference in reviewing the recorded conversation. It was not intended as a summary or substitute for the actual conversation.

Ex. II, p. 3[5]), which would be consistent with Ermachild's notations in places that Willis was hesitant, evasive and equivocal in response to some of her questions. Willis also said that he told Ermachild and Siller he did not want to lie to them because he did testify to the best of his ability (Res. Ex. II, p. 3), which is very similar to the notation by Ermachild where he said, "I won't lie to you. It's on my conscience. I didn't lie at the time – even if it cost me my life, I'd never lie." (Pet. Ex. 28, p. 2.)

Willis stated that when Ms. Ermachild wanted to know if he had written letters and then had Masters or Woodard copy them, he told her no, and that he would not order him to do so. (Res. Ex. II, pp. 4-5.) As noted above, Ms. Ermachild's notes indicate hesitation and equivocation on Willis's part when asked about copying, along with a denial that he wrote the kites. (Pet. Ex. 28, pp. 7, 13.)

Willis further elaborated on petitioner's involvement in the murder plan, reaffirming that Masters was part of the group[6] involved in the planning. (Res. Ex. II, pp. 6 and 10.) Willis stated that Redmond wanted he and Masters to gather information about staff routines. (Res. Ex. II, p. 11.) Redmond wanted Masters, as head of security, to start putting together strategy for the murder. (Res. II, p. 12.) Masters, as head of security was in charge of meetings regarding the making of the blades. (Res. Ex. II, p. 14.) Willis said that he thought it was Masters that came up with the code

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[5] Due to the difficulty of citing to particular points in a recording, the citation is to the page of the transcript. Respondent invites the Court to listen to the actual recording, as it clearly demonstrates that the conversation was friendly, and Willis – with the noted exceptions – was perfectly willing to speak with respondent's counsel.

[6] Willis stated that the people at the meetings were himself, Masters, Rhinehart, Woodard and Redmond. These are the same people he listed as attending the first meeting during his second interview with Ms. Ermachild. (Pet. Ex. 33, p. 5.)

words "Solid Gold" to indicate that Burchfield was on the tier. (Res. Ex. II, p. 15.) Masters was supposed to build a levee on the fourth tier to help destroy evidence after the hit. (Res. Ex. II, pp. 17-18.) And Masters picked Andre Johnson to be the killer. (Res. Ex. II, p. 18.)

While, as petitioner notes, there were questions that Willis chose not to answer, this certainly does not establish the truth of his declaration. Such a claim is, in fact, rather disingenuous, in light of the above noted instances from Ermachild's interview where the notes reflect occasions of hesitancy or equivocation not noted in either the declaration or her testimony, yet petitioner maintains the 2001 declaration is credible, while the 2010 recantation is not. Similarly, respondent notes that Willis made statements during the 2010 telephone call that are contradicted by other evidence – e.g., he indicated that Redmond was still in the unit (Carson section) the day after the murder (Res. Ex. II, p. 20), when evidence at trial established that Redmond was sent to the AC some weeks prior to the murder.[7] As with all of his statements, however, this is simply another matter to factor into the determination of Willis's general credibility.

II. THE REFEREE'S CREDIBILITY FINDINGS REGARDING WOODARD, RHINEHART AND WELVIE JOHNSON ARE SIMILARLY SUPPORTED BY THE RECORD

Petitioner offered the testimony of Lawrence Woodard, Michael Rhinehart and Welvie Johnson in support of his claims. All three were members of the BGF, although only Woodard admitted to current membership. Woodard and Rhinehart testified regarding the events leading up to the murder of Sgt. Burchfield. Welvie Johnson, as a senior BGF member, testified regarding his internal investigation on behalf of the BGF, following the murder. The referee found all three to be lacking in

[7] A similar statement regarding Redmond's presence in Carson section is found at Pet. Ex. 28, p. 4.

credibility. Petitioner challenges this finding pointing to an asserted lack of specifics in the referee's report as to particular lies told, and because they all gave the same testimony regarding petitioner's lack of involvement in the planning and murder. The referee's findings are amply supported by the record.

Initially, respondent notes that the referee set forth a list of "fundamental things" on which the testimony of these inmates and Willis disagreed, including: who ordered the killing, who planned the killing, who made the weapon, the existence of a backup plan, and who was calling the shots in Carson section. (Final Report, pp. 7-8.) In addition to these general categories, there were other portions of their testimony that rang false.

Woodard, for example, denied that in order to become a member of the BGF new recruits would have to commit an assault or murder. (4 RHRT 245-246.) Welvie Johnson, however, candidly admitted that this requirement - known as "blood in, blood out" - existed. (7 RHRT 357.)

Woodard testified that, when petitioner stated his disagreement with the plan to kill Sgt. Burchfield, that he punished petitioner by stripping him of rank, and excluding him from any involvement in the plan. Masters was also subjected to physical exercises and possibly required to do an essay. (4 RHRT 223, 233.) Woodard also claimed to have threatened petitioner with additional retaliation if he had anything further to do with the hit. (4 RHRT 228, 233, 247.) In contrast, Rhinehart, who also expressed his disagreement, not only was not punished, but maintained at least some minimal involvement in the proceedings, including the passing of kites and ordering Carruthers to make a spear. (5 RHRT 319; 6 RHRT 331.)

While all three agreed that a weapon would never be passed vertically between tiers,[8] given their stated reasons for this rule – noise and risk of guards or rival gang members seizing it – Rhinehart's testimony regarding the making of the weapon strains credulity. According to Rhinehart, a large piece of metal was cut from a bed brace in cell 8, passed to cells 12 and 14 to be sharpened and assembled, and only then passed back down the tier to cell 2, where Andre Johnson used it to kill Sgt. Burchfield. (5 RHRT 321-323; 6 RHRT 339-340.) Not only would this repeated passage of metal back and forth along the tier – especially where it had to be gotten past Rhinehart's cell at least twice without him touching it (6 RHRT 339) – be likely to cause noise or come to the notice of the guards, but taking it straight down the tier from cell 14 to 2 brought it directly past the cell of an inmate named Ephriam, a member of the rival Crips gang. (43 RT 11514-11515, 15763.)

As a part of the effort to exclude petitioner from any involvement, Woodard indicated that, with the apparent exception of himself and Willis, only second tier inmates were involved, or even advised – of the plan to kill Sgt. Burchfield. (4 RHRT 227.) Willis, however, in the notes and declaration, spoke of plans to build levees on the upper tiers that would cause flooding,[9] as well as a general contraband disposal out of the cells in

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[8] Interestingly, Bobby Evans reported that Woodard told him that he had passed the weapon to Masters who did not know how to sharpen it. (Pet. Ex. 58, p. 76.) That would place the weapon squarely on the fourth tier at some point in the process and in Masters' possession. Evans maintained that his statements regarding Woodard were true.

[9] In the first handwritten declaration (Pet. Ex. 29, p. 8), Willis indicated that the flooding came from Woodard's cell above Johnson and another cell above Chicken Swoop, although he could not recall whose cell. It was petitioner, however, who occupied the fourth tier cell above Andre Johnson, not Woodard, and it is simply not credible to believe that a plan

(continued...)

an effort to impede any investigation. (Pet. Ex. 26, para. 28.) Such plans, of necessity, would have involved notice and coordination with inmates housed on upper tiers. These events did, in fact, occur, thereby rendering any claims of petitioner's ignorance and total uninvolvement even less credible.

Rhinehart also claimed that Bobby Evans knew nothing of the Burchfield murder until the two of them met at Tehachapie in 1987, when Rhinehart claimed to have told him all about it. (6 RHRT 333-335.) As the referee noted, however, this seems unlikely given Evans's status within the BGF at San Quentin at the time and his testimony that a "115 write up" – a disciplinary notice – at the time, saying that they were all under investigation for the murder. (Final Report, p. 8, fn. 6.)

Woodard indicated that, at the time of trial, he directed petitioner and Andre Johnson not to take the stand, discuss the incident, or tell anyone what happened, on pain of death.[10] (4 RHRT 229.) Rhinehart stated that, although he was originally called out for court, he "made a fuss about it so they let [him] go." (6 RHRT 343.) From this it appears that both Woodard and Rhinehart would have been at some risk had they testified on petitioner's behalf at the time of trial. Neither of them explained, however, why they would not be at risk today for providing the same testimony and, in fact, Woodard indicated that he was still at some risk. (4 RHRT 257.) A reasonable inference, however, is that they are not now at risk because it serves the interest of the BGF to have petitioner off death row, if not actually out of prison. As the referee found, "all of them, as members of

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(...continued)
involving flooding and the general disposal of weapons as a distraction would not involve petitioner.

[10] One wonders how petitioner could have discussed the case with anyone as he purportedly had no knowledge of the plans.

the same prison gang, have a motive now to give testimony favorable to Masters." (Final Report, p. 6.)

Petitioner asserts that the testimony of these inmates should be believed because they have had no contact with one another in the intervening years. Therefore the fact that their stories about petitioner's lack of involvement match somehow establishes the truth of their statements. The BGF is capable of corresponding with its members between cells, tiers, housing units and even prisons. As Graham McGruer noted, the investigation into the "unsanctioned hit" on Sgt. Burchfield would have occurred immediately, no matter where the inmates were housed, and not waited until they were transferred to the AC where Welvie Johnson was housed. (5 RHRT 301-302.) Moreover, none of these inmates sought on their own to contact authorities to "clear their conscience." They "came forward" only when contacted by persons working on behalf of the petitioner, and then, only many years after the murder occurred. As noted above, it is clear that petitioner's team told Rufus Willis that statements purporting to clear Masters had been made. It is not unreasonable to infer that similar representations were made to Woodard, Rhinehart and Welvie Johnson.

Further, although petitioner asserts that the risk of being charged with a capital offense lends credibility to Rhinehart's testimony, respondent submits that the risk is overstated and that Rhinehart is likely well aware of that. Rhinehart is serving a life sentence. While technically true that he could be charged as a co-conspirator, and thus entirely appropriate for the court to advise him of his right to remain silent and to counsel as was done (5 RHRT 308), Rhinehart certainly would know that only the two members (other than Willis) of the Carson section leadership and the actual murderer were charged 27 years ago. Others, such as Carruthers, Ingram and Vaughn, whose involvement was known at the time, were not charged, nor

were upper-level leadership such as Evans, Welvie Johnson or Redmond.[11] Rhinehart's risk is further diluted when his actual "admissions" are considered. He claims to have voted against the hit, and that his participation was limited to passing a couple of kites and directing an inmate to make a spear. (5 RHRT 319; 6 RHRT 331.) Moreover, he denied having any rank within the BGF at the time. If people, such as Carruthers, Ingram and Vaughn, who were known to have been involved in making the weapon were not charged in 1985, then it seems highly unlikely (bordering on impossible) that Rhinehart would be charged with anything in 2012, much less with a capital offense. Rhinehart was surely aware of this.

Woodard, who is already serving life without parole for his part in the murder, has nothing to lose, but potentially things to gain on behalf of the BGF, by his testimony. Welvie Johnson seems similarly safe since he was not charged in 1985, and since his testimony at the reference hearing did not implicate him in any way in the murder. All he did was to state how things should have been handled under normal BGF practice. This testimony, however, ignores the fact that this entire hit was purportedly done without the sanction of the BGF leadership, and clearly went against policy in the selection of Andre Johnson as the hit man.[12]

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[11] It does appear that many of the inmates received internal prison disciplinary action as a result of the murder.

[12] Welvie Johnson testified that Andre Johnson, who was close to his parole date, would never have been selected to carry out the hit as he would be more valuable on the outside. (7 RHRT 375.)

III. THE INTERNAL CDCR MEMORANDUM OF HAROLD RICHARDSON'S STATEMENT WAS PROPERLY FOUND TO BE INADMISSIBLE AT TRIAL AND DOES NOTHING TO SUPPORT PETITIONER'S CASE AT THIS LEVEL

Petitioner relies heavily on the statement of Harold Richardson that was given to Jeanne Ballatore on August 21, 1986. (7 CT 1908-1910.) He sought, unsuccessfully, to introduce this report at trial when Richardson invoked his Fifth Amendment right and refused to testify. Ms. Ballatore testified regarding the circumstances of the interview, including the fact that Richardson was told that his statement could not be used against him in any way. Ultimately, the trial court determined that Richardson's statement would be inadmissible,[13] noting that, in light of Ms. Ballatore's assurances, the statement did not qualify as being against penal interest. (64 RT 14717.)

Petitioner asserts that the report of the interview with Richardson constitutes "new" evidence simply because it was not admitted at trial and that it should be considered here as it was offered without objection and the truth of the statements "was not disputed by respondent, and no contrary evidence was offered." (Petitioner's Brief at p. 65.) Because the statement is part of the appellate record in this case, and its admissibility had previously been ruled upon, respondent submits that no new objection was needed as the trial court's holding regarding the substantive inadmissibility of the statement constitute *res judicata*. Moreover, contrary to petitioner's claim that "no contrary evidence was offered," petitioner's own evidence from the reference hearing contradicts much of what Richardson said:

- Richardson lists himself as a planner, sharpener, and one of the proposed executioners (7 CT 1908-1909)

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[13] A claim challenging that ruling is part of petitioner's direct appeal currently pending before this Court. (AOB pp. 80-121.)

- When asked who gave him information about the plan, Rhinehart said it was Willis and Woodard. When prompted, he agreed that Richardson had told him that "someone assaulted another prisoner, a black prisoner, a guard, and he had got word from Redmond to retaliate." (5 RHRT 317-318.)

- Woodard testified that he and Willis were the planners. (4 RHRT 225.) When prompted he agreed that Richardson was on the tier saying that he "believe[d] Richardson was there for a couple of [the tier] meetings," and that he, Richardson and Willis "kicked some ideas back and forth." (4 RHRT 227-228.)

- Woodard stated that Daily or Carruthers made the weapon. (4 RHRT 226.)

- Rhinehart identified Ingram and Vaughn as the "sharpeners." (5 RHRT 322.)

- Woodard denied the existence of any executioner other than Andre Johnson. (4 RHRT 242.) Rhinehart indicated that Vaughn may have been the backup. (6 RHRT 31.)

- Welvie Johnson did not identify Richardson as having a role in the murder

- Willis denied that Richardson had a role in the murder (Pet. Ex. 28, p. 12.)

- Richardson identified Andre Johnson as a planner and executioner (7 CT 1908-1909)

  - Nothing in the record indicates that Johnson had any part in planning the murder and, according to petitioner, as a foot soldier, it is unlikely that he would be so involved. (Pet's Brief at p. 67.)

  - Welvie Johnson did not discuss the murder with Andre Johnson, even though he was tasked with investigating it. (7 RHRT 375.)

- Richardson identified Redmond as being the person who ordered the hit (7 CT 1908; 52 PHRT 7711)
    - Welvie Johnson denied that Redmond had any part in the murder
- Richardson claimed that Carruthers cut the brace and sent it to him to sharpen (7 CT 1909; 52 PHRT 7712)
    - Woodard and Rhinehart both identified Ingram and Vaughn as the "sharpeners"
    - Given Richardson's location on the opposite side of Carson section, a position from which he would have been unable to observe things being passed by Rhinehart (Pet. Brief, p. 24, fn. 9.), this is directly contradicted by Rhinehart's description of the weapon's movement
    - Any involvement by Richardson in passing or sharpening the weapon, although not requiring vertical movement, would contradict the claims of Woodard, Rhinehart and Welvie Johnson regarding the need to limit the distance over which weapons were passed
- Richardson claimed that he sent the piece of bed frame to Ingram to be cut (7 CT 1909; 52 PHRT 7712)
    - Contradicted by Rhinehart's testimony of how the weapon was passed back and forth
    - Given Richardson's location, contradicts the testimony about the need to limit the movements of metal pieces within the section
- Richardson states that one piece of the bed frame was sent to Gomez on the third tier, as he was to be a back-up executioner (7 CT 1909; 52 PHRT 7712-7713)
    - While this does corroborate Willis, both as to Gomez, and as to the vertical passage of the weapon, it is contradicted by Woodard, Rhinehart and Welvie Johnson
- Richardson named several people who were involved in the plot – himself, Redmond, Willis, Andre Johnson, Woodard,

Gomez, Ingram, Vaughn and Carruthers, but did not name Masters (7 CT 1908-1910)

- Richardson's list does not include Rhinehart, although Rhinehart testified that he continued to be involved in the meetings and passed kites
- Woodard and Rhinehart specifically denied any knowledge of involvement by Gomez
- Welvie Johnson denied involvement of Redmond

Petitioner also asserts that he would not have qualified to be a member of the planning group as he was a common soldier, which is why Willis "barely knew him," while Richardson "was a BGF lieutenant and 'a member of the BGF hit squad.'" (Petitioner's Brief, p. 67.) Neither of these statements are supported by the evidence. Woodard, Rhinehart and Willis – even in his declaration - all agreed that petitioner was the Usalama for Carson section, at least up until he voted against the hit on Sgt. Burchfield. Thus, he was not simply a "common soldier," and there is no support for the statement that Willis barely knew him beyond the physical description evidence that was developed at trial. As noted above, neither Rhinehart nor Woodard mentioned Richardson's name until prompted, and Woodard indicated only that Richardson was on the second tier and had been present at some of the tier meetings and that he, Richardson and Willis had tossed some ideas around. Neither Welvie Johnson nor Bobby Evans mentioned Richardson, either in connection to the murder or in any type of leadership role in the BGF.

The trial court correctly excluded the hearsay statements of Harold Richardson. Petitioner has offered nothing supporting a change in that ruling. Evidence regarding Willis's alleged misidentification of Masters for Richardson was developed at trial and rejected by the jury. And, as noted above, in his interviews with the defense, Willis indicated that his

confusion was between Masters and Woodard or Rhinehart, not Richardson. (Pet. Ex. 28, p. 13.) Further, as noted above, much of Richardson's statement is contradicted by evidence elicited from other inmates as a part of petitioner's case. Nothing in the record supports a determination that Harold Richardson is any more credible than the other inmates who testified at the reference hearing.

IV. THE EVIDENCE PRESENTED REGARDING THE TWO KITES WRITTEN BY PETITIONER DOES NOT SATISFY HIS BURDEN OF PROOF OR JUSTIFY SETTING ASIDE THE CONVICTION

As discussed above, petitioner bases his claim on the assertions in Willis's declaration that the kites written by petitioner – Usalama Report and T-Bone - were only copied by petitioner from other kites written by Woodard and Willis. Not only is this theory an unreasonable inference, given the total lack of motive for Numark, Berberian, or anyone else to randomly choose petitioner as the third defendant, but petitioner's time frames on the provision of the kites belie this theory as well and, in fact, are strongly supportive of the government's theory of the case.

A. The T-Bone Kite

The T-Bone kite, which was admitted at trial as PE 150-C, was given to CO Ollison on June 19, 1985, as part of a group of documents Willis asked to be given to the officer investigating the Burchfield murder. While it is certainly true – as was developed at trial – that Willis provided these documents in an effort to convince authorities that he could provide information about the murder in exchange for some type of favorable treatment, there is nothing in the record to show when Willis purportedly had petitioner copy this document, or why he would have had petitioner copy a document that he now claims is unrelated to the murder to be included as proof of Willis's ability to aid the investigation. Equally

missing is a motive for anyone – Willis,[14] Numark or Berberian – to choose Masters as the target of a frame-up.

Petitioner asserts that both this kite and the Usalama Report were created at the request of Investigator Numark in an effort to obtain evidence that would implicate Masters in the plot. Contrary to inferences in petitioner's brief, the T-Bone kite was provided to authorities before Willis ever met with Numark. Further, although Willis claims that this kite was copied from a kite, or kites, written by Woodard, petitioner failed to have Woodard identify the kite as being from a kite written by him.[15] Nor, as discussed separately, did petitioner have Dr. Leonard attempt such a conclusion, despite ample opportunity to do so.

B. The Usalama Report

The Usalama report was admitted at trial as PE 159-C. That kite was found inside a Bible taken from Willis's cell in Carson section. Although it was apparently retrieved from Masters after Willis's first meeting with Numark, the evidence does not support petitioner's theory.

The Usalama report was seized from the Carson section property room by Lt. Kaneohe on the afternoon of June 21, 1985.[16] At trial Willis stated that, following his first meeting with Inspector Numark on June 20, 1985 – the day after he had given the T-Bone kite to CO Ollison – and in

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[14] Although Willis at one point in his discussions with petitioner's investigators indicated that Masters would do what he said, given Willis's stated position in the BGF hierarchy, there is no reason to suspect that others would not have done likewise.

[15] Further, even a cursory review of the documents in Pet. Ex. 73, the collection of BGF writings attributed to Woodard, demonstrates that his style is very formal and precise. (Pet. Ex. 73, pp. 34-40.)

[16] Willis was moved to the AC on the morning of June 21 to facilitate his access to Andre Johnson. His personal property was removed from his cell in Carson section, inventoried, and placed in the property room.

response to Numark's request, Willis sent a kite to petitioner asking for the Usalama report regarding the murder. He testified that the kite was returned to him in five minutes. (9 PHRT 8660.) Even allowing the "lightening speed" estimation of 15 minutes set forth in petitioner's brief, however, this does not allow for the copying that petitioner submits occurred.

According to Willis's declaration, the Usalama report was compiled by Masters from various documents he had sent to petitioner.[17] The evidence relied upon does not address whether the "original" documents were already in petitioner's possession or whether they were sent to him along with the instructions to "copy" or "create" a report. Given the lock-down status in effect at San Quentin in the days following the murder it seems unlikely that large quantities of documents could be readily passed from cell to cell without detection. Nor does it seem likely that petitioner – who had purportedly been stripped of rank, was on the outs with the BGF hierarchy, and was denied all involvement in the planning of the murder – would have copies of BGF documents relating to the murder in his possession prior to June 20.

In any event, for petitioner's theory to work, in the 15 minutes stated in the brief, Willis's instructions had to be passed to petitioner's cell, petitioner had to read them, find paper and pen or pencil, sort through an unknown number of documents to piece together the details of the murder - which Willis asserts petitioner would not have known - and then write a report using bits and pieces from these various notes, all the while making sure to copy the words used by Willis or others, and specifically avoiding his normal word usage, spellings, etc. After completing the page-long

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[17] Even in the meetings with the defense investigators that petitioner now asserts should be believed, Willis stated that he did not write the kite.

report, petitioner then had to return the newly created Usalama report to Willis via a fishline. Under the 15-minute-scenario advanced by petitioner in his brief, this stretches credulity to the breaking point. A much more, if not the only, reasonable scenario to fit the time frame would be that Willis, who had agreed to obtain additional evidence for Investigator Numark, sent a request to petitioner to provide a copy of the Usalama report that would have been prepared by petitioner in the ordinary course of his duties as chief of security for Carson section. Petitioner, upon receiving the request, would have pulled his report from his "floor safe" or other hiding place and returned it to Willis by fishline - a task that would have been relatively easy to accomplish within the 15 minutes allotted, or even within the five minutes Willis claimed at trial.

C. Dr. Leonard's Report and Testimony

1. Is it new evidence?

Petitioner takes issue with the referee's footnote stating the she did not consider Dr. Leonard's report and testimony to be "new" evidence as it, or similar evidence could have been presented at trial had petitioner so chosen. He attempts to excuse his decision to ignore for 12 years evidence that he now relies heavily upon, by claiming that it would have been uncorroborated, and thus presumptively inadmissible, until Willis's 2001 statement that petitioner simply copied the notes.

First, whether or not the evidence would qualify as "new" for the purposes of this Court's order is moot given the referee's consideration of Leonard's testimony.[18] Second, petitioner's assumption that Willis's

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[18] Respondent maintains, as set forth in his opening brief, and as further elaborated upon here, that Dr. Leonard's testimony should have been excluded under the procedures established in *People v. Kelly* (1976) 17 Cal.3d 24, wherein this Court determined that, for a new scientific

(continued...)

declaration was required to make this evidence relevant is not supported by the record. At trial, evidence was presented that BGF members, particularly those in leadership positions, would sometimes have other members copy documents to avoid being identified by authorities. (See, e.g., 65 RT 14759-14761, 14904-14905.) Petitioner himself cites, albeit somewhat misleadingly,[19] to an observation by the trial court – even without the aid of a linguist – indicating that obvious transcription has occurred. Thus, there was evidence presented at trial from which the jury could have inferred that the documents were created by Willis rather than petitioner. In fact, petitioner's counsel argued that the jury should do just that:

> So, what you've got is Mr. Willis doctoring up notes. You know why? Maybe he's – maybe he told Masters to copy them for him. We heard Mr. McAfee. We heard Mr. Gates that over in D-Section Willis would have things written out for him. Willis would have other people copy notes for him. Is that what happened here? It that what happened Willis wrote Masters to say, "Hey, copy this note and get it back to me. I'm going to fill in the name of the persons that I want to have it sent to." Maybe.

(74 RT 16223.)

(...continued)
technique to be admissible, the proponent must establish that (1) the technique has obtained the requisite degree of general acceptance with the relevant community, (2) the expert is qualified, and (3) that the actual testing was done in accordance with standard accepted procedures.

[19] At pages 62 and 63, immediately following a statement in his brief regarding the second (Usalama report) kite penned by Masters, petitioner states that "[t]he trial court itself noted that one of the kites [unspecified] was an obvious transcription. (55 RT 13297.)" While the court did make that observation, it was made in reference to BGF documents of the type made during "classes" on gang structure and politics, and was in the handwriting of co-defendant Johnson. The actual statement made by the court was, "You know, the spelling's perfect on this, so you know very well it's simply Mr. Johnson copying somebody else's writing." (55 RT 13297.)

> So, this note really, if you read it, in certain very fundamental respects talks about things that Willis said, that he Willis was doing, and wanted to do. Is this perhaps a copy of the note that Willis wrote? Wills wrote out a note and says, "Hey, copy this for me. I don't want it in my handwriting because if they come to search my cell, I'm going to get nailed for it."
>
> He gets Masters to copy this down for him, and then he goes to the authorities and says, "Hey, Masters said he was involved." Maybe. Wouldn't we have the note that Willis wrote Masters to get this 150-C? Remember Willis said he always directed the persons to return his notes. Where is that note? Willis destroyed it I guess.
>
> He destroyed it why? Because it probably shows his manipulating, his craftiness, his cheating, and his lying. It shows the method by which he was able to get Masters unwarily, not knowing what he was doing to talk about things that Willis would thence use to say this shows Burchfield.

(74 RT 232-233.)

2. Dr. Shuy's report as corroboration

Petitioner claims that Dr. Shuy's preliminary report from 1998 serves as corroboration for Dr. Leonard's report. A close reading of it, however, does just the opposite.

Beginning with the word and sentence count, as noted during Dr. Leonard's cross-examination, the two reports are different. (Compare, Pet. Ex. 72, Dr. Leonard's report, p. 7 [806 words in 52 sentences], and App. To Pet. Ex. 72, Dr. Shuy's report, pg 1 [669 words in 51 sentences].[20]) Respondent submits that where professional linguists cannot agree even upon something as basic as what constitutes a word or a sentence – particularly where the authors's grammatical skills vary drastically from

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[20] Respondent notes that Dr. Leonard's numbers are a combined total for Q1 and Q2, whereas Dr. Shuy's report lists separate counts for Usalama and T-Bone.

those of the linguist – then there can be no confidence in the reliability of the system used. And when word count and words per sentence are factors relied upon in rendering an opinion, without some type of standards for making these assessments,[21] there is no way for others to determine what was done.

Dr. Shuy reviewed a very small amount of writing - 465 words in 36 sentences - designated as being "Willis kites,"[22] although the specific documents were not identified. His report includes findings of similarities and differences between Willis's writing and the two questioned documents, as well as Masters's. In contrast, Dr. Leonard made no such comparison, nor was he asked to, despite the ready availability samples of Willis's writings, and the additional work he did in reviewing other BGF documents between cross-examination and re-direct.

In addition to the word and sentence count disparities, an examination of Dr. Shuy's analysis calls into question both the usefulness of this type of linguistic analysis and the limited support it can be said to provide to petitioner's theory. For example:

- Average words per sentence – According to Dr. Shuy's count, the Willis and T-Bone kites both average 13 words per sentence (compared to nearly 16 for Usalama and 28 for Masters), although under petitioner's theory the T-Bone kite was based on Woodard's writings and the Usalama kite was Willis's.

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[21] As noted in respondent's opening brief, due to the inconsistent use of punctuation in the documents, Dr. Leonard did his sentence count based on where he, a linguist with advanced degrees, would normally break a sentence. Dr. Shuy's method of counting sentences is unknown. Dr. Leonard, by combining the two documents had an average words per sentence of 15.5, whereas Dr. Shuy calculated the words per sentence at 15.7 for the Usalama kite and 13.0 for the T-bone kite.

[22] His use of the plural, "kites," suggests more than one kite, but no identification of the documents was provided.

- A/an – Dr. Shuy found that "only Masters has any sense of the use of 'an,' even though he uses it inappropriately."[23] Yet, it is clear that such an opinion is strongly dependent upon the sample size, as Res. Ex. Z, Inmate/Parolee Appeal Form, shows Willis using "an" correctly in combination with "award." Additionally, a review of the documents submitted as Pet. Ex. 73,[24] show that Woodard can, and does, use "an" correctly (Pet. Ex, 73, pp. 35, 39-40), as do other unidentified members of the BGF (Pet. Ex. 73, pp. 71, 72, 74, 76, 79, 82, 88, 90.)

- Regular (-ed) past tense usage. Dr. Shuy's report concludes that "Masters differs from all other writers in how he produces the regular past tense form in verbs whose stem ends in a voice consonant, such as b, d, or g." (Dr. Shuy's report, p. 3.) The referenced chart, however, shows that for /b,d,g/ + /d/, Masters, Usalama and T-Bone all contain some examples while the Willis kites do not. Similarly, Masters and Usalama were consistent in failing to correctly use /p,t,k/ + /t/, while Willis and T-Bone both did it correctly, again despite the claim that Willis is purportedly the actual author of the Usalama report and Woodard of the T-Bone.

- Apostrophes in noun plurals – Dr. Shuy concludes that "Masters and Usalama differ from Willis and T-Bone in terms of the use of the inappropriate use of the apostrophe in noun plural forms." Again, this seems to contradict petitioner's theory that Willis is the actual author of the Usalama report.

- Apostrophes in past tense verbs – Again, Dr. Shuy's report finds that Masters and the Usalama report share a feature distinct from Willis and T-Bone, specifically noting that "Willis does not use this form in the following verbs ending in /d/ or /t/" 'departed,' and 'expected.'" (Dr. Shuy's report, p. 4.) Moreover, the feature in question – /'ed/ as

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[23] Dr. Leonard makes a similar finding, although his review was limited to the two kites and 14 documents by Masters, and he noted some correct usage by Masters.

[24] Pet. Ex. 73 was offered during the re-direct of Dr. Leonard, and consists of a number of documents selected by petitioner's counsel and presented to Dr. Leonard as being drafted by members of the BGF other than Masters. Some of the documents are attributed to specific individuals, while others are simply provided as BGF documents.

a past tense – is one that Dr. Leonard did not even address in his initial report simply assuming that it was not significant.

- Apostrophes in plural noun forms – Dr. Shuy found that Masters differed from all of the comparison documents "in that he does not use the apostrophe inappropriately in the construction of plural nouns." In K-11, however, a document reviewed by Dr. Leonard, Masters does have an example of this – "very good idea's" – thus, the sample selection would have made a difference as to Shuy's finding.

- Spelling: the doubling rule – Dr. Shuy noted that "Masters and T-Bone differ in their production of the doubling rule in English," listing no examples for either Usalama or Willis. A review of T-Bone, however, shows that the report omitted one use of "putting" with the correct spelling, and failed to note the following words in the Usalama report: "getting," "committed" and "cutting." When these words are considered, it would appear that Masters matches Usalama in this aspect while Willis does not.

- Address forms – Finally, Dr. Shuy noted that "only Willis and T-Bone use address forms in their messages, while Usalama and Masters do not," again demonstrating an apparent link between Masters and the Usalama report despite the claim that it was actually authored by Willis, whose writing is distinguished from it. (Dr. Shuy's report, p. 5.) Dr. Leonard did not analyze the use, or lack thereof, of greetings.

Other differences between the reports further demonstrate the lack of standards within the field of forensic linguistics, even between two experts who collaborate frequently.[25] Unlike Dr. Shuy, Dr. Leonard did not address the use of various verb endings or apostrophe plurals, nor did Dr. Shuy address the use of the deontic must, to which Dr. Leonard devoted two pages, or Masters's use of "and/or" which Dr. Leonard claimed not to have seen before. (18 RHRT 1014.)

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[25] This provides further support for respondent's position that a *Kelly* hearing should have been granted regarding the admissibility of this testimony.

Dr. Shuy also failed to address the two items that Dr. Leonard appeared to find most significant to his conclusion – the word frequency of "I" and "the," and the idiosyncratic nonstandard contraction "I'am." Since petitioner has never identified the Masters documents relied upon by Dr. Shuy, respondent understands that this may simply be because the Masters samples Dr. Shuy reviewed did not contain either of these markers. If that is the case, however, it again demonstrates the need for a solid representative sample, and casts further doubt on the reliability of this process.

Petitioner's own exhibit provides further support for the importance and significance of the sample used. In addition to the correct use of "an" by Woodard and other unidentified BGF members, a review of Pet. Ex. 73 shows a number of documents from different authors, including Rufus Willis, where the use of "I" equals or outnumbers the use of "the" (see, e.g., Pet. Ex. 73, pp. 3, 4, 6-7, 10-11, 19-21, 28, 33, 42, 46, 48-49, 50-51, 54-55, 56-58, 63-67.), and one instance of the use of "I'am" in a document attributed to Rhinehart. (Pet. Ex. 73, p. 42.) Although when brought to his attention, Dr. Leonard opined that the apostrophe in that instance could be the tail of a "y" in the line above (19 RHRT 1172), he had never previously attributed any apostrophes to other letters or random marks – except, reluctantly, when suggested by respondent's counsel on cross-examination – despite the poor nature of many of the copies used in his analysis.

For these reasons, not only does Dr. Shuy's report fail to corroborate Dr. Leonard's findings to any significant degree, it actually serves to cast significant doubt upon them by finding, at least under some measures, similarities between Masters's kites and the Usalama report that distinguish them from the Willis's and T-Bone documents, although the Usalama report is, according to petitioner, the one that was authored by Willis. Dr. Shuy's report and the documents in Pet. Ex. 73 certainly demonstrate the

problems inherent in such analysis given the lack of any tested and reliable standards and thereby support the need for a *Kelly* hearing to determine the admissibility of such evidence.

V. AS WITH WILLIS, THE REFEREE'S CREDIBILITY FINDINGS REGARDING BOBBY EVANS ARE FULLY SUPPORTED BY THE RECORD, BUT THEY DO NOT ESTABLISH GROUNDS FOR HABEAS RELIEF

Bobby Evans testified at petitioner's trial, primarily as a BGF expert giving background information on how the gang operated. Additionally, he gave brief testimony regarding statements made to him by Masters, Woodard and Johnson, while the three were housed at the Adjustment Center in the months following the murder. As noted in the opening brief, Bobby Evans's trial testimony regarding Jarvis Masters was extremely limited. The only statements attributed to Masters were an admission that he was a part of the leadership in Carson section and that he voted in favor of the hit on Sgt. Burchfield. Evans has now recanted the portions of his testimony relating to Masters and to purported threats and promises made to himself, and petitioner asks this Court to find that his recantation warrants overturning petitioner's conviction.

A. Petitioner's Habeas Proof

In his deposition, Evans denied ever speaking with petitioner at the AC. Evans maintained, however, that his testimony regarding his meetings with Woodard and Andre Johnson, and their admissions to him were true. Significantly, Evans admitted on cross-examination, that Woodard was the first person to mention Masters's name to him in their discussions of the murder. (Pet. Ex. 58, p. 109.) At the start of the evidentiary hearing, petitioner conceded that he had no proof that the district attorneys knowingly presented perjured testimony in this case.

In addition to Evans testimony, petitioner offered the testimony of Graham McGruer, an expert in CDCR policies. Mr. McGruer reviewed inmate housing documents for the San Quentin Adjustment Center in 1985 and 1986. He prepared a chart showing when various inmates at the AC were on the yard. (Pet. Ex. 16.) The purpose of this was to establish first that Bobby Evans could not have spoken with Masters on the AC yard in August, as he testified at trial, as Masters was not even at the AC until December of 1985. The second purpose was to show the limited opportunities for yard meetings even after Masters arrived at the AC. Of course, the fact that Masters did not arrive at the AC until December was brought out at trial by his defense counsel, [26] so the jury was well aware that Evans was either lying, or simply mistaken, about the date of the conversation. Thus, not only is this evidence not "new" for habeas purposes, but it was already considered by the jury. Further, Bobby Evans trial testimony was that he spoke first with Woodard in August and then, a short time later, with Masters. (58 RT 13723-13725.) A review of the chart prepared by Mr. McGruer shows that Woodard, too, was not available

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[26] During closing argument counsel for petitioner stated:

> Finally, [Evans] talked about a conversation with Masters in August of '85. Well, there are some prison records that show that that could not have happened. If you look at the prison logbook that's Exhibit 189, the logbook for the Adjustment Center, Period October 29, '85 to December 8, '85, if you look at December 2nd, which I paperclipped, if you look at December 2nd, that's when Masters was brought over to the Adjustment Center from Carson Section. December second. Which means that he wasn't there in August when this conversation Bobby Evans claims hasn't even occurred. He wasn't even in the Adjustment Center, so that conversation could not have occurred.

(74 RT 16205.)

on the AC yard until December, just a few days prior to petitioner. (Pet. Ex. 16.) Thus, it could readily be inferred, as the jury may well have done, that, rather than lying about speaking with petitioner, Evans was simply mistaken as to the timing.

B. The Findings

The referee found that Bobby Evans was "spectacularly unreliable," and his claim that James Hahn coerced his trial testimony was "unbelievable." (Final Report, pp. 10-11.) Although she found that at least some of his testimony at trial was untruthful, this finding does not, as petitioner argues, require a ruling in his favor. As the referee found, "Evans' recantation is not worthy of belief, much less worthy of usurping the jury's verdict." (Final Report, p. 14.)

There is no doubt that Evans's testimony that the meeting with petitioner occurred in August was at least inaccurate, and he certainly lied about the number of meetings he had had with James Hahn between 1986 and 1990. However, as noted, the jury had not only the information regarding the issue with the August meeting before it, it also had extensive information showing that Bobby Evans was a career criminal with a history of violent crimes for which he did not expect to be prosecuted, and that he had served as an informant against others. As the referee found, "petitioner's trial lawyer staged an unsparing attack on Evans." (Final Report, p. 10.)

Petitioner urges this Court to reverse his conviction based on Evans's recantation and the failure of James Hahn, an SSU officer who worked gang activities on the streets in Oakland, to advise the prosecution of the extent of Evans work as an informant and of the fact that Evans was an uncharged suspect in a San Francisco homicide. Such relief is not warranted.

1. Evans's work as an informant

It is undisputed that Bobby Evans had many more meetings with James Hahn than he testified to at petitioner's trial. Between December 1986, when Evans was released on parole, and his testimony in 1989 and 1990, it appears that Evans and Hahn may have met as many as 30 to 50 times. Quantity, however, does not necessarily equate with quality. Both James Hahn and James Moore testified that Evans's information was inconsistent, and might often exist simply in advising them that word on the street was that a particular individual had drugs or guns, or was similarly involved in criminal conduct. Often this could not be corroborated. Both Hahn and Moore also testified that when informants – Evans and others – would come in with "information," they might ask for money for a burger, or cigarettes, which Hahn or Moore might provide out of their own pockets.

Although at trial Evans testified that he had met with Hahn only a few times since 1986, he confirmed that he gave information to Hahn about a Lt. Kane, Johnny Wells, and Roy Smith.[27] (58 RT 13795-13802.) Evans also testified that his wife gave information to the SSU in an effort to have him released. (58 RT 13835-13836.) During his deposition, Evans stated that, although they met up to 50 times, he provided Hahn and Moore with information leading to arrests on only one or two people, a guy named "Red," and Roy Smith. (Pet. Ex. 58, pp. 56 & 95.) James Hahn similarly stated that Evans information led to maybe two arrests. (8 RHRT 470.) As Mr. Hahn stated, informants often gave information of little or no direct value to Hahn, or information that could not be substantiated and so went no further. (8 RHRT 470-471.) Thus, it appears that, while Evans may

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[27] Although Evans maintained that it was his wife who had "informed" on Roy Smith, he did acknowledge speaking with Hahn about Smith. (58 RT 13798.)

have met with Hahn on many more occasions than he admitted, the jury heard about the times when he provided information of some substance in the hope of favorable treatment – something more than a hamburger or pack of cigarettes. This is consistent with the referee's finding that, "Evans had many contact with Hahn, although it is unlikely that Evans gave useful information to Hahn more than a few times." (Final Report, p. 11.)

Petitioner offered evidence that Evans also worked as an informant for federal agents. Again, it is clear that Evans's credibility was attacked at trial, including arguments to the jury that his work as a snitch was significant and that he likely was lying about a lack of promises for favorable treatment. (See Final Report, pp. 12-13.) There seems little likelihood that this additional information would have impacted the jury either way. Further, it is unclear to what extent Evans involvement with federal agencies was known to the prosecution, particularly as at least some of his work was done up at Lake Tahoe. (Pet. Ex. 58, pp. 58-59.)

2. The Beasley murder

Petitioner makes much of the fact that Bobby Evans was a suspect in the homicide of the head of a San Francisco drug family for which he was not prosecuted. While there is no doubt that Evans name was brought up as the possible shooter, the testimony of the investigating detectives and other evidence establish there were other suspects as well. (See, e.g., Res. Ex. A; Res. Ex. M (sealed)[28], pp. BEA 00029-00029A, 00093, 00098, 00100, 00102, 00109.) Moreover, Evans was never arrested or even questioned about the murder and it remains unsolved.

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[28] Consideration of Res. Ex. M, filed under seal, demonstrates that the referee's decision is supported by the record. In accordance with the requirement of Cal. Rules of Court, rule 8.46(g), respondent is listing only a sampling of page numbers for the Court's reference without specific discussion of the material contained therein.

Edward Erdelatz and Carl Klotz, the two San Francisco police officers who investigated the murder, identified their notes from the file. Although they did not recall why Evans was not pursued as a suspect, they emphatically stated that they had never been asked to drop a murder charge to help a witness in a trial in another county, nor would they have done so even if asked. (2 RHRT 94 and 124.) In addition, Mr. Erdelatz stated that if sufficient evidence was developed as to a suspect, the case would be presented to the District Attorney, but there was no indication that this was done regarding Bobby Evans. (2 RHRT 93-94.)[29] Petitioner presented no testimony from any witnesses directly implicating Evans in the Beasley murder.[30]

Much as petitioner wishes to convert an unsolved murder into some type of deal with Evans, or further impeachment, the evidence fails to justify such an inference. Evans himself denied committing the murder when asked about it at his deposition. (Pet. Ex. 58, p. 113.) There is no reason to suppose he would have responded any differently at trial. Although he claimed that he had been threatened with prosecution for a number of crimes when he indicated that he would not testify in petitioner's case, the Beasley murder was not one of these. The referee's determination that Evans's status as an uncharged suspect in an unrelated murder would

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[29] Earlier in the proceedings, in response to a subpoena duces tecum issued by petitioner, a representative of the San Francisco District Attorney's office reported no records of any suspects forwarded for prosecution in the Beasley homicide.

[30] A separate exhibit offered by petitioner indicated that, while Evans was paid large sums of money by James Beasely, Jr., in August and September 1988, those payments were for shooting people who owed Beasley, Jr., money, which is consistent with Evans' deposition testimony, not for the murder of his father. (Pet. Ex. 40)

likely have been immaterial in light of the other impeachment evidence presented is amply supported by the record.

VI. THERE WERE NO EVIDENTIARY RULINGS THAT PREJUDICED PETITIONER IN THIS CASE

Petitioner complains of two evidentiary issues: the admissibility of prior hearsay statements of Bobby Evans, and the proposed testimony of petitioner's counsel regarding his conversations with Rufus Willis. Neither the statements nor the testimony was admissible, and even if they were found to be, their exclusion did not prejudice petitioner.

A. The Excerpts of Bobby Evans's Testimony in Two Unrelated Cases, and A CDCR Memo Purporting to Contain Statements of His Made to A Counselor in 2002 Do Not Constitute Prior Consistent Statements And Therefore Were Not Admissible

In an early catalog of proposed witnesses and exhibits, petitioner indicated that he intended to present excerpts of Bobby Evans's testimony from the 1996 case of *People v. Williams*, Yolo County No. 95-8640, the 1998 case of *People v. Defendant A*, San Joaquin County No. 97-60419, and the 1998 case of *People v. Bailey*, Yolo County No. 98-0029. These excerpts were attached to his petition as Exhibits 16, 17 and 18. Bobby Evans testified via in-court deposition on May 14, 2010. (Pet. Ex. 58.) Petitioner did not seek to admit these documents as a part of his deposition, nor did they ask Evans about the prior statements, even telling the court, in response to a question, that he would not necessarily be going into these statements, although it would most likely occur on redirect if there was an attempt to impeach Evans or to allege a contradiction. (Pet. Ex. 58, pp. 7-8.)

On August 20, 2010, respondent filed a motion in limine to preclude certain witnesses and exhibits, including the transcripts of Evans's

testimony, and witnesses[31] who would purportedly testify about those and other statements. (Respondent's Motion in limine to preclude admission, filed August 20, 2010.) Petitioner's response did not include the transcript from *People v. Defendant A*, but it did include a report written by a correctional counselor as part of Evans's 2002 prison admission containing statements relating to his testimony in this case. (Petitioner's Opposition to Respondent's Motion in limine, filed October 19, 2010.) At the status conference held on October 29, 2010, the referee reserved ruling on respondent's motion pending the filing of a final witness list. (Minute Order, October 29, 2010.)

On January 20, 2011, Mr. Andrian mentioned the pendency of respondent's motion to preclude admission of the statements, indicating that Mr. Baxter hoped to argue the motion later that day or the next. (12 RHRT 639.) The motion was argued the next day. (15 RHRT 811-825.) Respondent noted that, although a motion in limine to exclude the statements had been filed, petitioner had never attempted to offer the statements during the reference hearing. Counsel for petitioner stated that he had been "waiting" for the court to rule on the motion. The documents were then marked as Pet. Exs. 66, 67 and 68 for identification. (15 RHRT 814-815.)

Petitioner offered the documents as prior consistent statements to counter allegations of fabrication or motive to lie. The referee enquired as to the applicability of the prior sworn statement exception and respondent noted that the transcripts were not addressed with Mr. Evans, nor was respondent a party to the cases where the testimony was given. (15 RHRT 818-819.) The counseling statement was not given under oath or subjected

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[31] None of these witnesses were called by petitioner, nor did he seek permission to do so.

to any adversarial proceeding. As to considering it under prior consistent testimony, respondent noted that the only inconsistent testimony was at petitioner's trial, and all of the proposed statements post-dated that. As for motive to lie, respondent noted that no evidence had been offered to show what caused the change in Evans's testimony. In response, petitioner asserted that the fact that Evans had given his new version over a number of years, beginning in 1996 and continuing through 2010, somehow gave it "enhanced reliability." When asked by the referee where the claim of recent fabrication was made, counsel respondent by asking where was the evidence that Evans 1996 statement was false. (15 RHRT 824.) Following a brief recess, the referee found that the statements were not admissible under the former testimony exception, but did not specifically address the prior consistent statement exception. She did state that the matter was submitted. (15 RHRT 825.)

On January 27, 2011, petitioner filed a Motion for Reconsideration and/or Clarification of the Court's Ruling. In that motion, petitioner asserted that the prior statements "would have bolstered Mr. Evans's credibility" following cross-examination, that "[r]espondent's line of questioning sought to raise doubt as to Mr. Evans's credibility and motivation," and that establishing the lengthy period of time over which the prior statements were made "could go a long way to extinguish those doubts." (Petitioner's Motion for Reconsideration, pp. 2-3.) Although petitioner had cited to the specific portion of the cross-examination in his response to the motion in limine some months before, he did not bring those references to the referee's attention, nor did he attempt to explain his failure to offer the transcripts on re-direct.[32] The referee reiterated that the

[32] In fact, petitioner conducted no redirect of Evans. (Pet. Ex. 58, p. 130.)

matter was under advisement. Petitioner made no further requests for a ruling at any of the remaining court sessions and states now that he "assumed that the referee would address the issue in her report." (Petitioner's Brief, p. 190.)

1. Although the referee apparently did not rule on the admissibility of the exhibits as prior consistent statements,[33] they do not fall within the rule governing such statements and therefore were not admissible

The admissibility of prior consistent statements is governed by Evidence Code section 791, which allows such statements to be admitted only after:

> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (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.

As noted, for purposes of this issue, the inconsistent statement in question is Evans's testimony at petitioner's trial in 1989 and 1990. The consistent testimony petitioner seeks to support is Evans's May 2010 deposition in this case. Petitioner offers no statements, consistent with the deposition statement, that were made by Evans prior to 1989, nor has respondent offered any statement inconsistent with the deposition testimony made after 1996, therefore petitioner cannot satisfy the requirement of subsection (a).

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[33] Petitioner does not challenge the referee's finding that the statements do not qualify under the former testimony exception.

a. Recent fabrication

Of necessity, petitioner seeks to rely on subsection (b)'s provision that statements may be admitted if they were made prior to the existence of bias or a motive to fabricate. Again, however, the temporal requirement must be met and the burden is on the proponent to establish that requirement. (See, e.g., *People v. Brents* (2012) 53 Cal.4th 599, 616 [challenges to inconsistencies between preliminary and trial testimony implied fabrication, and temporal requirement satisfied where statement in question was made prior to preliminary hearing]; *People v. Coleman* (1969) 71 Cal.2d 1159, 1166 [implied motive to minimize involvement in crime may well have occurred prior to statement being offered under section 791].) In this case, there are any number of possible motives that predate the statements petitioner sought to admit.[34] Moreover, the statements in question go only to Evans's claims of additional benefits received as a result of the testimony, not to the truth or falsity of the testimony regarding petitioner, and he could well have had differing motivations for the two types of statements.

Petitioner asserts that respondent, on cross-examination, implied that Evans's deposition testimony was a recent fabrication. While it is true that a claim of recent fabrication need not be explicit, as noted, the proponent of the statement must establish that the statement preceded the event causing the fabrication. Here, petitioner conducted no re-direct at the time of Evans's deposition, despite noting his position, at the outset, that the

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[34] Evans may have been attempting to bolster his own credibility with the trial courts and counsel by exaggerating his importance as a witness in petitioner's trial, or his work with other law enforcement agencies. He may simply have felt that his statements served some purpose known only to him. Of, he may even have simply made a mistake in his recollection of the reasons underlying the prior decisions not to prosecute.

statements could become relevant depending upon cross-examination, nor did he make any other effort to challenge the supposed allegation of fabrication.

Petitioner identifies a short series of questions during cross-examination that he claims qualify as an implicit charge of recent fabrication. Those questions, however, followed four pages of questioning where Evans stated that he had been in contact with Mr. Baxter for a number of years[35] prior to telling him that he lied about petitioner's involvement in the case. In light of the long-term relationship between the two, respondent sought simply to ascertain why Evans decided to tell Mr. Baxter about his testimony in 2008, and the follow up was in response to Evans's claim that he had done so in an effort to clear his conscience. (Pet. Ex. 58, pp. 121-122.)

To the extent that respondent sought to challenge anything related to Mr. Evans's motivation, that challenge was limited to the motive he, himself, gave and to ascertaining the basis for the delay in admitting his alleged perjury to Mr. Baxter. Significantly, the referee specifically found that Evans's "stated reason for recanting – 'a lot of things has been bothering me. I want to clear my mind. . .I hurt a lot of people's. . .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' – is wholly incredible." (Final Report, p. 10.) Respondent did nothing to place or limit the time frame to 2008; that was the time frame that Evans gave. Respondent does not know what motivated Evans to change his story, either as to supposed benefits received or as to petitioner's involvement in the murder, at any point in time and, as noted, Evans likely had different

[35] Exhibit 7 to the petition is a declaration by Mr. Baxter stating that he first contacted Evans at a court appearance in October 1999.

motives for the two types of testimony. Again, respondent notes that petitioner, despite bearing the burden on admissibility, failed to conduct any re-direct examination of Evans, which seems surprising if those questions truly could be seen as an allegation of recent fabrication and not just a challenge to Evans's claimed attack of conscience. At that point, respondent would have had the opportunity to challenge the motivation of the earlier statements as well. By refusing to do so, petitioner seeks to offer these statements to bolster Evans's credibility while denying respondent the opportunity to challenge them.

b. Negative evidence

Petitioner also asserts that the negative evidence exception to the rule allows for the admission of these statements. In support of this he focuses on the questions regarding Evans's failure to relate his recantation to the District Attorney. (Pet. Ex. 58, 122-123.) Again, the questions relating to the District Attorney were in direct response to Evans's claim that he was coming forward to clear his conscience. Further, negative evidence is found where the witness did not speak of matters where it would have been natural to do so. (*People v. Williams* (2002) 102 Cal.App.4th 995; *People v. Gentry* (3d Dist. 1969) 270 Cal.App.2d 462, 473 [witness admitted certain details of testimony not given to police during prior statement, on re-direct explained failure and police officer called to present consistent statements].) Here, Evans's "silence" in failing to seek out the District Attorney, is inconsistent only with his testimony that his attack of conscience struck him in 2008 and continues to the present and he wants to make things right. As to the recantation itself, one would, in fact, not expect him to seek out the District Attorney to confess to having committed perjury – regardless of the likelihood of any prosecution. Respondent is aware of no instance between 1990 and 2010 in which Bobby Evans would have normally been expected to speak about petitioner's involvement in the

murder of Sgt. Burchfield, much less one where he would have felt any obligation to recant if that recantation were true.

c. Petitioner's claim that the statements are "inherently reliable and do not violate the confrontation clause" is without support in the record

Finally, petitioner asserts that Evans's statements, presumably including his deposition testimony, are inherently reliable and thus would be admissible. As to the alleged admission of perjury, respondent has previously noted in the discussion of Rhinehart's testimony that, although technically a perjury prosecution would be possible, the realities of such are that it is unlikely, and Mr. Evans's experience with the criminal justice system would tell him that. Further, in determining the admissibility of a statement against interest under Evid. Code section 1230, the court may consider the words themselves, the circumstances under which they were said, possible motivation in making the statement, and the declarant's relationship to the defendant. (*People v. Geier* (2007) 41 Cal.4th 555; *People v. Frierson* (1991) 53 Cal.3d 730.) These factors – particularly the latter two – combined with Evans's history and stated willingness to lie to suit his own purposes, make the likelihood of any admission under 1230 non-existent.

d. In any event, in light of the referee's findings, the failure to admit these statements is harmless

In this case, as noted, the only motive offered in court regarding Evans's change in testimony as to petitioner's involvement in the murder was offered by Evans himself, and was not pursued at the time by petitioner whose burden it was. It cannot be the case that a party can satisfy his burden of admissibility by relying on his witness to suggest a motive for the change that post-dates any statements, then when that particular motive is

challenged, claiming that the requirements of section 791(b) have been met. Moreover, as noted, the purported challenges were to Evans's statements regarding petitioner's involvement and the proffered exhibits do not address that. Nonetheless, even if this Court were to find that the cross-examination of Evans constituted sufficient allegation of recent fabrication to satisfy section 791, petitioner cannot establish any harm as a result.

The referee had extensive opportunity to observe Evans during his deposition. She also had the benefit of reviewing his trial testimony, as well as evidence both at trial and at the reference hearing relating to Evans's knowledge and participation. She made specific findings that he was not credible, noting that he "freely and frequently admitted that he would say or do anything to protect himself, help himself, and avoid returning to prison." (Final Report, p. 10.) She also found that he was "utterly lacking in credibility. . .[a] career criminal whose word, under oath or otherwise, means nothing. ... [He] would say anything to save [his] own hide – and [has] so admitted. [He is] manipulative and unreliable." (Final Report, p. 8.) Based upon those findings, there is no possibility that the addition of three more unchallenged statements would have had any impact upon her view of Evans's credibility.

B. The Referee Did Not Err in Refusing to Allow Joseph Baxter to Relate Additional Hearsay Statements by Rufus Willis

Petitioner asserts that the referee erred by not allowing him to present further hearsay testimony regarding Rufus Willis. As noted, at the close of the case – other than petitioner's expert – counsel sought to call Joseph Baxter to testify regarding his conversation with Willis about a TV that had been in his cell. Mr. Andrian made a proffer that the testimony would be that Willis told Mr. Baxter that the kites hidden in the television were kites made after the murder and included the kites that he gave Masters to copy.

Mr. Andrian acknowledged, however, that he did not know that this was "really in dispute." (16 RHRT 850.) Nothing in the proffer indicated that Mr. Baxter could say anything more than that, and certainly, given that the TV in question was removed from Willis's cell prior to trial, Mr. Baxter could not have seen the kites himself, nor is there any indication that Willis could have reproduced them.

As Mr. Andrian noted, there is certainly evidence in the record, including in the telephone conversation between respondent's counsel and Willis, that indicates Willis kept kites in his television, that a some point it was removed from his cell, and that he never got it back. The referee similarly indicated her awareness of this. (16 RHRT 850.) Nothing in the record indicates that the prison authorities found the kites or were even aware of them being inside the television.

The record also demonstrates, however, that the mere existence of kites inside the TV does not help petitioner. Without seeing the actual kites, it would be impossible to establish that they were used by petitioner to create the Usalama and T-Bone kites. Even a summary of their contents would not establish that, as it is clear from other evidence that reports were made and shared among the BGF leadership such that it would be surprising to find no similarities. And, given the nature of the plan, there are only a limited number of ways in which it could be described. Further, absent the actual kites, petitioner cannot even attempt to establish that the writing of the missing kites was that of Willis and that Willis's style is sufficiently distinctive from petitioner's to say that they were copied. As previously discussed, Dr. Leonard was not asked to do such a comparison even between petitioner and other known Willis writings despite petitioner's unfettered access to Willis's prison files and the District Attorney's file.

Further, even if they did contain some of the same phrasing as used in the questioned kites, that, standing alone, says nothing about petitioner's motivations in using them to compose the report. While petitioner asks this Court to presume that he did so under threat of punishment by Willis, it at least as likely, if not more so, that petitioner was operating under the BGF version of a "cut and paste" method of writing reports rather than recreating things out of whole cloth.

All Joseph Baxter could have done, based upon the proffer, was to reiterate that Willis claimed to have stored an unknown number of kites inside a television, and that some of those might have been the ones petitioner used in copying portions of the Usalama and T-Bone kites. At best this is merely cumulative and thus properly excluded. In no way can this second-hand hearsay evidence regarding the past existence of "possibly" helpful documents be deemed material. In any event, the exclusion of this testimony certainly was not prejudicial. As with the Evans's statements above, the referee's credibility findings as to Willis make it clear that such limited testimony would not have rendered his recantation any more believable. Nor would Mr. Baxter's recitation of statements made by Willis make those additional statements credible.

VII. THE REFEREE ANSWERED THE REFERENCE QUESTIONS CORRECTLY BASED UPON THE EVIDENCE PRESENTED

As set forth at the outset, petitioner approaches this case, and asks this Court to treat it, more in the manner of a reasonable doubt argument than a case where he has the burden of establishing that the verdict should be overturned. One aspect of this is the definition of "credible" that he asks this Court to apply. He also seeks to equate a present finding that Willis and Evans lack credibility with a finding that all of their trial testimony related to petitioner was therefore false, while at the same time ignoring the fact that it is undisputed that their testimony regarding Woodard and Andre

Johnson was true. That leap cannot be made on the basis of this record, if at all.

Petitioner's burden is not simply to show that Willis and Evans have credibility issues, as that was well established at trial for the jury's consideration. That is simply fodder for a reasonable doubt argument. To prevail here, petitioner must establish that Willis and Evans are being truthful when they now say that petitioner had no part in the murder. That would be a case-in-chief that satisfies a burden of proof, but that was not done here.

A. Question 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?

The referee correctly found that petitioner's proof fell short of a positive response. Petitioner claims that her ruling is contradicted by her findings relating to Willis's and Evans's credibility. Not so.

1. Willis and Evans are chronic liars

As noted, petitioner's job is not simply to establish what was already demonstrated at trial; that Willis and Evans are not models of trustworthiness. Rather, he must establish that their statements that contradict their trial testimony are, in fact, credible. As this Court noted in *In re Roberts, supra,* 29 Cal.4th at p. 742, "[i]t has long been recognized that 'the offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion.'" Because of that, where it cannot be determined that the lie was given at trial or in the recantation, the recantation will not support overturning a jury verdict, particularly where it is subsequently disavowed. (*Id.* at p. 743.)

2. Referee's finding that there is "little doubt" that Evans lied at trial and that he "had more extensive contact with law enforcement than was disclosed at trial"

Respondent agrees that Evans apparently lied at least as to the number of meetings he had with law enforcement seeking to act as an informant. Question 1, however, focuses only on false evidence as to *petitioner's role* and the referee's findings do not identify that as having occurred. At best, it was established that Evans was mistaken when he said his meeting with Masters at the AC occurred in August 1985, another fact that was known at trial and argued to the jury.

As to a general finding that he lied at trial, respondent notes that Evans testified extensively at trial, but only a minute amount of that testimony related to petitioner's role in the murder. Moreover, he affirmed in his deposition that Woodard told him petitioner had been given the murder weapon to sharpen but was unable to do so. Given all of the evidence presented, and the referee's credibility findings relating to all of the inmates, there simply is no proof by a preponderance that petitioner was not a co-conspirator in Sgt. Burchfield's murder as found by the jury.

3. The referee's finding regarding authorship of the kites

Petitioner asserts that the referee found "that Masters most likely did not author the two crucial kites, which means that Willis falsely testified that he did." (Petitioner's Brief, p. 52.) Two points should be considered. First, the referee's findings state that Dr. Leonard concluded that it was more likely the kites were authored by someone other than petitioner and that Dr. Leonard testified convincingly. (Final Report, p. 15.) She went on, however, to state that the fact that petitioner wrote the kites, "whether in his own words or those of a higher-ranking member," would not exonerate him. (Final Report, p. 15.) Her inclusion of the possibility that the kites

were in petitioner's own words indicates that, although she may have found Dr. Leonard convincing, she was not fully persuaded that his conclusion was correct. Thus, there is no "finding" that the kites were copied. Moreover, as already noted, Dr. Leonard did not speak to the motivation for copying, even assuming it occurred, and the sole evidence that it was done under some type of coercion comes from witnesses that the referee determined were not worthy of belief.

4. The referee's "now versus then" determination

Petitioner asserts that the referee's job was not to weigh the "now versus then" of the various versions of events. He then asserts that "[h]er job was to weigh the evidence of the falsity of Evans's 1989 testimony against the evidence of its truth, and the evidence of the falsity of Willis's 1989 testimony against the evidence of its truth." (Petitioner's Brief, p. 53.) The only difference between what petitioner asserts was or was not the referee's job, however, is that he is asking that the weighing be done on the assumption that the recantation testimony is true. Unfortunately for petitioner, the referee did not make that finding, nor was she required to assume the truth of the recantations in responding to this Court's questions. Were that the case, this Court would have had no need for a reference hearing at all.

Petitioner also asserts that the referee made inappropriate materiality findings. "The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations [citation]; consequently, we give special deference to the referee on factual questions 'requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying' [citation]." (*In re Lawley*, *supra*, 42 Cal.4th at p. 1241.) A part of any credibility determination based

upon conflicting statements is an assessment of the relative importance or materiality of those statements.

As to specific evidence relating to the referee's answer, that was discussed in detail above. Respondent will summarize it only briefly here to avoid undue repetition.

5. Bobby Evans's testimony

Bobby Evans's testimony offered little in the way of evidence regarding petitioner's role in the case because Evans had no personal knowledge of the planning and execution of the murder. He learned of it only after it happened. Since the referee found that Evans's testimony at the deposition was not credible, it cannot be assumed that she found his statement that he had no conversations with petitioner to be truthful, although his dating of the conversation was certainly incorrect. Further, Evans stated that he was truthful about his contacts with Woodard, who was the first to mention Masters's name to him, and Andre Johnson – their roles are uncontested. And the fact that he maintains his truthfulness regarding his meetings with Woodard would seem to support that his claim to have met with Masters in August was simply an error in the date, as neither Woodard nor Masters were on the AC yard until early December as petitioner's own exhibit demonstrates. As for Evans's involvement with James Hahn, a finding that he lied regarding the number of contacts does not impact Question 1 as Evans's work for law enforcement is unrelated to petitioner's role in the murder.

6. Evidence regarding the authorship of the Usalama and T-Bone kites

Respondent has provided ample support for his contention that Dr. Leonard's testimony should have been the subject of a *Kelly* hearing prior to its admission, and further, that given the lack of standards for selection of comparison criteria as well as the admitted inability – or even

desirability - to determine an error rate or to somehow quantify the confidence level of conclusions reached, it is unlikely that his conclusion, if not his entire testimony, would have been admitted. (See *United States v. Van Wyk* (D.N.J. 2000) 83 F.Supp.2d 515 [forensic linguist allowed to point out similarities between documents, but not to state conclusion as to authorship].) Even allowing for consideration of his testimony, however, in the absence of credible proof regarding petitioner's motivation in copying portions of the kites, or that Willis knew he was copying things, the referee's answer is correct.

7. Harold Richardson

Richardson's inadmissible statements were thoroughly addressed previously. Even ignoring the trial court's proper finding that the statements are inadmissible, petitioner's own evidence contradicts much of what he said. His statement simply fails to accuse petitioner.

8. Rufus Willis

Petitioner makes much of the fact that Willis stated to defense investigators that he lied at trial and that the statements were made "under penalty of perjury." (Petitioner's Brief, p. 71.) Of course, Willis's trial testimony in 1989 was made in-court and under oath – at least as much under penalty of perjury as the 2001 declaration. If the simple fact of the perjury language makes his declaration believable, then this Court must believe his trial testimony given under more stringent circumstances.

The fact that the referee found the declaration to be uncoerced likewise does nothing to support its credibility in light of her findings that Willis would, and did, lie whenever it suited his interests. Additionally, a review of the recorded conversation between Willis and respondent's counsel also shows that the conversation was friendly and lacked any efforts at coercion, therefore, under petitioner's theory, Willis was truthful

there when he reaffirmed Masters's involvement. Moreover, as noted in the discussion of the interviews, the notes reflect some statements that are contradictory to the declarations as well as containing statements that indicate petitioner did have involvement in the plot, albeit not exactly as described at trial.

As to the statements being against penal interest, again, respondent notes that while Willis, who is serving a life sentence, is technically at risk of prosecution if he admits to lying at petitioner's trial, and is at greater risk than Rhinehart given his greater involvement, the actual likelihood of the state undertaking another trial, much less another capital trial, in this case seems relatively low.

Willis's letter of apology likewise does nothing to support petitioner's claim that the recantation is credible. Willis could very well feel guilt that petitioner is on death row as a result of his testimony, even if that testimony is true. Or, as previously noted, Willis could have had his own motivations in writing that letter, such as hoping that an apology and cooperation with petitioner and his team would result in word getting out that he was no longer working for the government and should be left alone.

9. Jury instructions regarding credibility

Petitioner correctly notes that CALJIC No. 2.21.2 instructs a jury that a witness who is willfully false in one aspect of his testimony is not to be trusted in others. That instruction, however, merely allows the jurors to disbelieve the witness's testimony, it does not require that they do so. If it did, many witnesses in many trials would, essentially, be precluded from testifying. In this case, the jury had ample evidence from which they could determine that Willis and Evans lied about the nature and extent of petitioner's involvement in the murder, yet it chose to convict. Petitioner's argument that the additional evidence was critical, presumes its

truthfulness, a shaky proposition at best, and one specifically negated by the referee's findings.

Petitioner also overlooks another instruction, CALJIC No. 2.51, which tells a jury that motive can be relevant in an assessment of evidence. Although that instruction speaks specifically to a defendant's guilt or innocence, the presence or lack of a motive to lie is certainly a factor that one can take into account.

In this case, although the jury heard of motives on the part of Willis and Evans – hope of favorable treatment or protection – to lie, the "fact" of a lie about petitioner presupposes that someone wanted to frame petitioner in the first place and there simply is no evidence of any motive to do so. Moreover, according to petitioner's theory of the evidence, Masters's would seem to be a highly unlikely candidate for framing. It is clear that there were a number of BGF members involved in the plot, including Rhinehart, Carruthers, Ingram and Vaughn. If, in fact, weapons were "never" passed between tiers, and if, in fact, those involved – except for Woodard and Willis – were confined to the second tier, then it would only make sense for Willis to name someone on the second tier if a third defendant was needed.[36]

Similarly, there is no evidence supporting a reason for any law enforcement officials to want to go out of their way to avoid prosecuting people on the second tier who were most certainly involved, in favor of creating a false case against petitioner who, according to Willis's

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[36] Given Rhinehart's actual involvement, and Willis' apparent antipathy towards him as evidenced by comments regarding his poor performance as Usalama prior to Masters assumption of that position, Rhinehart would seem to have been the prime candidate for Willis to name. This is especially true as Rhinehart did not suffer from an inconvenient residence on the 4th tier as did Masters.

declaration and the testimony of Woodard and Rhinehart, was no longer even a part of the BGF leadership.

B. Question 2: Is There Newly Discovered, Credible Evidence Indicative of Petitioner's Not Having Been A Participant in The Charged Offenses?

Given the referee's findings regarding the credibility of the inmate testimony, the answer to this question is clearly no, at least as to the majority of the evidence proffered by petitioner. Even setting aside the question of what constitutes "new" evidence for purposes of answering this question, the only evidence other than inmates testimonies and declarations is of little or no help to petitioner.

1. Non-inmate testimony

Edward Erdelatz and Carl Klotz testified that they would not have dropped an investigation into a murder suspect based on a District Attorney's request, nor did they recall ever getting such a request in any case, much less in this one. Therefore petitioner's attempt to imply some darker meaning from Bobby Evans's status as a possible suspect in an unrelated homicide from San Francisco is unsupported by credible evidence.

Bob Conner, James Moore and James Hahn confirmed that Bobby Evans had more involvement as a snitch than he testified to at trial. Although credible, that testimony is not indicative of petitioner not having been a participant in the murder of Sgt. Burchfield.

Melody Ermachild, Pam Siller and Chris Reynolds provided testimony regarding Rufus Willis's declaration. They could, however, state only that he provided the information recorded in the declaration. They could not provide direct evidence relating to petitioner's involvement in the murder.

Graham McGruer provided evidence to show that Bobby Evans could not have met with petitioner at the Adjustment Center in August 1985. (Pet. Ex. 16.) Not only is this clearly not new evidence, as it was presented at trial, but his chart also shows that Woodard was not there, or at least not on the yard there, until December and Evans testified that he met with Woodard prior to meeting with Masters, thus making Evans's testimony more likely a matter of poor recollection as to timing.

Dr. Leonard's testimony should not have been admitted, but even if it is considered, including consideration of his conclusion that the hypothesis of copying is "superior" to the hypothesis of authorship, he could not and did not speak to motivation. Although the referee opined that copying showed clear involvement after the murder, which it would, copying does not rule out actual participation in the planning and execution, just as using the utilization of the cut and paste functions of a word processing program does not require a finding that the person copying the section at issue did not understand or intend the words to be used.

2. Inmate testimony

The obvious problems with the testimony of the various inmates has been discussed earlier in this brief. In this portion, however, petitioner asserts that, contrary to the referee's findings, she "failed to weigh the credibility of the prison witnesses," apparently because she did not pick and choose among the various inconsistent statements to determine which specific things were false for each inmate, and because she "ignored the unanimity of their testimony on all matters exonerating Jarvis Masters." (Petitioner's Brief, p. 100.)

As previously noted, the referee included in her findings several points of disagreement between the various inmates' testimonies. Although she did not engage in a futile effort to discern which individual statements by which inmates were true, she did note that the conflicts related to such

fundamental things as who ordered the hit, who planned it, who made the weapon, and the existence of a backup plan. (Final Report, pp. 7-8.)

Petitioner's claim in this regard also suffers from the overly broad definition of credibility that he relies upon, asserting that "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.*" (Petitioner's Brief, p. 100, emphasis in original.) If this were truly the standard, either generally, or limited to this question, there would have been no need for this Court to order a hearing as to this question.

Most items of evidence are "capable" of being believed to at least some extent. Capability in the abstract, however, does not automatically equate to credibility in reality. The central purpose of a reference hearing is to allow a referee to actually see the witnesses and assess their credibility. (*In re Lawley, supra,* 42 Cal.4th at p. 1241.) If that assessment step is not required – or, as petitioner would have it, actually prohibited – then this Court could simply have ruled on the petition by reading the declarations attached to it as they are "capable" of being believed. Such a standard would directly conflict with the holding in *Roberts*, as well, as most recantations would be "capable" of being believed.

The referee correctly did as this Court asked. She listened to the testimony, observed the demeanor of the witnesses, compared their testimony to the other parts of the record and found that they were not credible.

Petitioner also asserts that the "remarkable consistency" between the inmates as to petitioner's lack of involvement is a further indication of their credibility. He asserts that the inmates were not in communication with each other and "[t]heir evidence came forward at entirely different times and under entirely different circumstances" which petitioner asserts can be

explained only by his innocence. (Petitioner's Brief, pp. 100-101.) The problem with this assertion of course, lies in the record.

As to the lack of communication between them, we have only the testimony of those inmates, people who the referee found to be generally unworthy of belief. Moreover, it is clear that the BGF is capable of communicating not only between cells and tiers, but between institutions. So even if, for example, Woodard has had no direct contact with petitioner or the other inmate witnesses, indirect contact from the BGF is a distinct possibility.

As to the timing and circumstances of their evidence coming forward, there was no evidence presented that these inmates sought out petitioner (which would belie the first claim of no contact) or his counsel to volunteer their services.[37] The most likely way in which their evidence came to light was, as with Willis, through a visit by investigators or counsel working on petitioner's behalf. Although we have no evidence as to how or when the original contact was made with each of them, we do know, from the notes of Willis's interview, that petitioner's investigators advised him that Andre Johnson had made a statement denying involvement by petitioner. It is not unlikely, therefore, that similar statements may have been made to others during similar interviews. Even without any improper motive, such statements could serve to color or shape their statements.

Finally, even if all they wanted to do was to get petitioner off death row, the inmates would all be aware that he was tried as a co-conspirator, rather than as the hit man. The easiest way to absolve him is to say that he had no involvement. Willis had the hardest job as he had to contradict prior

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[37] As discussed previously, Bobby Evans testified that it was petitioner's counsel, Joseph Baxter, who approached him over the course of several years. There is no evidence to support an inference that he would have come forward but for that contact.

testimony. Woodard, who sat through the trial, would know that he simply had to exclude Masters from the group. Rhinehart, having been on the tier and well aware of the plans would likewise know that. In fact, Rhinehart's "precise unanimity" with Woodard's version that Masters was punished for objecting to the plan, when his own objection not only went unpunished, but he was allowed continued involvement, makes that unanimity suspect. As for Welvie Johnson and the Harold Richardson statement, the best that can be said of them is that they were unaware of, or failed to mention, petitioner's involvement. That is a far cry from evidence exonerating petitioner.

The problems with Willis's declaration have been addressed in detail earlier in this brief. Here, petitioner actually claims that the testimony of the investigators who interviewed Willis serve as corroboration of the declaration. (Petitioner's Brief, pp. 119-120.) While they certainly can, and did, testify that he said the things in the declaration and that he signed it, they can in no way corroborate the truth of the statements, nor does petitioner cite to any authority that would support such an assertion. If that were possible, it would essentially do away with the hearsay rule and one could avoid credibility issues simply by having a person of good credibility – e.g. a minister – listen to the witness' statement ahead of time and then testify that they heard it.[38] Similarly, while the referee did find that the

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[38] (See also, *People v. Gentry* (3d Dist. 1969) 270 Cal.App.2d 462, 473, where the court noted that the reason for the temporal requirement of Evid. Code 791 is that, "when there is a contradiction between the testimony of two witnesses it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has asserted the same thing previously. 'If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible.' (4 Wigmore, Evidence (3d ed.) § 1127, p. 202.)"

declaration was not coerced, lack of coercion does not rule out lying for one's own purpose.

The letter of apology is nothing more than a statement that Willis feels badly that his testimony resulted in petitioner being put on death row. Willis could feel that way even if his testimony was truthful, as petitioner was a fellow BGF member. The same is true of the letter to petitioner's counsel. The "hint hint" remark adds nothing to the declaration, and could easily be an effort on Willis's part to keep them interested in him as a witness to obtain assistance or to convince the BGF that he was now back on their side.

The trial testimony of Cader and Wright, corroborates nothing more than that Willis hoped to work out something to get an early release from prison. His whole purpose in coming forward and risking BGF wrath was in hope of a reduced sentence and this was made clear to the jury.

Willis's conversation with respondent's counsel reaffirmed his trial testimony in many respects, although he also declined to answer some questions. Petitioner asserts that the conversation is replete with leading questions. Respondent takes issue with that assessment, but, unlike petitioner's interviews which were not recorded, the Court can review the conversation verbatim, including listening to Willis himself. The recording includes both the things supporting Willis's trial testimony as well as those that detract. Again, this is in contrast to the declaration which, as noted, did not include many statements and notations of demeanor that either conflicted with, or at least detracted from, the credibility of the final version and were not helpful to petitioner's case. At best, the conversation further demonstrates that Willis changes his version of events to suit himself. This is entirely consistent with the referee's findings but does nothing to establish that the recantation is the "true" version of events.

C. 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 And, If So, How?

Petitioner begins by asserting that the referee, in finding that there was no evidence of undisclosed threats or promises, and that the new claim of undisclosed prosecutorial promises or threats was unsubstantiated, based her holding on a misunderstanding of the question. According to petitioner the question is simply whether there were *any* promises made, and he references the promises made by DA Investigator Numark as well as the allegations in Willis's declaration that Deputy District Attorney Berberian threatened Willis. As with the definition of credibility in Question 2, petitioner's reading of this question would render this Court's reference order meaningless.

The discussion between Numark and Willis about shortening his sentence was presented at trial. If Question 3 must be answered in the affirmative based on that, then that question could have been answered from the appellate record. The only reason to order a hearing relating to promises or threats made to Willis would be to allow petitioner to prove the existence of threats or promises *not* previously disclosed.

The only evidence offered in support of such new threats or promises is the statement in Willis's declaration that Mr. Berberian told him he would put him back in the general population and provide no protection to him. The referee, quite correctly, found this to be unsubstantiated. In addition to the general problems with relying solely upon the statements in Willis's declaration in support of this claim, respondent again notes that there simply is nothing in the record that would provide a reason for Mr. Berberian or Ms. Kamena to seek to present perjured testimony by Willis.

Petitioner does not dispute – nor can he reasonably do so in light of Woodard's admissions – that Willis's testimony regarding Woodard, Andre Johnson, and the other tier two inmates is accurate. The District Attorney, therefore, had a witness who could reliably testify regarding those involved in the murder of Sgt. Burchfield. There is nothing to support a reason for Numark, Berberian, Kamena, or anyone else tied to the prosecution to want to frame petitioner, or that they would jeopardize a significant murder prosecution by presenting false testimony involving an innocent man when they could simply have chosen among others who were unquestionably involved.[39]

While Numark may have made Willis an offer of help that he could not support, that offer was retracted prior to trial, the jury was aware of it as they were of Willis's desire to get out of prison at any cost, and there is no credible evidence that the offer was made in exchange for Willis lying. Although petitioner seeks to squeeze some measure of corroboration from the fact that respondent chose not to call District Attorney Berberian to deny Willis's allegations, that again overlooks who has the burden of proof in this case. It is for petitioner to prove that a deal existed, not for respondent to disprove it. Given that burden, although petitioner called Mr. Berberian as his own witness, he also chose not to explore that area with him.

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[39] In the case of Berberian and Kamena, such behavior would have put them at risk of disciplinary action, up to and including disbarment. And for all three, there would be possible prosecution under Penal Code section 128.

D. 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? If So, What Are Those Promises, Threats or Facts?

At the beginning of the hearing, petitioner conceded that there was no evidence of any wrongdoing on the part of Deputy District Attorneys Berberian and Kamena. Although he specifically noted that this eliminated proof as to Question 5, respondent submits that it also addresses at least the portion of this question addressing promises, threats or facts of which they were aware, since such awareness would have triggered an obligation to inform the defense. Therefore, this question is left with only information of which they should have been aware, and respondent submits that the referee correctly answered this in the negative.

As an initial matter, the only way in which this question could possibly be answered in the affirmative would be if James Hahn is found to be a member of the prosecution team thereby imputing his knowledge to the prosecutors. Petitioner submits that this is the case.

1. James Hahn was not a member of the prosecution team

Hahn was assigned to the SSU which, although under the umbrella of the Department of Correction, was, in Hahn's case, an external unit operating primarily in Oakland and dealing with gang parolees. District Attorney Berberian also testified that, to his understanding, there were two parts to SSU, one internal to the prisons and one external. As Mr. Hahn's job required him to be aware of gang members coming up for parole and to keep tabs on members' actions on the streets, it should come as no surprise that he questioned gang members about their knowledge of gang activity when he had the opportunity, or that he might meet with BGF leadership –

such as Welvie Johnson – on occasion, even if some of those members remained in prison. Moreover, because he was, in effect, operating as a parole officer for those gang members on the street, it should be equally obvious that he might facilitate introductions and transportation for parolees wishing to contact law enforcement agencies and vice versa.

Hahn testified that when he got information from parolees that pertained to other agencies he would pass that on to those agencies. He would not undertake to investigate those cases. Jim Moore and Bob Conner, with whom Hahn worked in Oakland, gave similar testimony. Hahn's involvement in this case fell well within the range of his normal duties and did not rise to the level of participation that would warrant a finding that he was a part of the prosecution team.

Bobby Evans called Hahn when he was arrested in Alameda, and volunteered to provide information regarding the Burchfield homicide among other things, in the hope that Hahn could be of some assistance to him. Hahn told him that he did not want to know any details, as he did not want to become involved, and instead served as a liaison to introduce Evans to the District Attorney's office. Hahn promised him only that he would try to ensure his safety, a promise Hahn stated that the state, as a custodian, had a duty to undertake in any event. As previously noted, Evans's claims that Hahn coerced his testimony are not credible.

Hahn also wrote a letter in December 1989, asking the parole board to approve Evans's release from supervision. While that letter included a statement regarding Evans's testimony in this case, Hahn testified that the purpose of obtaining Evans's release was to allow him to be placed in the Federal Witness Protection program and that Hahn's supervisor instructed him to include the Burchfield testimony in an effort to persuade the board to approve the request. There is no evidence that this was done in exchange for Evans's testimony, or that Evans even knew about it at the time.

Hahn also transported Carruthers, who was on parole at the time, to the District Attorney's office for an interview. Again, what effectively amounts to taxi service does not make one a part of the prosecution team. Similarly, the fact that David Gasser referred a call from Carruthers's mother to Hahn does not make him an investigator in this case. Carruthers was a gang member on parole when he gave his statement to the prosecution. It is not unreasonable to refer a question from a family member who is not in prison to personnel who work in the community.

District Attorney Berberian testified that he did not recall giving Mr. Hahn any instructions regarding the investigation of this case. Although David Gasser stated that he had "lots of contact" with Hahn during this period, he did not state that the contact involved directing Hahn to conduct any investigation or that Hahn did so. The record supports the limited role of transport and introduction played by Hahn, and does not support a finding that he was part of the prosecution team so as to impute any knowledge to the District Attorney.

As to threats or promises by Hahn, the referee found that Evans received exactly what the jury was told he was promised – protection. (Final Report, p. 16.) She specifically found Evans's testimony that Hahn coerced him into giving evidence against petitioner to be not credible. (Final Report, pp. 10-11.)

As to the extent of Evans's involvement with Hahn and other law enforcement agencies, the referee found that there was no basis for finding that the prosecution knew of these as Hahn worked in Oakland. Since Hahn was not a part of the prosecution team, there is likewise no basis to impute knowledge to the prosecution.

Evans's status as a suspect in the San Francisco Beasley homicide has previously been addressed in some detail. Although new, it was again not something of which the prosecution was or should have been aware. Nor

was the extent of Hahn's knowledge sufficiently clear to warrant imputation of that knowledge to the prosecution, even assuming such imputation would be appropriate.

The referee correctly answered this question in the negative.

E. Question 5: Did Deputy District Attorney Berberian and Kamena Knowingly Present False Testimony by Bobby Evans?

As the referee found, no evidence was presented on this question and petitioner conceded the point during opening and closing statements. He does not challenge this finding.

F. 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?

Again, petitioner relies solely on allegations that any threats or promises made to Evans were made by James Hahn. He asserts that the referee did not address the bulk of the evidence supporting this claim.

The evidence relating to Evans's status as a suspect in the Beasley homicide has been discussed. Not only was the evidence limited as to the extent of Hahn's knowledge, but Evans's own testimony at the deposition indicates that it was not used as a threat against him as he denied knowledge of his status as a suspect.

James Hahn agreed that he told Bobby Evans that he would do what he could to protect him. As previously noted, Hahn stated that this was his duty given Evans's status as a parolee. Further, the jury was well aware of this promise.

The existence of any additional threats or promises is supported solely by the testimony of Bobby Evans at his deposition; testimony that the referee found spectacularly unreliable. Evans claimed that he was told

what to say by Hahn and David Gasser. Although he could not recall the instructions in detail, he did indicate that they wanted him to testify that petitioner made the weapon. Significantly, neither his interview with the prosecution nor his trial testimony contain statements to that effect. Respondent submits that, if Hahn and Gasser were going to go to the trouble of scripting Evans's testimony and threatening him to coerce his cooperation, they would have ensured that his testimony implicated petitioner in some substantial way. Also, such alleged scripting does not account for Evans's statement during his deposition that Woodard was the first to mention Masters's name to him when then spoke at the Adjustment Center.

The record supports the referee's finding that there were no threats or promises, other than that disclosed at trial regarding protection, that influenced Evans trial testimony.

G. Question 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?

Petitioner did not assert any objections to the referee's findings regarding Johnny Hoze. The findings are amply supported by the record and in accordance with this Court's holding in *Roberts*.

CONCLUSION

For the reasons set forth above, this Court should adopt the findings of the referee , with the exception of the admissibility of the testimony of Dr. Leonard, and deny the petition for writ of habeas corpus.

Dated: August 8, 2012

Respectfully submitted,

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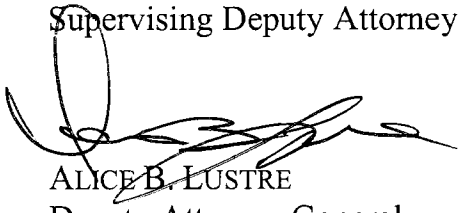

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT uses a 13 point Times New Roman font and contains 21,976 words.

Dated: August 8, 2012

KAMALA D. HARRIS
Attorney General of California

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Attorneys for Respondent

DECLARATION OF SERVICE

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

No.: **S130495 & S016883**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 8, 2012, I served the attached

RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT

by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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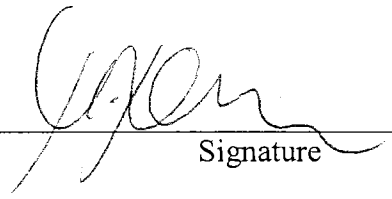
On August 8, 2012, I caused 1 original and thirteen (13) copies of the **RESPONDENT'S BRIEF IN RESPONSE TO PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT** in this case to be delivered to the California Supreme Court at **350 McAllister Street, San Francisco, CA 94102** by **Personal Delivery**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 8, 2012, at San Francisco, California.

M. Argarin
Declarant



Signature

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