

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**SUPREME COURT
FILED**

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In re

RONALD LEE BELL,

On Habeas Corpus.

CAPITAL CASE

No. S105569

(Former related appeal: S004260;
first related petition: S015786;
second related petition: S044466)

Frederick K. Ohlrich Clerk

DEPUTY

**PETITIONER'S BRIEF OF EXCEPTIONS
TO THE REPORT OF THE REFEREE**

Reference Hearing, Superior Court
Contra Cost County, State of California
No. 21631

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**PETITIONER'S BRIEF OF
EXCEPTIONS TO THE
REPORT OF THE
REFEREE**

Petitioner Ronald Lee Bell ("Bell") submits his exceptions to the Report of the Referee ("Report"), filed November 30, 2006, in Contra Costa County Superior Court and transmitted to this Court in December of 2006. The Report was the result of habeas proceedings filed by Bell in April of 2002 in this Court, in which he challenged his convictions and death judgment on the grounds he is actually innocent, and that his conviction resulted from false testimony in violation of Penal Code section 1473¹ and state and federal due

¹ All further statutory references are to the Penal Code unless otherwise noted.

process. This Court issued an order on July 9, 2003, appointing the Honorable Thomas Maddock, Judge of the Contra Costa County Superior Court, as referee to “take evidence and make findings of fact on ... [six] questions” regarding Bell’s case. (CTR 69.)² The Report found against Bell on all six questions, including that the trial testimony of the three eyewitnesses was truthful and that none of them had recanted her testimony since the trial.

SUMMARY OF EXCEPTIONS

The question whether petitioner Ronald Lee Bell was the perpetrator of a robbery-murder at Wolff’s Jewelry Store in Richmond on February 2, 1978, for which he was condemned to death in 1979, has shadowed this case from its inception. A first trial ended in a mistrial after the jury deadlocked on the question of guilt, and even the second jury appeared hopelessly deadlocked on guilt until the trial court pushed for further deliberations that ultimately resulted in guilty verdicts on all counts. The only physical evidence from the offense — jewelry proceeds from the Wolff’s robbery — was found on Larry Bell, Bell’s brother, who was arrested a few days after the Wolff’s offenses for assaulting a victim with a gun like the one used in the Wolff’s robbery.

² Citations to the record are either to the original trial transcripts, which will be designated CTT (clerk’s transcript of trial), or RTT (reporter’s transcript of trial), or CTR (clerk’s transcript of reference hearing proceedings) or RTR (reporter’s transcript of reference hearing proceedings).

The evidence that Bell committed the offense was the testimony of an adult eyewitness, Ernestine Jackson, and two children related to her — her sister Ruby Judge, age 14, and her niece Dorothy Dorton, age 13 — who had accompanied Jackson to Wolff's, and were from Bell's neighborhood. Jackson had a powerful motive to falsely or even mistakenly identify Bell as the perpetrator, and therefore to influence her young sister and niece to do the same: Bell had been convicted ten years earlier of manslaughter for the killing of Alcus Dorton, father of then-toddler Dorothy Dorton with Judge and Jackson's older sister, Dorothy Jean. Dorothy Jean had then died in her twenties of alcoholism four to five years after Alcus's death.

In addition, the Richmond community in which the Bells, Dortons, Jackson, Judges and others lived was split by the death of Alcus Dorton. There were those, such as Jackson and her family who were angry because Alcus had died and Bell had served only two short, meaningless years in the California Youth Authority for that offense. On the other side were those in the community who defended Bell's actions as self-defense because Alcus Dorton was large, a drunk, a bully generally and toward Bell in particular, and had pursued Bell and his pregnant girlfriend, Rene, to their house and broken the door down before Bell had shot and killed Alcus on Bell's front porch. In the wake of the community rift came the untimely death of Dorothy Jean, which had a profound effect on the Jackson/Judge family, powerfully apparent even today as evidenced by witnesses at the evidentiary hearing.

The timing and circumstances of the deaths of Alcus and Dorothy Jean leads to a strong inference that Dorothy Jean's alcoholism and ensuing death were related to Alcus's death and, perhaps, even deepened the division in the community. Only a suggestion of the Judge family's bias was presented to the jury that convicted Bell in 1978. Defense counsel at trial asked questions of Jackson, and the Dorton and Judge girls, in an effort to elicit that the family was deeply angry and vengeful towards Bell for having killed Alcus Dorton and for having received such a light penalty. In their trial testimony they denied such was the case. No evidence was presented at trial of the devastation to the Jackson/Dorton/Judge family in the aftermath of Alcus Dorton's death, including the death a few years later of Dorothy Jean, or of the rift which split the community and is evident even today.

Solid, credible testimony at the evidentiary hearing by Leroy Kelly, corroborated in relevant aspects by Jackson and Judge, exposed Jackson's own post-trial admission that she had lied in her testimony at Bell's trial when she identified Bell as the perpetrator when, in fact, that person was Larry Bell. The testimony of Jackson and Judge at the evidentiary hearing also exposed the details and depth of Jackson's proclivity to misidentify Bell never presented at trial: that her family was cut to the core in the aftermath of the slow suicide of Dorothy Jean by substance abuse following the death of Alcus Dorton, for which Bell in their view had paid virtually no price; and the community was broken apart, yet to recover, by the differences in opinion whether Bell was or was not justified in killing Alcus Dorton.

These emotions, evidenced primarily by Judge at the evidentiary hearing but suggested also by Jackson, were striking.

In its order filed June 11, 2003, directing that a reference hearing be held, this Court requested that the referee answer six questions. In light of the evidence presented at the evidentiary hearing, in the context of all the evidence produced at trial, the crux of those questions is: Did Ernestine Jackson lie at trial in her testimony identifying Bell as the perpetrator of the offenses at Wolff's and cause Dorothy Dorton and Ruby Judge to also identify Bell when he was not the perpetrator and, if so, was the false testimony substantially material or probative? The referee found against Bell on all six questions, except for a conditional finding that false testimony of the three eyewitnesses, if any, was substantially material or probative³ and thus on the crux of those questions previously stated. Bell submits that the referee was wrong in finding :

- Ernestine Jackson was truthful at the evidentiary hearing and in her trial testimony, and never recanted her trial testimony. As shown by Jackson's hostility, her disrespect for the reference proceedings, the many internal contradictions and inconsistencies in her evidentiary hearing testimony, and certain testimony she gave that defies common sense and was therefore not credible, Bell carried the burden of showing that Jackson significantly lied at the evidentiary hearing.

³ Bell does not except to the referee's finding in this regard.

- Dorothy Dorton was truthful in her evidentiary hearing testimony. Although Bell has withdrawn Dorton's declaration submitted with the habeas petition filed April 2, 2002, in this Court and initially to the referee in the proceedings below, as well as any reliance on that declaration, through admissible evidence in the evidentiary hearing Bell carried his burden of showing that Dorton willfully and significantly lied under oath in a deposition taken in the course of the reference proceedings, and during her evidentiary hearing testimony.
- Leroy Kelly was not credible in his evidentiary hearing testimony and in his declaration. The referee found Leroy Kelly not credible in his testimony because during it "his demeanor changed, he crossed his arms and became nervous, and was observed to actually begin sweating on his forehead." Close scrutiny of all of Kelly's evidentiary hearing testimony, in light of the person he is and the evidence presented at trial in 1978, demonstrates that Bell has carried his burden of showing that Kelly was truthful in his declaration and evidentiary hearing testimony; that Jackson did recant her 1978 trial testimony; and that Jackson materially lied at the trial in 1978.

The referee also omitted findings on the following important issues:

1) Whether Ernestine Jackson, Dorothy Dorton, or Ruby Judge discussed Bell's shooting of Alcus Dorton at home, in the family, at the time it occurred, in its aftermath, or at any time thereafter including in 1978.

2) Whether the three eyewitnesses had drawn any inference that Dorothy Jean Dorton's death of alcoholism, in her early twenties a few short years after Alcus Dorton's homicide, was related to Alcus's death and therefore could be blamed on Bell.

3) Whether a serious rift developed in the neighborhood inhabited by Ernestine Jackson, Dorothy Dorton, Ruby Judge, Bell, Leroy Kelly, and others, with supporters of Bell and supporters of Alcus Dorton pitted against each other, resulting in further despair and conflict in the community whose origin could be attributed to Bell.

4) Whether the death of Dorothy Jean combined with the split in the neighborhood was blamed on Bell by Ernestine Jackson, Ruby Judge, Dorothy Dorton, or that family in general, providing a deep-seated basis for them to identify Bell as the perpetrator, either purposefully or mistakenly.

STATEMENT OF THE CASE

On November 1, 1978, a jury trial commenced for Bell on an information charging him as follows: count 1, murder of Raymond Murphy; count 3, attempted murder of John Benjamin; counts 2 and 4,

robbery of both of them; count 5, ex-felon in possession of a firearm; and a special circumstance allegation that the murder of Raymond Murphy had been committed under a special circumstance, murder during the commission of a robbery. (CTT 388-389, 400, 895.) Use of a firearm was alleged as to counts 1 through 4, and a great bodily injury clause was alleged as to the offenses against John Benjamin. (CTT 388-389.)

On November 13, 1978, after several days of deliberations, the jury informed the trial court that it was unable to reach a verdict on the murder count, but it had found Bell guilty of count 5. (CTT 944, 947.) The court declared a mistrial on counts 1 through 4, and later granted a new trial on count 5. (CTT 1084.)

Bell's second jury trial began on December 11, 1978. (CTT 1106.) During that trial Bell moved for a mistrial on the basis of prosecutorial misconduct (CTT 1114; RTT 666) which occurred when the prosecutor, despite a stipulation excluding such evidence at trial, questioned a defense expert regarding a police report of a confidential informant who had purportedly seen Bell cleaning a short-barreled gun the day before the offense. (CTT 672.) The trial court denied the motion for mistrial, struck the prosecutor's comments and admonished the jury to disregard them, and the trial continued. (CTT 676.)⁴

⁴ This Court in *People v. Bell* (1989) 49 Cal.3d 502, 541-542, concluded that the prosecutor indeed committed misconduct in this and other regards but found it to be harmless.

On December 21, 1978, after at least twenty hours of deliberations, including requests for readbacks and exhibits; an announcement by the foreperson after about ten hours of deliberations that the jury was hopelessly deadlocked on count 1 (the only count considered at that point); and ten further hours of deliberations with requests for readbacks, exhibits, and explanations, after the court prodded the jury whether further deliberations might be helpful and first one, then two other jurors thought they might be, the jury at 7:45 p.m. found Bell guilty as charged, and found the firearm enhancements and the special circumstance allegation to be true. (CTT 1118-1120; RTT 824, 824i-j, 824 m-r.) Following a short penalty trial (RTT 868-941, 935-1002), and a question whether the jury must be unanimous on either a sentence of death or life without the possibility of parole, the jury on January 16, 1979, fixed the penalty on count 1 at death. (CTT 1271; RTT 1051-1052, 1054, 1056, 1058.)

On September 5, 1989, this Court affirmed Bell's convictions and judgment on automatic appeal. (See *People v. Bell* (1989) 49 Cal.3d 502.) Since then, Bell has filed three state petitions for writ of habeas corpus, and a federal petition for writ of habeas corpus that is still pending in the United States District Court for the Northern District of California, No. C-99-20615 RMW. The first two state habeas petitions were denied without issuance of an order to show cause.

On April 2, 2002, Bell filed a third state petition for writ of habeas corpus in this Court. In it he alleged both that he was actually

innocent of the robbery-murder at Wolff's, and that his conviction was based on false evidence in violation of section 1473. (See pars. 44-59 of that petition.)

Following the filing of an informal response and reply, on June 11, 2003, this Court issued an order for the appointment of a referee in the Contra Costa County Superior Court for the taking of evidence and findings of fact. The relevant portions of the reference hearing were held on April 20 and 21, 2005, before the Honorable Thomas M. Maddock in the Contra Costa County Superior Court. This Court directed the referee, following the taking of evidence, to make findings of fact on the following questions in this case:

1. In conversations with Wanda Diane Moore, Tanya Moore, Leroy Kelly, or any other person, did eyewitness Ernestine Jackson recant her trial testimony identifying petitioner as the perpetrator of the crimes at Wolff's Jewelry Store? If so, was her trial identification of petitioner nonetheless truthful?
2. Did Ernestine Jackson instruct eyewitnesses Dorothy Dorton or Ruby Judge to lie to the police or at trial about the identity of the perpetrator? Did Jackson instruct Dorton or Judge to identify petitioner, contrary to their actual perceptions or observations? Did Jackson tell any person that, to Jackson's knowledge, the true perpetrator was petitioner's brother Larry Bell?
3. Has Dorothy Dorton ever recanted her trial testimony identifying petitioner as the perpetrator? If so, was her trial identification of petitioner nonetheless truthful?
4. Has Ruby Judge ever recanted her trial testimony identifying petitioner as the perpetrator? If so, was

her trial identification of petitioner nonetheless truthful?

5. What, if any, newly discovered evidence exists that, if credited, casts fundamental doubt on the accuracy and reliability of the eyewitness testimony identifying petitioner as the perpetrator?

6. If the trial testimony of Jackson , Dorton, or Judge identifying petitioner as the perpetrator was false, was the false testimony substantially material or probative in light of all the evidence produced at the trial?

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

(CTR 69.)

At the conclusion of the evidentiary hearing, following briefing and argument, the referee answered those six questions as follows:

1. Eyewitness Ernestine Jackson did **not** recant her trial testimony identifying petitioner of the crimes at Wolff's Jewelry Store in conversations with Wanda Diane Moore, Tanya Moore, Leroy Kelly or any other person. Evidence was presented that Ernestine recanted to Mr. Leroy Kelly, but that evidence was found not to be credible. Nonetheless, her trial testimony identifying the petitioner was truthful.

2. Ernestine Jackson did **not** instruct Dorothy Dorton or Ruby Judge to lie to the police or at trial about the identity of the perpetrator. Ernestine Jackson did **not** instruct Dorothy Dorton or Ruby Judge to identify petitioner, contrary to their actual perceptions or observations. Ernestine Jackson did **not** tell anyone that to Jackson's knowledge, the

true perpetrator was petitioner's brother, Larry Bell. Evidence was presented that Jackson told Leroy Kelly that Larry Bell was the true perpetrator, but that evidence was found to be **not** credible. [As to numbers 1 and 2, the referee found that "Ernestine Jackson did not want to be in court for the reference hearing and had poor recollection of the events questioned at the reference hearing. She was antagonistic to the questions and displayed symptoms of being harassed by virtue of her required appearance. Nonetheless, her denial of lying at the trial was found to be credible by the referee."]

3. Dorothy Dorton has **not** recanted her trial testimony identifying petitioner as the perpetrator. [The referee "found the testimony of Dorothy Dorton (at the evidentiary hearing) to be credible."]

4. Ruby Judge has **not** recanted her trial testimony identifying petitioner as the perpetrator.

5. The only newly discovered evidence presented at the hearing which, if credited, could cast some doubt on the accuracy and reliability of the eyewitness testimony identifying petitioner as the perpetrator, was the testimony of Mr. Leroy Kelly and his declaration. In view of the findings of fact, this referee did not credit the relevant testimony of Mr. Leroy Kelly. [During Kelly's testimony the referee "observed that Kelly's demeanor changed, he crossed his arms and he became nervous, and was observed to actually begin sweating on his forehead."]. Further, even if credited, any doubt cast did **not** reflect fundamental doubt on the accuracy and reliability of the eyewitness testimony identifying the petitioner as the perpetrator.

6. The trial testimony of Ernestine Jackson, Dorothy Dorton and Ruby Judge identifying petitioner as the perpetrator was **not** false.

Hypothetically, if such testimony of all three of these witnesses was false, such false testimony would be material and probative in light of all the evidence produced at trial.

(CTR 413-415, bold in original.)

STATEMENT OF FACTS

A. Evidentiary Hearing Testimony & Other Evidence.

Leroy Kelly lived for several years in his early teens in the Richmond neighborhood where Alcus Dorton, Ernestine Jackson and petitioner lived. (RTR 227.) Leroy was very good friends with Alcus. (RTR 229, 254-255.) They spent a great deal of time at each others' homes. (RTR 255.)

During that time Leroy, Alcus Dorton, Bell, Ernestine's brother Pie Jackson, and others met almost every day in the garage at Ernestine's and Dorothy Jean's house. (RTR 228-230, 263, 253-254.) Leroy characterized it as a "teen center" for their clique. (RTR 229.) The girls, such as Ernestine and Dorothy Jean, were often present in the garage but it was the boys who were "one for one, and one for all." (RTR 228-229.) Leroy fondly remembered that Ernestine taught him to slow dance. (RTR 267.) Although Leroy was friends with Bell as part of this group, the friendship between him and Alcus was much closer and stronger. (RTR 254-255, 263.) Leroy remembered that time with great warmth and affection, a time when there was a tight-knit community of friends and good times. (RTR 228-231.)

The fact that Leroy and Alcus were great friends did not prevent Leroy from seeing Alcus honestly. He described Alcus as a bully and a drunk whose large size enabled him to pick on others in the community. (RTR 234-235, 260.) Bell's small size made him a frequent target of Alcus's bullying. (*Ibid.*) Leroy had been with Alcus on the day he was shot by petitioner. (RTR 234.) Alcus was drunk. (*Ibid.*) Leroy speculated that, had he taken Alcus away from the group in front of the liquor store that included Bell, his girlfriend, Rene, and others that day, the shooting would not have happened. (*Ibid.*)

According to Leroy Alcus tried to take Rene from Bell in an offensive manner. (RTR 256.) Bell and Rene left, but Alcus followed them to Bell's house, kicking, "whooping [sic]," and dragging him. (RTR 234, 258-259.) Bell and Rene went into the house and closed the door, but Alcus arrived and broke the door in. (RTR 259.) According to Leroy someone called the police but they did not come. (RTR 259.)

Alcus was still at Bell's door when Bell shot him, to Leroy's mind, in self-defense. (RTR 259.) Leroy believed both that Bell was justified in shooting Alcus under the circumstances, but also that it is wrong to take a man's life. (RTR 259.) He believed that Bell's manslaughter conviction for the death of Alcus was the result of bad lawyering. (RTR 259.)

After Alcus died Leroy never went back to the Judge/Jackson garage again. (RTR 260.) Their group split into two factions, as did the community as a whole: those who believed Bell was justified in

the shooting and who lived in the geographic area closer to Bell which was from 6th to 7th Streets and those, including Jackson and the Judge family, who believed the shooting of Alcus was unjustified and who lived in the geographic area closer to the Jackson/Judge household between 9th and 10th streets. (RTR 232-233, 260-2632.) The park at 8th Street and Ripley was a geographic dividing point between the two factions. (*Ibid.*) After Alcus died those below 8th Street could not cross the park after dark without getting “jumped” by those from above 8th Street, and vice versa. (*Ibid.*)

Leroy became very emotional while describing what happened in the community after Alcus died, expressing deep sorrow and a tremendous sense of loss even to this day. (See, e.g., RTR 231.) Leroy did not spend much time in the community after that, but would see Ernestine Jackson from time to time and might honk his horn at her but not stop for conversation. (RTR 260-265.) To Leroy, because of their past, he and Ernestine would always be friends even if they rarely saw each other or had differences. (RTR 261, 266-268.)

In about 1977 Leroy moved to Los Angeles and was not present in Richmond again until about June of 1993. (RTR 227.) During his time in Los Angeles he heard from his sister that Bell was in prison for murder. (RTR 233, 235-236.) Leroy did not know any details of the crime or the trial, or who the witnesses were at the trial. (RTR 236, 268-271.)

Not long after Leroy returned to Richmond he was sitting in his mother's yellow and black Oldsmobile⁵ in a parking lot at the Food Bowl in San Pablo, waiting for her to return from shopping there. (RTR 236-238.) He saw Ernestine Jackson pushing a cart through the parking lot and called out to her, at which time Leroy got out of the car, they hugged, and had a conversation. (RTR 238.) Leroy had not seen Ernestine since he left for Los Angeles. (RTR 238.) During this conversation, Bell's name came up. (RTR 239.) Ernestine said Bell "went down for what he did to Alcus." (*Ibid.*) She continued that she lied when she said Bell was at Wolff's, and that it was not Bell there but his brother, Larry. (RTR 239-241.) Leroy told Ernestine she was lying (RTR 241.) Ernestine responded, "Watch and see; he gonna die for what he did to Alcus." (*Ibid.*) Ernestine was smiling, happy, and delighted when she said these things. (RTR 243-244.) Leroy was shocked and disgusted, called her a liar and a dike, and walked away. (RTR 241, 243-244.)

Leroy did not go to the police with this information because he did not trust them to believe him or to do anything, and he suggested that if he went to the police he himself might get in trouble. (RTR 244, 248, 279) He denied, however, disliking or resenting the police, testifying that "I don't have no resentment against police. I'm not a police hater," and that "[w]ithout the police and the law things would be a lot badder than what they are." (RTR 279.)

⁵ Petitioner's Exhibit A, p. 2.

He explained that now, although he is homeless by choice and does not have a regular, steady job in his profession as a chef, in the warehouse and light industrial area where he stays he gets paid by local businesses to keep an eye on their properties, and he reports any unlawful activity in the area to the police. (RTR 279, 281-284.) Leroy Kelly brought with him to the evidentiary hearing several letters by these local business owners who paid him for being an unofficial security guard attesting to Leroy Kelly's good character and integrity. (RTR 281-284; see petitioner's exhibits B-E, admitted into evidence at RTR 283, 427.) Leroy explained he had told the letter writers that he was going to court to testify and, since the judge and the prosecutor would know nothing about him or his character, he wanted the letter writers to tell the judge and prosecutor about him so they would understand who he was. (RTR 281-284.) He testified he did this on his own and not at the direction of Bell's representatives. (RTR 283.)

Sometime after the conversation with Ernestine, Leroy saw petitioner's wife, Caroline. (RTR 244.) He told her what Ernestine had said. (*Ibid.*) He also told several friends of his on the street: Carl, Danny Boy, and Dale, but everyone in the community knew that Bell did not commit the crime. (RTR 245-246.) Leroy did not understand why they would not come forward. (RTR 245-246.)

Later, investigators for Bell contacted Leroy and he told them about the conversation with Ernestine. (RTR 248-249.) He remembered signing something each time he saw one of these

investigators. (RTR 248.)⁶ He believed one time he saw a woman investigator, maybe when he was in jail in Contra Costa County, and another time or two he talked to a man. (RTR 248-249.) During his April 20, 2005, testimony Leroy Kelly carefully read Bell's Exhibit A, and affirmed that it was a declaration prepared for him by an investigator based on what he had told her and signed by him after he read it. (RTR 250-253.) He further testified that all its contents were true. (*Ibid.*)

Ernestine Jackson admitted to having seen Leroy Kelly at or near the Food Bowl around the time he described his conversation with her, but denied that their contact went beyond "hi," or that she had told Leroy or anyone else that she lied to get back at Bell for killing Alcus, and had actually seen Larry at Wolff's. (RTR 335-338.) She testified that her trial testimony was true, and that it had been Bell she saw walking past her car on February 2, 1978, outside Wolff's before the offenses occurred there. (RTR 295-296.) She denied having directed or influenced either Dorothy Dorton or Ruby Judge to identify Bell as the perpetrator, and denied that the perpetrator had, in fact, been Larry Bell. (RTR 296.)

When asked by Bell's counsel to carefully review the declaration by Leroy Kelly describing Ernestine's recantation (see Bell's Exhibit A), Jackson responded that she had not brought her glasses and could not read without them. (RTR 297.) She rejected

⁶ Counsel for Bell are in possession of only one declaration that was written out for Kelly by one of Bell's investigators after a conversation with Kelly, and signed by him. That is Bell's Exhibit A.

the suggestion that she might be able to use someone else's glasses instead. (RTR 297.)⁷ Initially she flatly denied having previously seen or heard anything of the declaration of Leroy Kelly from investigators for the prosecution; then testified that she could not recall; and later testified that she had been shown the declaration while she was working at Casino San Pablo by two investigators from the prosecution, and knew something about it. (RTR 297, 301; and, cf. 322-328.) Ernestine also testified that she did not know Bell's father or who Richard Bell was (RTR 331), and in the next breath said she had communicated with Bell's father, Richard, from time to time for years and years and, in fact, had been to his house. (RTR 331.) She then claimed that she could not answer whether she would recognize Richard Bell if he drove by at a normal speed. (RTR 332.) She did not know what kind of vehicle Richard Bell had, then said he could have had a pickup truck. (*Ibid.*) Her general demeanor and attitude were hostile throughout her testimony at the evidentiary hearing. (RTR 295-345.)

Jackson claimed to have had only minimal contact with Leroy Kelly in the early 1960s, the period in which Leroy described the group of teenaged boys and girls that met at the Jackson/Judge house practically every day. (RTR 296-297, 304-306.) She at first did not remember or did not know anything about a group of young people that used to "party and hang out at" her house. (RTR 304.) She then

⁷ As a result, the court granted counsel for Bell his request that he be able to read the declaration to Ernestine Jackson and ask her questions about what he had read to her. (RTR 298-299.)

described the group as one associated with her brother, Pie Jackson; couldn't remember their names; but then conceded that Leroy Kelly was one, but flatly denied that she, Dorothy Jean, or other girls had ever been part of it. (RTR 304-305.) She denied the garage was any sort of "teen center." (RTR 306.) She suggested that Alcus Dorton was at the Judge/Jackson house because he was seeing Dorothy Jean, not as part of her brother's group of friends. (RTR 306.) She denied having slow danced with Leroy in the garage there, then diffidently acknowledged she may have slow danced with him sometime in her life, then did not recall if she had ever done so in the garage. (RTR 305.) She denied knowing of any split in the community because of Alcus Dorton's death, but testified that "[t]hings just changed ... [p]eople went on about they lives" after his death. (RTR 306-307.)

When asked about the killing of Alcus Dorton, Jackson responded that she "heard" Bell was convicted for it; when asked whether there was a court case going on after the killing she answered, "I don't remember. It was so short, so I don't really remember. I don't know how much time he got because it was kind of short. So I don't know." (RTR 303.) Jackson did not remember whether there was any discussion within the family, or with her sister Dorothy Jean, about the killing of Alcus (*ibid.*); she later testified that her sister did not discuss Alcus's death but was sure his family and her family did talk about it. (RTR 307.) She acknowledged the family's and her own feelings that Bell did very little time for Alcus's death (*ibid.*), but would not elaborate other than to say "[l]ife go on" and "... murder is murder ... [p]eople do different things." (RTR

307-308.) She again acknowledged that Bell “didn’t get much time” for the killing of Alcus, but did not “know if he paid for it or not ... [¶] ... What he did, he did, that’s it.” Jackson denied any hostility or ill will toward Bell. (RTR 337-338.) Jackson also denied telling Leroy Kelly that Bell ought to be executed, or talking about his execution with Ruby Judge, or hearing Ruby say Bell ought to get executed. (RTR 338.) Ernestine testified that she had no feelings about Bell’s being executed; when asked, “[s]o he could get executed, that would be okay; he could not get executed, that would be okay too?” she responded, “[w]hatever they do, they going to do it anyway, so it’s still no, my opinion.” (*Ibid.*)

In briefly going over Jackson’s testimony at trial with her, Ernestine acknowledged that her memory now is not as good as then, and could not remember most specifics when asked. (RTR 309-319.) She also could not remember or did not know if the prosecution investigators who had talked to her recently about Bell’s case had shown her a transcript of her trial testimony. (RTR 310-311.) Ernestine could not remember if either Bell or Larry Bell had gone to school with her at any time. (RTR 319-321.)

According to Jackson, she did not know how Dorothy Jean was affected by Alcus’s death, but she herself was affected: “I hated that it happened. [¶] I just went on with my life.” (RTR 340.) She then testified that her sister, Dorothy Jean, had died of alcoholism a few years after Alcus Dorton was killed. (RTR 342-343.) She did not know whether Dorothy Jean’s alcoholism and death may have been

related to the death of Alcus, although maybe not in that Dorothy Jean had married someone else after Alcus died. (RTR 343-344.)

At the time of her evidentiary hearing testimony, Ruby Judge had been in recovery from substance abuse for a year and a half. (RTR 356.) Ruby Judge stated that her testimony at Bell's trial had been truthful and that it had, in fact, been Bell she had seen shoot the clerks at Wolff's jewelry store and take the jewelry. (RTR 345-346.) She denied ever having been told by Ernestine to falsely identify the perpetrator as Bell, or ever having heard Ernestine say she had lied or seen Larry Bell rather than petitioner by Wolff's that day. (*Ibid.*)

Ruby did not recall Dorothy Dorton asking her in Wolff's the day of the robbery to ask the man in the store if he was Larry "because that was Ronnie Bell in the store," nor did she recall ever having any discussion with Dorothy Dorton about differences in whether the man was Larry or Bell. (RTR 348-350.)

Ruby was then shown her testimony a year earlier at a deposition where she said, "But I'd really like to see – if he gets electrocuted, I would like to be there." (RTR 354.) She could not recall having said that. (*Ibid.*) She acknowledged she testified truthfully at the deposition. (RTR 353-355.) When asked if she had had a change of heart since then, she answered:

I don't even – I don't – I put that way behind me now since I got growner, but I still – it still come to me as – you know, I'll be – like it's just like a nightmare, you know. I just don't – it just – I just don't understand it, and I probably never will understand it, you know.

(RTR 355.) In her evidentiary hearing testimony she added, “Well, ... I wouldn’t like to be [present at Bell’s execution] because I don’t want to see nobody dying.” (RTR 354.)

When asked about her sister who had died, Dorothy Jean, Ruby broke down in tears several times. (RTR 351-353.) She expressed that Dorothy Jean’s death had left a hole in the family that could never be filled by anyone, even Ernestine. (RTR 352.) The emotions surrounding the loss of Dorothy Jean completely overwhelmed Ruby Judge these thirty or more years later. (RTR 351-353.) Ruby then denied ever having talked about Alcus’s death to Dorothy Dorton or to her mother, Ruby Judge. (RTR 353.)

The parties stipulated, and the referee accepted the stipulation, that two investigators for Bell met with a woman calling herself Dorothy Dorton at a Carrows restaurant on April 7, 2001, where the woman — accompanied by a male called Sean King — talked with them and signed a document. (RTR 439-442; CTR 279-281.) The investigators in 2004 viewed a photo line-up containing six pictures, one of which was Dorothy Dorton. Neither could identify her. The parties also stipulated that a handwriting expert reviewed a document the investigators indicated was signed by the woman they met at Carrows on April 7, 2001. The parties further stipulated that Bell’s handwriting expert, upon reviewing signatures from the Carrow’s document, and exemplar signatures known to belong to Dorothy Dorton, “cannot positively identify the writing on the [document] as Ms. Dorton’s. (CTR 279-281.) He concludes that she “probably” wrote the initials on page one, that it is ‘strongly indicated- that she

wrote the signature on page three, and that there is no evidence that someone else attempted to imitate or distort Ms. Dorton's initials and signature." (CTR 281.)

Dorothy Dorton denied both in deposition testimony and in her evidentiary hearing testimony, that she — in company with her cousin Marchon King — had sat at a table at Carrows Restaurant in El Cerrito on April 7, 2001, or at any time, and met with two investigators for Bell. (RTR 359-360, 363-364, 428; CTR 1444-1474.) Dorton testified at the evidentiary hearing that she had not committed perjury. (RTR 367.)

Tonia Moore denied signing a paper she was shown regarding Bell, or knowing anything about his case. (RTR 292-293.) Wanda Diane Moore was called to testify, and invoked the Fifth Amendment. (RTR 516-518.)

Bell withdrew exhibits he had previously submitted with his California Supreme Court Petition and had marked for identification in the reference proceeding, i.e., the declarations of Dorothy Dorton, Tonia Moore, and Wanda Diane Moore, and his reliance on them, pursuant to California Rules of Professional Conduct, rule 5-2700. (RTR 498, 515.)

B. Pertinent Trial Evidence.

Petitioner and Larry Bell are brothers. Larry is two years younger than petitioner, an inch or so taller, and years earlier at least had been lighter skinned than petitioner. (CTR 53b, 682, 773, 790, 906, 1055.) The brothers resemble one another and acquaintances

were known to confuse them, though the evidence conflicted as to how close their resemblance was. (CTR 53b, 1205; RTT 601, 701.)

On February 2, 1978, Ernestine Jackson arrived by car at Wolff's Jewelry Store at about 4 p.m. (CTR 702.) Wolff's is about 15 minutes at normal walking pace from the Seahorse Motel where Larry Bell checked in that afternoon. (CTR 1082-1085, 1089.) He was with Marilyn Mitchell, who testified they were at the motel from about noon to 10 p.m., "shooting up" cocaine. (CTR 867-869.) Hasu Patel, the hotel manager, testified at trial and brought the registration records from the Seahorse Motel with him. (CTR 1072.) Those records showed that Larry Bell checked into the Seahorse at 3:04 p.m., for three hours. (CTR 1072.) Another record showed the check-in time as 1:45 p.m., but Mr. Patel believed that 3:04 was the correct time. (CTR 1071-1076.) According to Marilyn Mitchell Larry left the motel "around the time it was getting dark" for 30 to 45 minutes. (CTR 868.) The Seahorse Motel records do not show when a person left his or her room, or whether a person left his room and returned during the rental period. (CTR 1076.)

Arriving at Wolff's with Jackson were her sister Ruby Judge (age 14), and her two nieces Dorothy Dorton (age 13) and Alicia Carter (age 4). (CTR 677-678, 702.) Judge went into the store to pick up a watch while the others waited in the car. (CTR 680, 782.) While Jackson sat in the car she briefly saw a man walking toward her, and as he passed the right back window she called out: "How're you doing, Ronnie Bell?" (CTR 681, 684.) The man bent down and asked "Who is it?," she responded "Ernestine," and the man left.

(CTR 684.) She did not know where he went. (CTR 686.) She testified she could differentiate between Bell and Larry (CTR 682) despite the fact her last close contact with them had been 12 years earlier in high school and she had only seen Larry fleetingly a few times since then. (CTR 714-715.) Jackson then pointed the man out to Dorton, saying that he “was supposed to be the guy that kil’t [Dorton’s] father back in ’68.”⁸ Dorton then left the car “to get a good look at him.” (CTR 686.)

Judge saw the man come into Wolff’s followed by Dorton. (CTR 783-784.) Judge later identified him as Bell, whom she had not seen for about six years when she would wave to him and Larry Bell on their porch on her way to elementary school. (CTR 785-790, 815.) According to Judge, she asked the man if he was Ronnie Bell. (CTR 783.) According to Dorton, however, Judge at Dorton’s request asked the man if he was Larry.⁹ (CTR 738.) In either event, the man said “No.” (CTR 738, 783.)

John Benjamin, the clerk, showed the man a ring, which he examined and then returned to Benjamin. (CTR 735-742.) When

⁸ Bell had been convicted of the voluntary manslaughter of Dorton’s father, Alcus, in January of 1969. (CTR 1123-1124.)

⁹ Jackson, Dorton and Judge were interviewed at their home eight days after the Wolff’s robbery by Investigator Michael Tye. (CTR 895-896) At that time Dorothy told Tye that, once she entered Wolff’s on February 2, 1978, she went to Ruby and asked her to ask the man if he was Larry. (CTR 738.) Aside from the fact the three eyewitnesses were not shown separate photo lineups, one containing a photo of Larry Bell and one containing a photo of petitioner (RTT 637), no follow-up investigation was conducted after Dorothy indicated some confusion whether the man in Wolff’s was Larry Bell or Bell. (CTR 1216.)

Benjamin started to put the ring away, the man pulled a gun from his waist area and said: "Hold it. I said hold it." (CTR 741-742.) He shot Benjamin once, then turned and fired once at a second clerk, Raymond Murphy, who was bent over behind the opposite counter. (CTR 741-742.) The man then placed one hand on the counter, reached over it and grabbed some jewelry, and put the jewelry in a bag he had. (CTR 745.)¹⁰ As he left the store he told Dorton to get some jewelry; she did not but patted him on the back as he left. (CTR 745-746, 797.)

Jackson, still in the car outside the store, noticed the man in her rear-view mirror walking away from the area carrying a bag and testified it was petitioner. (CTR 688, 690-691, 707.) After the shooting, Jackson left her car and entered Wolff's, where she spoke to Ruby and Dorothy. (CTR 715-717.)

All three denied bearing Bell ill will arising out of the homicide of Alcus Dorton, although Judge told police she thought Bell should get the electric chair. (CTR 719-722, 769-772, 816, 831.) Jackson, Dorton, and Judge went to the police station shortly after the offense and separately identified Bell in photo lineups as the perpetrator.

¹⁰ Ruby Judge in the interview with police on February 10, 1978, a transcription of which was admitted into evidence during trial as People's Exhibit 30A, said at page 24 that the perpetrator at Wolff's "climbed over the thing [the counter] and got all their stuff [the jewelry]." She repeated at page 30 of the transcript that the perpetrator "jumped over the counter and got all their jewelry." In order to vault the counter, the perpetrator would have had to place his hand on the counter, likely leaving a latent palm or finger print.

(CTR 885, 887, 889.) Both Jackson and Dorothy Dorton testified that they were looking for a photo of Bell. (CTR 717, 748, 769.)

The bullets were consistent with having been fired from the type of gun that Larry owned. (CTR 540, 632, 635, 639-640, 642, 646, 655.) Bell's father, Richard Bell, said he gave that gun to Bell in the latter part of December 1977 when he came to his father and said that Larry told him to retrieve the gun for Larry. (CTR 540, 545-546.) Three days after the Wolff's robbery Larry Bell threatened an acquaintance, Thomas Boyden, with a black revolver or handgun like the one used in the Wolff's robbery. (RTT 696-698.) When Larry was arrested for that offense several days thereafter, police found him in possession of several rings — including one of the rings stolen during the Wolff's robbery; following the theft, the initials "L.B." had been engraved by an amateur inside its band. (CTR 528-529, 532-535, 1049.)

Dr. Shomer was called by Bell as an expert in eyewitness identification factors. He testified that these factors suggested that Jackson, Dorton and Judge had misidentified Bell as the man who shot the clerks in Wolff's because of bias, suggestion, and inducement of a "set" state of mind predisposing them to believe the man was Bell because he was the man who had killed Alcus Dorton. (RT 480-481.) Shomer concluded that the eyewitness identifications were highly unreliable. (See generally CTR 981-1041, 1130-1133; RTT 601-695.) The eyewitnesses' claims that they bore Bell no ill feeling was unrealistic and might indicate strong, unconscious hostility; the testimony of young teenagers is generally less reliable. Shomer

discounted the value of the photo-lineup identifications because the police did not employ procedures which help witnesses distinguish between two brothers who resembled each other as he found Bell and Larry did; because the officers indicated to the eyewitnesses that their belief Bell was the perpetrator was correct; and because the eyewitnesses all said they went into the line-ups specifically looking for a photo of Bell. (See generally CTR 981-1041, 1130-1133, RTT 601-695; *People v. Bell, supra*, 49 Cal.3d at p. 518.)

ARGUMENT RE: EXCEPTIONS

I.

THIS COURT SHOULD NOT AFFORD DEFERENCE TO THE FINDINGS OF THE REFEREE TO WHICH BELL EXCEPTS.

Because "petitioner seeks to overturn a final judgment in a collateral attack, he bears the burden of proof. [Citation.] 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands' [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 710.) A referee's findings on factual questions are not binding on the Court, but are entitled to great weight when supported by substantial evidence. (*In re Malone* (1996) 12 Cal.4th 935, 945.) Deference to the referee is called for on factual questions, especially those requiring resolution of testimonial conflicts and assessment of witnesses' credibility, as the referee has the

opportunity to observe the witnesses' demeanor and manner of testifying. (*Ibid*; see also *In re Avena, supra*, 12 Cal.4th at p. 710.) If, however, the referee's factual findings are not supported by ample, credible evidence, they may be disregarded. (*In re Hitchings* (1993) 6 Cal.4th 97, 122.) The referee's resolution of any legal issues or of mixed questions of law and fact is subject to the Court's independent review. (*In re Cordero* (1988) 46 Cal.3d 161, 180-181.) For example, in *In re Roberts* (2003) 29 Cal.4th 726, this Court rejected findings of the referee favorable to the petitioner there that two trial witness's testimony was not believable after he also heard their testimony at an evidentiary hearing. (*Id.* at pp. 742-744.)

A. Dorothy Dorton.

The Court should not accord deference to the findings of the referee to which Bell has excepted. First, Bell has met his burden of showing that Dorothy Dorton lied and committed perjury in her deposition and evidentiary hearing testimony. She lied that she never met the investigators for Bell at Carrow's restaurant, and she lied that she has not committed perjury. The referee failed to acknowledge this, and instead found that Dorothy Dorton's testimony at the evidentiary hearing was credible. Because her lies are significant, willful, calculated, repeated, and under oath, none of Dorothy Dorton's testimony should be credited. (See CALCRIM No. 226, which provides in relevant part: "If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything the witness says.") For this reason alone the referee's finding regarding Dorothy Dorton's deposition and

evidentiary hearing testimony is not supported by ample, credible evidence. Dorothy Dorton's untruthfulness in her deposition and evidentiary hearing testimony as an adult, also makes suspect her trial testimony when she was a child.

B. Ernestine Jackson.

The referee found credible Ernestine Jackson's evidentiary hearing testimony that she had never recanted her trial testimony. The referee acknowledged Jackson's problematic demeanor during her testimony, but found that it was because she did not want to be in court for the reference hearing, had poor recollection of the events at issue there, and felt harassed by her required appearance. Again, CALCRIM No. 226 indicates the referee's finding was in error and not supported by substantial evidence. It provides in relevant part:

What was the witness's behavior while testifying?
Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided? What was the witness's attitude about the case or about testifying?
Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?
How reasonable is the testimony when you consider all the other evidence in the case? Did other evidence prove or disprove any fact about which the witness testified? Did the witness admit to being untruthful? What is the witness's character for truthfulness? If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier testimony on that subject.

Ernestine Jackson's attitude toward the evidentiary hearing proceedings and her demeanor during her testimony provide strong support that her testimony was not truthful. Jackson showed her disdain for the proceedings when she appeared without her glasses even though she knew, or at least claimed, that she could not read without them. She knew from contact with prosecution investigators within two years of the evidentiary hearing that written documents from, inter alia, Leroy Kelly were involved in the current proceedings in Bell's case for which she had been asked to appear. A witness with respect for the Court and the law, who knew she could not read without glasses, would have brought them to proceedings that she knew related to written documents dealing with her prior trial testimony regarding Bell's convictions and death sentence.

Jackson was also hostile and evasive throughout her evidentiary hearing testimony. A great number of her answers indicated she did not remember, could not recall, or did not know. With further prodding, however, she would sometimes provide information about a question she had previously claimed she could not answer. She also reversed herself entirely on a number of occasions, such as when she was asked about Bell's father, Richard Bell, and disclaimed any knowledge of him, only to turn around an instant later to say she knew Bell's father was Richard Bell, with whom she had had contact many times, including having visited him at his home.

It is also understandable that Ernestine Jackson would have revealed her false testimony to Leroy Kelly. She must have known or recalled that Leroy was not only a friend of her brother's, Pie, but also

that Leroy had been a good friend of Alcus Dorton's, and therefore could be sympathetic to the avenging of Bell for killing Alcus. Leroy had not been part of the Richmond community for over a decade, and as far as Ernestine knew, he therefore would not remain there after she talked to him. She could be relatively secure that, given his past relationship to her prior life, Leroy Kelly would be unlikely to report her false testimony to the authorities, and he in fact did not. As acknowledged by many cases, those who are aware they have committed a crime or done something morally wrong — especially in matters of life and death — feel compelled at some point to confess their misdeed to bring psychological and moral relief. (See, e.g., *People v. Anderson* (1980) 101 Cal.App.3d 563, 583-584, fn. 3.)

Given all the foregoing, particularly in conjunction with the testimony of Leroy Kelly which is discussed immediately below, the Court should not accord deference to the referee's findings that Ernestine Jackson was credible in her evidentiary hearing denials that she never recanted her trial testimony, in her trial testimony, and in her denials of ever having influenced Dorothy Dorton and Ruby Judge to identify Ron Bell as the perpetrator of the Wolff's offenses — at worst knowing it was not him, and at best being unsure.

C. Leroy Kelly.

This Court should not accord deference to the referee's findings that Leroy Kelly was not credible. First, Kelly's detailed recollection of the community in which he, Ernestine Jackson, Bell, Jackson's brother Pie, and Alcus Dorton grew up, and of the conversation he had with Ernestine Jackson by the Food Bowl, supports his credibility.

That detailed memory contrasts with Jackson's repeated statements that she did not remember, didn't know, and her flip-flops in testifying. Kelly described a world of real people, actions, thoughts, and sentiments that rings true. Jackson simply was a wall.

Ernestine Jackson herself confirmed that she had a conversation with Leroy at the location and around the time he described, and the referee found that they did. Her denial that she and Leroy said anything more than "hi" to each other when they had once been friends and neighbors and had not seen each other for so many years, and Leroy and Ernestine's brother Pie had also been friends, rings false. It shows her lack of credibility in itself. All of the above, particularly in combination with other strengths in Leroy's testimony and further problems with that of Ernestine, as set forth previously, indicates that Ernestine Jackson is a witness not to be believed in any respect. (See, e.g., CALCRIM No. 226 [credibility of witness and witness willfully false].)

Leroy Kelly presented himself at the evidentiary hearing as a man of integrity and intelligence. He also presented himself as a man who believed that a wrong of the magnitude of putting an innocent man on death row should not be ignored, as well as a man able to understand complex human dynamics and motivations. It was apparent he believed the foregoing to be very important qualities in good people, and that he genuinely strives to be an honorable person. It was important to him that others understand that about him, especially given the fact that his homelessness and lack of a standard job would likely induce others living an average life to think that he

was not a person of integrity and honesty. These are not the characteristics of a person who would lie at all, especially knowing that if he lied about this it would harm Ernestine.

There is no conceivable motive for Leroy Kelly to have fabricated the conversation he had with Ernestine Jackson, and this Court cannot help but recognize his respectful attitude toward the proceedings, as evidenced by his provision of letters about his character for the Court and the prosecutor; his appreciation of the necessity for laws and their enforcement; and his demeanor during his evidentiary hearing testimony. All these underscore the truthfulness of his testimony.

The referee found that Leroy Kelly during his testimony was nervous, crossed his arms, and sweated, as essentially his only reasons to find Kelly not credible. These symptoms do not indicate untruthfulness. Leroy Kelly is homeless, and knew that he would be looked down upon in the courtroom. He was attacked in exactly that way by the prosecutor, who also announced questions to Kelly about his testimony on direct and in his declaration that quibbled with or misstated that testimony to make Kelly appear dishonorable, of little value as a human being, and anti-law enforcement. Kelly became agitated, hurt, and then almost defiant when attacked as he was. Although Kelly is articulate and intelligent, somewhat of a street philosopher, and prides himself on being a man with integrity, he is clearly not versed in the normal manners and ways of conventional society as reflected in the courtroom and those at home there.

Thus, there is solid, credible testimony that Ernestine Jackson recanted her trial testimony by telling Leroy Kelly: 1) that she misidentified Bell as the perpetrator of the offenses at Wolff's Jewelry Store on February 2, 1978, when she was either sure it was Larry Bell or she was unsure who it was; 2) she did this, consciously or not, in order to avenge the killing of Alcus Dorton and, inferably now with additional testimony from the evidentiary hearing, the subsequent tragic death of her sister Dorothy Jean a few years later that devastated the Jackson/Judge family.

II.

BELL'S CONVICTIONS AND DEATH JUDGMENT SHOULD BE VACATED BECAUSE THEY WERE THE PRODUCT OF FALSE TESTIMONY.

Section 1473, subdivision (b)(1) provides that relief should be granted where a petitioner establishes in habeas corpus proceedings that "[f]alse evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration" False evidence is "substantially material or probative" (*ibid.*) "if there is a 'reasonable probability' that, had it not been introduced, the result would have been different. [Citation.]" (*In re Sassounian* (1995) 9 Cal.4th 535, 546.) The requisite "reasonable probability" is a chance great enough, under the totality of the circumstances, to undermine confidence in the outcome of the trial. (*Ibid.*) The petitioner is not required to show that the prosecution knew or should have known that the testimony

was false. (§ 1473, subd. (c); *People v. Marshall* (1996) 13 Cal.4th 799, 830.) Neither must a petitioner show that the false evidence was perjurious. (*In re Hall* (1981) 30 Cal.3d 408, 424.)

A recent case concerning a challenge to a conviction based on false testimony aids Bell's case. In *In re Roberts*, *supra*, 29 Cal.4th at pp. 743-744, this Court rejected a referee's reassessment of a trial witnesses' demeanor — and thus credibility — at an evidentiary hearing regarding false testimony where that reassessment was not based upon any new evidence, but constituted primarily a reweighing of the witnesses' credibility when he repeated his trial testimony at the evidentiary hearing, which the jury at trial had already passed upon. The Court there stated: "It is not the function of a referee or an appellate court to reweigh credibility determinations made by the jury. It is true that the referee observed Cade's demeanor while testifying at the reference hearing, but the jury already had observed Cade's demeanor when he testified at trial. The jury was in the best position to determine the truthfulness of Cade's trial testimony." (*Ibid.*) Additionally, where simple impeachment of a trial witness who had already been impeached at trial, as had Ernestine Jackson here, is not based on new evidence not heard by the jury, such impeachment at the evidentiary hearing cannot cause a referee to question the validity of the jury's verdict.

Roberts thus teaches that where, as here, there is credible new evidence never heard by the jury that directly refutes the primary evidence against Bell, showing it to be false, the credibility of the proponent of that false evidence may be reweighed in its entirety.

When Jackson's credibility is reweighed, in light of the entire record of the trial, Leroy Kelly's evidentiary hearing testimony, and Jackson and Judge's, and Dorton's testimony at the evidentiary hearing, Jackson is a demonstrably incredible witness.

Once the testimony of Leroy Kelly at the evidentiary hearing is found to be credible, and Jackson is found not to be credible, the Court analyzes the effect of her having testified falsely in the context of the entire record, including the identifications of Bell by Judge and Dorton. Given Dorothy's statement in the taped interview of February 10, 1978, and her testimony at the preliminary hearing and trial that she directed Ruby to ask the man in Wolff's if he was Larry, it is apparent that real confusion as to the man's identity occurred in Dorothy's mind — not immediately rejected by Ruby according to Dorothy.

Ernestine Jackson lived with Dorton and Judge. Ernestine Jackson identified Bell knowing instead it was Larry, or at least suspecting it was Larry. One does not have to be a licensed psychologist to understand the influence of the primary caregiver over two children, ages 13 and 14. As far as the two children were concerned, Ernestine Jackson's identification was the truth: it was Bell. One of those children, Dorothy, clearly had confusion in her mind about whether it was Larry or Bell. That confusion was taken away by Ernestine. Judge, perhaps, misidentified Bell unconsciously for reasons described by Dr. Shomer in the trial testimony, in which case the fact she appeared not to waver in her identification deserves little weight. Does her identification, standing alone, satisfy the Court

of the outcome of the case, especially knowing the incidents of mistaken identification in the annals of criminal jurisprudence. (See, e.g., *Neil v. Biggers* (1972) 409 U.S. 188; *Raheem v. Kelly* (2d Cir. 2001) 257 F.3d 122.)

Dorothy told the police eight days after the crime and testified consistently that she had asked Ruby to ask the man in Wolff's if he was Larry; Ruby did so. Ruby thus did not refute Dorothy's assertion. This evidence from Dorothy that came to light eight days after the offense, after she and Ruby had been at home with Ernestine for that many days, was not simply concocted of whole cloth. The inferences from it are that Dorothy saw Larry at Wolff's, a person she knew, and was attempting to assert that belief; and/or that there had been discussion or mention at home by Ernestine and/or Ruby that Larry was at Wolff's.¹¹ Ernestine then took Dorothy's identification away from her, and would have quashed any question that Ruby had as well.

Ruby, like Dorothy, when shown the photo line-up containing petitioner's photo, but not Larry's, picked a Bell. Ruby said she could tell the difference between them, but that was based on what she saw of them many years earlier when, as a young child, she walked by and waved at them on their front porch. That simply cannot bear — with any convincing force — on whether she could tell the difference between them at the time of the offense when she had not seen them

¹¹ It is simply not credible that there was no discussion at home among Ernestine, Dorothy Dorton, Ruby Judge, and even Ruby's mother, as the three suggested both at trial and at the evidentiary hearing.

for so long. Like Dorothy, Ruby had also heard the name “Ron Bell” both from Ernestine and during her discussions with the police at the scene.

The ease with which Ruby and Dorothy could have become convinced that “Ron Bell” was the perpetrator of the Wolff’s offenses is underscored by the fact that they were very young teenagers at the time. In *Roper v. Simmons* (2005) 543 U.S. 551, 559-560, the United States Supreme Court described the nature of children and young teenagers thusly: “A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. ... [¶] ... [J]uveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. [Citation.] ... ‘[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.... This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.’ ... [¶] ... The reality [is] that juveniles still struggle to define their identity....”

The recantation of Ernestine should not be viewed with suspicion. (See *In re Roberts, supra*, 29 Cal.4th at p. 742, and *In re Weber* (1974) 11 Cal.3d 703, 722.) Ernestine’s boast to Leroy Kelly is not analogous to the recantations this Court has cautioned about. Unlike the classic Weber recantation, Ernestine’s boast to Leroy was not disclosed under circumstances prone to suspicion. She was not

talking to a defense investigator who was taking the recantation for the purpose of helping the accused. Ernestine was under no pressure to talk to Leroy, nor was Leroy guiding an interview designed to elicit changed testimony which might help an accused. Nor was there the possibility that Ernestine's "recantation" was motivated by a desire to lessen the impact of her former testimony. Rather, Ernestine's boast to Leroy, was just that: a statement to an old friend that she had gotten even with Ronnie for killing Alcus, made under circumstances where she had no reason to believe her "recantation" would ever help Bell, let alone become known to the court system.

In the context of *Roberts*, Leroy is much like the inmate witness, Ruben Lavert Howard. (*Roberts*, at pp. 738-739.) Howard overheard Long, Calvin and Rooks state that Roberts did not commit the crime and was framed. The referee believed Howard's testimony, which supported the theory that Long testified falsely at trial that Roberts had committed the crime. Ultimately, this Court discounted the effect of Howard's testimony, however, because it was cumulative of testimony Roberts' jury had already heard from two other witnesses, Givens and Yacotis. Leroy Kelly's testimony is not cumulative. If his testimony is credible, it totally undermines the testimony of the only adult eyewitness, Ernestine Jackson, who was in a superior position of influence and control over the two minor eyewitnesses.

Nor is it impossible that Ernestine could keep such a monstrous conspiracy intact through all the proceedings held in this case from her initial statements at the time of the offense, through the

preliminary hearing and trials, and through the reference proceedings. Close attention to Ernestine's demeanor and presentation at the evidentiary hearing revealed that she is a very hard woman indeed, one who would be quite capable of such action if she had reason enough to do so.

And such reason Ernestine had. She admitted at the evidentiary hearing that she was very affected by the death of Alcus. (RTR 340.) More importantly, however, what became stunningly apparent at that hearing was that the untimely and tragic death of her and Ruby Judge's sister, Dorothy Jean, so struck the family in the heart and left a void that could not be filled, that it provided a powerful motive for Ernestine to identify Bell.

It takes no leap of faith whatsoever to understand that the Judge/Jackson/Dorton family would connect Dorothy Jean's untimely death to the death of Alcus when her only child, Dorothy, was fathered by Alcus and was but an infant when Alcus died at Bell's hand. Dorothy Jean's death left Dorothy to be raised by Ernestine and her mother. Bell's shooting of Alcus created a rift in the community whose power is evident even today.

Leroy Kelly's demeanor, sincerity, and seriousness toward the proceedings in this case belie any suggestion that he lied in his evidentiary hearing testimony. Whether other witnesses who provided declarations may have lied by no means indicates Leroy Kelly did. Of all the witnesses who testified at the evidentiary hearing, for Bell or for the State, it was Leroy Kelly who showed the most integrity, honesty, sincerity, earnestness, and respect for the

Court. Leroy Kelly testified that others in the community knew that Bell did not commit the offenses at Wolff's, and Leroy was distressed that others would not come forward. (RTR 245-246.) From all aspects of Leroy's testimony and presentation it is evident that Leroy is not a person who would improperly use such information.

Accordingly, Dorothy and Ruby's identifications of Bell are so suspect as to lack credibility. Again, as with Ernestine, the new evidence supplied by Leroy Kelly allows the Court to reassess its effect on the outcome of the trial. (See, e.g., *Roberts*, 29 Cal.4th at pp. 743-744.) Bell has met his burden of establishing a reasonable probability that, had the identifications not been introduced, the result of the trial would have been different. To allow Bell's conviction to stand, based on the present knowledge that Bell's conviction rests on false evidence that was substantially material and probative as to guilt, is also a violation of his right to due process under the Fourteenth Amendment. (See *Napue v. Illinois* (1959) 360 U.S. 264, 269; *United States v. Agurs* (1976) 427 U.S. 97, 103; *Alcorta v. Texas* (1957) 355 U.S. 28, 31; *Hall v. Dir. of Corrections* (9th Cir. 2003) 343 F.3d 976.)

* * * * *

III.

BELL'S CONVICTIONS SHOULD BE VACATED BECAUSE HE HAS MET HIS BURDEN OF ESTABLISHING THAT NEWLY DISCOVERED EVIDENCE THAT ERNESTINE JACKSON LIED IN IDENTIFYING PETITIONER AS THE PERPETRATOR OF THE WOLFF'S OFFENSES, WHEN SHE KNEW OR THOUGHT IT WAS LARRY, UNDERMINES THE STRUCTURE OF THE PROSECUTION'S CASE AND POINTS TO ACTUAL INNOCENCE.

To obtain habeas relief based on newly discovered evidence, the petitioner must persuade the court that the evidence undermines the structure of the prosecution's case and points to actual innocence. The court in *In re Wright* (1978) 78 Cal.App.3d 788, discussed the two related but distinct grounds for habeas relief also presented here: "Newly Discovered Evidence" and "Perjured Testimony — False Evidence." (*Id.* at pp. 802, 807.) To warrant habeas relief on the former ground, "new evidence must be such as to undermine the entire structure of the case upon which the prosecution was based; it must point unerringly to the petitioner's innocence and must be conclusive; it is not sufficient that the new evidence conflicts with that presented at the trial and would have presented a more difficult question for the trier of fact." (*Id.* at p. 802.) Bell has the burden of proving there is newly discovered and credible evidence which undermines the entire case of the prosecution. (*In re Hall, supra*, 30 Cal.3d at p. 417.)

Once Leroy Kelly is found to be credible, Bell has also satisfied his burden of establishing that the newly discovered evidence of Ernestine Jackson's statement to Leroy Kelly "undermines the entire structure of the case upon which the prosecution was based," and points unerringly and conclusively to petitioner's innocence. (See *In re Wright, supra*, 78 Cal.App.3d at p. 802.) This is not simply new evidence that conflicts with that presented at trial.

As set forth in the previous argument regarding false evidence, aside from the eyewitness testimony in this case there was no evidence upon which to find Bell guilty of the offenses at Wolff's. There was no physical evidence connecting him to the scene. The fact he possessed a gun resembling the one used in the Wolff's offenses two months before those crimes is not evidence, absent substantial corroboration, that he committed the Wolff's offenses.

The fact that Bell hid himself for some days after the offense when he knew he was wanted by the police for the Wolff's crimes is not evidence that he was guilty of those offenses. First, the fact he turned himself in voluntarily indicates that he was not guilty. (See CALCRIM No. 372 [flight after crime as consciousness of guilt].¹²) That he fled at first is easily reconcilable with innocence, given that he had felony convictions in the past which alone made it more likely

¹² CALCRIM No. 372 provides: If the defendant fled immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.

he would be considered guilty even if he was not, let alone the fact that he had virtually been convicted of the offenses in the media before he was arrested and could expect an uphill battle for that reason as well.

The original hung jury additionally establishes that the evidence against Bell was underwhelming, particularly in combination with the initial deadlock in the second jury trial despite the egregious prosecutorial misconduct there where the jury learned of inadmissible evidence from a confidential informant that on February 1, 1978, Bell was seen cleaning a gun like that used in the Wolff's offenses.

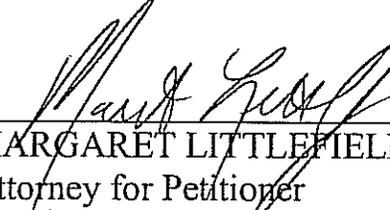
As Bell has shown in the foregoing argument, the credibility of the eyewitnesses Jackson, Ruby Judge, and Dorothy Dorton that it was Bell who committed the robbery-murder at Wolff's, has been deeply shaken. The testimony of Leroy Kelly that Jackson admitted to lying about Bell's involvement is, on the other hand, eminently credible. This Court accordingly should find that Bell is actually innocent.

* * * * *

CONCLUSION

For the foregoing reasons, the Court should not adopt the Report of the Referee.

Respectfully submitted,



MARGARET LITTLEFIELD
Attorney for Petitioner
Ronald Lee Bell

In re Ronald Lee Bell on Habeas Corpus
California Supreme Court No. S105569
Contra Costa County No. 21631

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of Marin County. I am over the age of eighteen years and not a party to the within above entitled action. My business address is P.O. Box 337, Bolinas CA.

On April 11, 2007, I served the within **PETITIONER'S BRIEF OF EXCEPTIONS TO THE REPORT OF THE REFEREE** on the interested parties in said action causing to be placed a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States Post Office box addressed to the parties as follows:

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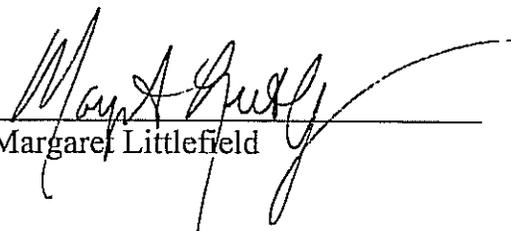
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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 11, 2007.


Margaret Littlefield