IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| In re<br><br>**RONALD LEE BELL,**<br><br>On Habeas Corpus. | **CAPITAL CASE**<br><br>S105569<br>(Former related appeal: S004260; first related petition: S015786; second related petition: S044466) |

# RESPONDENT'S BRIEF ON THE MERITS FOLLOWING SUBMISSION OF THE REPORT OF THE REFEREE


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## I. INTRODUCTION

This is a habeas corpus proceeding arising from crimes petitioner committed nearly 30 years ago. The petition (the third presented to this Court by petitioner) was filed on April 2, 2002. Of the several claims the petition contains, two were certain to arouse interest: Petitioner alleges that he is "factually innocent" of murder, and that the eyewitness testimony establishing otherwise was "false." Breathtaking as those claims are, petitioner's conduct with respect to them has been even more startling: Although the "factual bases" for those claims, such as they are, had been known to petitioner for many years, he assiduously delayed and obstructed any meaningful consideration of them by the courts. It is now clear why.

On June 11, 2003, this Court referred the matter to the Contra Costa County Superior Court to take evidence and make findings of fact with respect to six specified questions implicated by petitioner's "factual innocence" and "false testimony" allegations. After the referee's report was filed on December 11, 2006, the Court invited the parties to submit exceptions and simultaneous briefing on the merits. Respondent takes no exception to the referee's report, as it is thoroughly correct and fully supported by the record. It also

demonstrates what petitioner himself appreciated from the outset: His assertions of "innocence" and "false testimony" were just tantalizing enough to generate enormous delay but would otherwise prove worthless.

## II. BACKGROUND

On February 2, 1978, petitioner entered Wolff's Jewelry Store in Richmond, and shot two of its employees, one of them fatally. He fled with approximately $30,000 worth of jewelry and remained at large until his mother surrendered him to the police. Soon after the crimes, and again at trial, three eyewitnesses who had been in or about the jewelry store at the time petitioner committed the offense identified him as the perpetrator. One of the eyewitnesses, Ernestine Jackson, had known petitioner for more than 10 years, had attended school with him, and even spoke with him briefly (addressing him by name) just before he entered the jewelry store. Another witness, Ruby Judge, then age 14, also knew petitioner from the neighborhood in which they both lived, and she too spoke with petitioner inside the jewelry store just before he opened fire. The third witness, Dorothy Dorton, then age 13, was also in the jewelry store at the time of the offense. Although she did not previously know petitioner, she was aware that he had killed her father, Alcus Dorton, when she was very young. Her identification of petitioner, like that of the other witnesses, was positive and unequivocal. (See *People v. Bell* (1989) 49 Cal.3d 502, 514-517.)

Petitioner, who did not testify, defended the charges on a theory of mistaken identification, i.e., that his brother Larry—an individual known to all three eyewitnesses, and who, accompanied by a female companion, had checked into a motel, located more than a mile from Wolff's Jewelry Store, over a period that included the time the crimes were committed—was the actual culprit. In mounting this defense, petitioner primarily relied upon the testimony of a psychologist claiming to specialize in "person perception." The

expert opined that the testimony of all three eyewitnesses identifying petitioner as the perpetrator had been the product of confusion, uncertainty, and suggestive influences exerted by investigating officers. This same expert also opined that the eyewitnesses might have harbored strong but unconscious hostility toward petitioner, owing to their relationship with Alcus Dorton, whom petitioner had earlier killed. In its effort to demonstrate that Larry, not petitioner, was the actual perpetrator of the robbery-murder, the defense offered evidence to the following effect: (1) that a few days after the crimes committed in Wolff's Jewelry, Larry was observed by others accosting Thomas Boyden and Clarence McIntosh using a weapon similar in appearance to that believed to have been used in the charged crimes (although that same testimony also tended to undermine the defense's theory that petitioner and his brother would be easily confused by observers); (2) that one week after the charged crimes Larry was found in possession of a few of the items taken in the jewelry store heist (although this same testimony was entirely consistent with Larry having secured possession of those items from petitioner himself); and (3) that the distance between the motel where Larry had been staying at the time of the crimes and Wolff's Jewelry could be walked in 13½ to 17 minutes (although evidence also reflected that Larry had checked into the motel with his female companion before the crimes; that he was unarmed; that he stepped out only once, for 30 to 45 minutes when it was dark or near dark (not during daylight when the crimes occurred); and that he did not check out of the motel until 10:30 or 11:00 that night). (See *Bell*, *supra*, 49 Cal.3d at pp. 517-519.)

The jury heard considerable testimony concerning differences in the brothers' respective heights, physiques, and skin tones, and the witnesses' ability to distinguish petitioner from his brother; the jury also had the opportunity at trial to compare petitioner with a photograph of his brother. Although no physical evidence linked petitioner to the scene directly, petitioner's father testified that in December 1977 he accepted $50 from

petitioner in exchange for a .38-caliber revolver; furthermore, in discussions with an investigator, petitioner's father had described the weapon he provided to petitioner as a two-inch barrel Colt. The slugs recovered from the victims were consistent with having been fired from just such a weapon. (See *Bell*, *supra*, at pp. 515-518.)

Petitioner was convicted of special-circumstance murder, attempted murder, robbery, and possession of a firearm by an ex-felon. He was sentenced to death on March 2, 1979. (*Bell*, at p. 513.)

Petitioner's conviction and sentence were affirmed by this Court nearly 18 years ago. (*Bell*, at pp. 514-554.) His first application for collateral relief, filed in this Court on May 29, 1990, was denied on October 18, 1990. (*In re Bell*, S015786.) His second, filed on January 20, 1995, was denied on June 21, 1995. (*In re Bell*, S044466.) As noted, this makes petitioner's third application.

The instant petition contains nine claims. (Pet. 19-65.) Respondent filed an Informal Response addressing all claims on May 6, 2002. In that pleading, we explained that none of petitioner's claims had been timely presented to this Court, that some had already been rejected on appeal or in one of the previous habeas proceedings, and that all are meritless. We conceded, however, that under this Court's precedents two of petitioner's contentions—that he is "factually innocent of the offenses as he was not the perpetrator" ("claim B") and that the trial testimony of the three eyewitnesses identifying him as the perpetrator was "false" ("claim C")—"should be considered regardless of delay or failure to include the claim in a prior petition." (Informal Response 2, citing *In re Clark* (1993) 5 Cal.4th 750, 796-797.) Thus, notwithstanding our ability to document that petitioner had consciously employed a series of stratagems to withhold and obscure his factual innocence/false testimony claims over several years (Informal Response 2-11), we concurred with petitioner's suggestion that the claims be explored at

an evidentiary hearing, and that in service of that objective the Court issue an Order to Show Cause and ultimately appoint a referee to take evidence and make pertinent findings of fact (*id.* at 2-3, 11-12, 34).[1/]

On February 19, 2003, this Court ordered respondent to show cause why the relief prayed for should not be granted on petitioner's "factual innocence/false testimony" claims. Respondent filed a Return to the Order to Show Cause on March 14, 2003, again observing that petitioner's claims are meritless, but acknowledging that if petitioner were to file a Traverse refuting the material allegations in the Return, he would be entitled to an evidentiary hearing. (Return 5-9.) Petitioner filed such a Traverse on May 14, 2003, and the Court thereafter referred the matter to the Superior Court to resolve the following factual questions:

> 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?

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1. Although constrained to acknowledge that petitioner's resort to hide-the-ball tactics (detailed *post* at pages 11-20) would not impair the cognizability of his claims, we did note that his conduct no doubt reflected his considered judgment that the value of the delay to be achieved by withholding the claims from prompt adjudication exceeded any prospect that the claims, once adjudicated, might actually supply a basis for relief. As noted, the record of proceedings before the referee now confirms that petitioner's assessment of the situation was entirely accurate. Indeed, as we shall see, petitioner would ultimately withdraw from the referee's consideration significant elements of the evidentiary proffer he had used to induce this Court to refer the matter for hearing.

> 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?

(1 CT 68; see 1 CT 69.)

The referee authorized or otherwise facilitated extensive discovery and investigation. (See 1 CT 131, 134-146, 172-174, 248-262, 276; 2 CT 298-306; 1 RT 11, 30-33, 42-46, 67-72, 77-80, 88- 93, 97-141, 145-149, 153-157, 161-163, 171-172, 177-178, 181-188, 190-191, 196; 2 RT 424, 433-434; 3 RT 444-486, 491, 496-515, 526-542.) The hearing itself was conducted over several sessions between April and November of 2005. (1 CT 277; 2 CT 290-296, 311, 318, 395.) The matter was argued and submitted to the referee on September 1, 2006. (2 CT 409-410; 3 RT 552-584.) The referee's report (2 CT 411-415) was filed in this Court on December 11, 2006 (2 CT 420), and the invitation to file exceptions and briefing on the merits issued the same day.

## III. DISCUSSION

## PETITIONER IS NOT "ACTUALLY INNOCENT" AND THE TESTIMONY OF THE EYEWITNESSES WHO IDENTIFIED HIM AT TRIAL AS THE PERPETRATOR WAS NOT "FALSE"

### *A. Introduction*

"In a habeas corpus proceeding, the burden of proof lies with the petitioner to prove, by a preponderance of the evidence, facts that establish the invalidity of the judgment under which he is restrained." (*In re Andrews* (2002) 28 Cal.4th 1234, 1252-1253.) When a reference hearing has been ordered the referee's findings on factual questions, while not binding on the Court, "are entitled to great weight when supported by substantial evidence." (*In re Johnson* (1998) 18 Cal.4th 447, 461.) "This is especially true for findings involving credibility determinations. The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations." (*In re Thomas* (2006) 37 Cal.4th 1249, 1256, citing *In re Scott* (2003) 29 Cal.4th 783, 824.) Thus, this Court gives "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.'" (*In re Freeman* (2006) 38 Cal.4th 630, 635, quoting *Thomas*, *supra*, 37 Cal.4th at p. 1256, quoting *In re Malone* (1996) 12 Cal.4th 935, 946.) By contrast, *prior* testimony will be reviewed independently by this Court. (*Thomas*, *supra*, 37 Cal.3d at p. 1256.)

Whether petitioner is, as he asserts, "actually innocent" is a factual question, the resolution of which turns in substantial part on the credibility of the evidence petitioner presented to the referee in support of that claim. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 ["'For purposes of collateral

review, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them'"].) Likewise, whether the three eyewitnesses who identified him at trial as the perpetrator had provided "false testimony" is also a factual question. (*Ibid.*) And although the witnesses' prior testimony at trial itself is subject to this Court's independent review, to the extent its truth or falsity is illuminated by the truth or falsity of those same witnesses' testimony at the hearing regarding the subject matter of their trial testimony and the truth or falsity of any statement of "recantation" ascribed to any of those witnesses by another, the referee's findings will be accorded great weight if supported by substantial evidence.

As we shall explain, the referee's findings are supported by substantial—even overwhelming—evidence, and we urge their adoption. In light of those findings and the record of proceedings, the petition must be denied. Indeed, at the hearing conducted before the referee petitioner called only one witness, Leroy Kelly, in his effort to establish the material allegations set forth in his petition. Kelly's testimony—which the referee expressly declined to credit—ascribed no statements or conduct to Dorothy Dorton or Ruby Judge at all. Instead, Kelly's operative testimony concerned only a single conversation with Ernestine Jackson in which, according to Kelly, Jackson claimed that she had falsely identified petitioner as the perpetrator in retaliation for petitioner's earlier killing of Alcus Dorton. Jackson herself refuted Leroy's testimony on that point, and the referee credited Jackson's reaffirmation of her trial testimony. In short, petitioner has wholly failed to sustain the claims on which the Court ordered respondent to show cause, and the record now leaves no doubt why petitioner displayed such little enthusiasm for presenting his factual innocence/false testimony claims in a manner that would have led to their earlier scrutiny.

### *B. The Eyewitness's Trial Testimony*

#### 1. Ernestine Jackson

Ernestine Jackson had known both [petitioner] and Larry Bell for at least 10 years. She attended junior high school and high school with [petitioner], and has also attended school with Larry. For some time she had lived only two and one-half blocks from the Bell home. She was able to distinguish the brothers. Larry was taller and had a lighter complexion than [petitioner]. However, in recent years she had seen [petitioner] only "a couple of times," and Larry "every now and then."

Ernestine had driven to Wolff's Jewelry Store about 4 p.m. on the day of the crimes to pick up a watch that was being repaired. Ruby, Dorothy, and four-year-old Alicia Carter, another niece, were with her in the car. She parked in a red zone close to the store and waited while Ruby went in to pick up the watch. As she waited she observed [petitioner] approaching, opened her window, and greeted him, saying "How're you doing, Ronnie Bell." He asked who it was and when she said "Ernestine," greeted her, and continued walking toward the jewelry store. Ernestine then told Dorothy that [petitioner] was the man who had killed Dorothy's father. Dorothy then said that she was going to get a good look at him and left the car.

When Ernestine later saw [petitioner] leave the area of the store carrying what appeared to be a beige and white plastic bag, cross the street, and then run out of sight as he turned a corner, she herself went to the jewelry store where Dorothy told her that two men had been shot. Ernestine called the police from a store next door. She later identified a photo of [petitioner] as the person she had spoken to prior to the robbery. She also identified him at trial.

(*People v. Bell*, 49 Cal.3d at pp. 515-516.)

#### 2. Dorothy Dorton

Dorothy did not know [petitioner], but was aware and had discussed with family members the fact that he had killed her father when she was very young. She had no recollection of her father, remembering only the funeral.

Dorothy testified that she had entered Wolff's Jewelry Store because she saw that the man who had greeted Ernestine had not walked past the store and concluded that he was inside. [Petitioner] was waiting to be helped. Ruby was being helped by a man who was

writing out a receipt. Dorothy walked over to Ruby and told Ruby to ask [petitioner] if his name was "Larry." Ruby did so. [Petitioner] replied "no." When Ruby went to the back of the store to pay for the watch, [petitioner] asked Benjamin to show him a ring, which [petitioner] tried on and returned. Dorothy went to the rear to join Ruby, at which point [petitioner] drew a gun from his waist, told Benjamin to "hold it," shot Benjamin, and then turned and shot Murphy. Neither victim had made any attempt to restrain [petitioner], who, after the shooting, scooped up some jewelry which he put in a blue bag bearing the name Wolff's in white lettering. [Petitioner] walked out of the store after telling Dorothy to "get some jewelry." At the instructions of a woman who worked in the store, Dorothy then pushed an alarm button.

Dorothy subsequently identified a photo of [petitioner] without hesitation or difficulty, stating that she was looking for a photograph of [petitioner]. She testified at trial that she was positive the person she had seen in the jewelry store was [petitioner], and was not Larry. She had seen Larry in the past and could distinguish the brothers. She identified two photos of Larry at trial, and also testified that Larry was taller, and had lighter skin.

(*People v. Bell*, 49 Cal.3d at p. 516.)

**2. <u>Ruby Judge</u>**

Ruby testified that she saw [petitioner] enter the jewelry store after she had handed the receipt for the watch to a man wearing a blue suit who directed her to the rear of the store to make payment. She saw Dorothy follow [petitioner] into the store. Ruby testified that she had asked [petitioner] if his name was "Ronnie Bell," to which [petitioner] had replied "no." Ruby also saw [petitioner] examine and return a ring to a man at the counter; remove a gun from his waistband; shoot the man to whom he had returned the ring and who had neither offered resistance nor threatened [petitioner]; and turn toward and shoot another man in the store. She saw [petitioner] scoop up jewelry and place it in a white bag with blue lettering, and heard him tell Dorothy to "get some jewelry."

Ruby was familiar with both [petitioner] and Larry, and with their home which was near an elementary school she had attended. She had identified a photograph of [petitioner] in a photo lineup, and was also able to distinguish [petitioner] and Larry, the latter being taller and lighter. She was positive in her identification of [petitioner]

> as the person she had seen in the jewelry store. Both Dorothy and Ruby disclaimed any animosity toward [petitioner] for killing Dorothy's father.

(*People v. Bell*, 49 Cal.3d at p. 517.)

### *C. The Origins Of, And Manner In Which Petitioner Elected to Present, Claims B And C*

In December of 1991, a defense investigator working for petitioner secured a declaration signed in the name of Wanda Diane Moore purporting to recite a conversation earlier that year between herself and Ernestine Jackson in which the latter stated that she had witnessed petitioner's brother, Larry Bell, at the murder scene but falsely identified the perpetrator as petitioner "because he killed my niece's father, Alcus, and I even got my people to change their story to say they saw [petitioner] instead of Larry, because I was gonna get him." (Petition, Exh. E.[2/])

Petitioner did not seek relief in this Court on the basis of the foregoing information. Instead, six months later on June 11, 1992, petitioner filed a 13-page "Petition for Writ of Habeas Corpus" in the United States District Court for the Northern District of California. (Informal Response, Exh. 1.) Among the allegations set forth in that pleading was the following, which appeared in paragraph 30 of the petition:

> On information and belief, principal witnesses against petitioner perjured themselves and in fact petitioner is innocent of the crime for which he has been convicted.

(*Id.*, at p. 12, para. 30.) Nowhere in the petition did petitioner mention Wanda Diane Moore or the declaration secured 18 months earlier.

On July 2, 1992, respondent moved the district court to compel

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2. Unless otherwise indicated, citations to pleadings and exhibits are to those filed in the instant habeas proceeding.

petitioner to exhaust (or abandon) all previously unexhausted claims, including the one set forth in paragraph 30. (Informal Response, Exh. 2 at p. 2.) In response to respondent's motion, petitioner questioned the availability of state remedies, but acknowledged that investigative funding requests to this Court would require petitioner's identification of, inter alia, "[s]pecific *facts* that suggest there may be an issue of possible merit." (Informal Response, Exh. 3 at p. 4, emphasis added; see Supreme Court Policies Regarding Cases Arising from Judgments of Death, Policy 3, Std. 2-4.2.) By order of October 15, 1992, the district court granted respondent's motion to compel, and explicitly directed petitioner "to exhaust state remedies as to: . . . (c) *all factual grounds* and legal claims, *whether asserted in the federal petition or not*, which *petitioner knows or should know to be unexhausted at the time of his return to state court.*" (Informal Response, Exh. 4 at p. 10, emphasis added.) By the time of the district court's order, petitioner's investigator had already secured a second declaration, this one signed in the name of "Tanya" or "Tonie" Moore[3/] and purporting to recite a conversation between herself and Ernestine Jackson sometime between 1984 and 1986 during which the latter "stated that the reason she testified against [petitioner] is that he killed her brother-in-law Alcus Dorton." (Petition, Exh. F.)

By October 12, 1994, petitioner still had not presented his innocence/perjured testimony claim to this Court, prompting the district court to observe, with cautious understatement, that petitioner "has not been particularly diligent about exhausting his state-court remedies." (1 CT 66.) Finally, two years after being ordered to do so by the district court, petitioner filed a Petition for Writ of Habeas Corpus—his second such petition—in this

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3. The purported signatory of this declaration is apparently *Tonia* Moore. (3 RT 292-293.) Ms. Moore would deny that the signature it bears is hers (2 RT 292-293), and petitioner ultimately withdrew the document at the reference hearing (3 RT 498).

Court. (Petition, *In re Bell,* S044466.) On page 89 of the 133-page/36-exhibit petition, petitioner alleged that:

> 1. Substantial credible and reliable evidence that was not presented to the jury at either the guilt or penalty phases of trial establishes Petitioner's innocence of the crimes of which he was convicted and sentenced to death.
>
> 2. Significant and substantial evidence indicates that Petitioner's brother, Larry Bell, was the actual perpetrator of the robbery and murder.

(*Id.* at p. 89.) On page 109, petitioner alleged that Dorothy Dorton, Ernestine Jackson, and Ruby Judge had "provided false, unreliable, misleading, perjurious, and inaccurate statements and testimony" and "concealed critical information, including but not limited to their past inability to distinguish petitioner from his brother Larry Bell." (*Id.* at p. 109.) Again, petitioner did not mention Wanda Moore or Tonia Moore anywhere in the petition, nor did he include among the 36 exhibits submitted in support of the petition the declarations bearing their names or the name of Dorothy Dorton.

The utter lack of factual support for petitioner's "innocence" and "perjury" claims was pointedly noted in respondent's Informal Response. (Respondent's Informal Response, *In re Bell,* S044466, at pp. 22, 28; see also *id.* at p. 12 (citing *In re Harris, supra,* 5 Cal.4th 813, 827).) In his Reply to the Informal Response, petitioner did not address the "innocence" claim at all. Nor did petitioner address the fatal evidentiary void identified by respondent with respect to the "perjury" claim; instead, he blithely intoned that the alleged falsity of the witnesses' testimony was "a dispute of fact" that required "issuance of an order to show cause, which will allow petitioner to file additional pleadings, to utilize the Court's compulsory process and subpoena power, to obtain discovery and to prove his claims at an evidentiary hearing." (Informal Reply, *In re Bell,* S044466, at p. 13.) The petition was denied by order of this Court on June 21, 1995.

In November of 1999, petitioner's investigator secured a declaration signed by Leroy Kelly purporting to recite a conversation between himself and Ernestine Jackson more than six years earlier, during which the latter stated that "she had testified against [petitioner] because she wanted him to pay for what happened to her brother-in-law Alcus Dorton"; that "she really saw Larry Bell at the jewelry store that was robbed, but she lied because this was her opportunity to get [petitioner]"; and "that she hopes [petitioner] is executed." According to the Kelly declaration, Jackson "was laughing and bragging about having put [petitioner] on death row." (Petition, Exh. G.)

On March 17, 2000, petitioner filed an "Amended Petition for Writ of Habeas Corpus" in the United States District Court for the Northern District of California. In that pleading, petitioner claimed that he was "factually innocent of the convictions and special circumstances findings," first insisting that he "is not the perpetrator," and later arguing that he "lacked the requisite mental states." (Informal Response, Exh. 5 at p. 12.) Both variants of his "innocence" claim assertedly rested, in part, on "substantial credible and reliable new evidence that was not reasonably discoverable or presented to the jury at the guilt phase of the trial." (*Id.* at pp. 12-13.) But once again petitioner presented no evidence that he was "not the perpetrator"; instead, he advanced only a series of unsubstantiated factual conclusions. (E.g., *id.* at p. 13 [asserting, without so much as an offer of proof or any further detail, that "Ernestine Jackson has on several occasions admitted to [unidentified] friends or acquaintances" that she falsely identified petitioner as the perpetrator at trial]; *id.* at p. 13 [asserting, without the slightest substantiation, that at the time of his crimes petitioner "was with Howard and Stella Crummie and their sister, Verline"].[4/]) Later in the same pleading, petitioner alleged that the three

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4. Howard and Stella Crummie would never again be mentioned by petitioner in any proceeding.

eyewitnesses "were motivated to testify against petitioner by a family grudge which developed against petitioner years earlier when he killed Dorton's father"; thus, petitioner further alleged, these witnesses "provided false, unreliable, misleading, perjurious, and inaccurate testimony, such as identifying petitioner as the perpetrator of the crimes, and asserting their ability to distinguish petitioner from his brother, Larry Bell." (*Id.* at pp. 109-110.) And once again, petitioner did not mention Wanda Moore, Tonia Moore, or Leroy Kelly anywhere in the petition, nor did he present any declarations to the district court.

Because the "Amended Petition" contained other unexhausted claims, it was dismissed by order of the district court on May 26, 2000, and petitioner filed a "First Amended Petition" on June 27, 2000. With respect to petitioner's "innocence" and "perjury" claims, the "First Amended Petition" was identical to the "Amended Petition," and like the "Amended Petition," it made no mention of Wanda Moore, Tonia Moore, or Leroy Kelly, and it made no mention or use of their declarations. (Informal Response, Exh. 6.)

In April of 2001, petitioner's investigator secured a declaration signed in the name of Dorothy Dorton in which it is asserted that Dorton's aunt, Ernestine Jackson, instructed Dorton "to lie" and identify petitioner to the police and at trial "for revenge." (Petition, Exh. H.)

On September 24, 2001, petitioner moved the district court to grant him an evidentiary hearing on a number of claims, including the "innocence" and "perjury" claims. Identifying his "proposed evidence," petitioner alleged that Ernestine Jackson told "a longtime [still unidentified] acquaintance at a mini-mart in 1991," "another [still unidentified] life-long acquaintance sometime between 1984 and 1986, when they were working together for a janitorial service at Macy's-Hilltop," and "a third [still unidentified] acquaintance when they encountered each other in the parking lot of the Food Bowl on San Pablo Avenue in El Cerrito," that she knowingly misidentified

petitioner at trial as the perpetrator of the crimes she witnessed on February 2, 1978. (Informal Response, Exh. 7 at p. 12.) Petitioner also proposed to substantiate his claim of innocence with various other forms of proof, including evidence that Dorothy Dorton had also "recanted [to some unidentified person] her previous statements and testimony that she saw Petitioner outside of and in [the jewelry store where the crimes occurred]." (*Id.* at pp. 11-12.)[5/] Characteristically, petitioner did not mention Tonia Moore, Wanda Moore, or Leroy Kelly. Nor did he refer to the existence of, or submit for the court's consideration, any of the declarations signed in their names or in the name of Dorothy Dorton.

Petitioner's "innocence" claim, as embellished and recast in the motion for evidentiary hearing in district court, had not previously been fairly presented to this Court. The district court so ruled on January 8, 2002, and further determined "that it is in the interest of justice to permit petitioner to attempt to exhaust his claim of actual innocence based on the recantation of eyewitness testimony before the state court prior to determining whether [the district] court will hear evidence regarding this and other of petitioner's federal habeas claims." (Informal Response, Exh. 8 at pp. 6-7.) The district court carefully explained its analysis, and detailed the profoundly troubling extent to which it appeared petitioner had actually *concealed* the bases of his claims from this Court:

> A review of petitioner's prior petitions for writ of habeas corpus which have been filed in state court indicates that petitioner has argued from the time of his arrest that he was not the perpetrator of the crimes and that his brother, Larry, had committed the burglary and shootings. *However, none of the claims contained in the prior* [*state*] *petitions alleged that petitioner was factually innocent based on the fact that two of the three eyewitnesses to the crime have*

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5. Petitioner's "summary of proposed evidence" for the "perjury" claim incorporated by reference the same evidence proposed in support of the "innocence claim." (Informal Response, Exh. 7, at p. 77.)

*purportedly recanted their testimony*. The court's review of the petition for writ of habeas corpus, filed by petitioner in January of 1995 before the California Supreme Court, reveals a sole allegation related to this claim. In his fifteenth claim for relief, buried on page 109 of the petition, petitioner alleged that "[d]uring the crime investigation and at Petitioner's trial, the three witnesses provided false, unreliable, misleading, perjurious, and inaccurate statements and testimony. They concealed critical information, including but not limited to their past inability to distinguish Petitioner from his brother, Larry Bell." *See* Petitioner's Petition for Writ of Habeas Corpus, field January 24, 1995, in the Supreme Court of the State of California, at p. 109. The claim then goes on to allege that non-eye witnesses Vicki Clark and Bobby Ingram provided false testimony.[6/] *Id. No mention is made of any of the three eyewitnesses to the crime, nor does petitioner allege that any of the three eyewitnesses had recanted her testimony*.

At the hearing on petitioner's motion for an evidentiary hearing on December 7, 2001, petitioner's counsel suggested that the claim that two of the three eyewitnesses to the crime had recanted their testimony was presented to the state court in the form of a funding request. Counsel submitted such funding request to the court for an *in camera* review. The court has reviewed counsel's submission and finds that the request referred to does not sufficiently raise the claim presented in the present petition. In fact, the court finds that *the funding request made to the state court failed to apprise that court that eyewitnesses to the crime had recanted their trial testimony*. The only allegation made in the funding request that arguably raises the present claim is a one-sentence reference which states that one of the witnesses, Ms. Jackson, "has revealed to other people that she lied in her testimony because of a family grudge against Mr. Bell." *See* Petitioner's Supplement to Motion for Evidentiary Hearing, Confidential Application, at p. 11, ¶ 2. However, this vague reference appears on page eleven of the fourteen page funding request and fails to proclaim that Ms. Jackson had recanted her trial testimony. *Id.*

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6. Clark and Ingram testified at the penalty phase regarding instances in which they allege petitioner shot at them. Their testimony was wholly unrelated to the Wolff Jewelry Store robbery. [Fn. renumbered.]

As petitioner is aware, prisoners in state custody who wish to challenge collaterally in federal habeas proceedings either the fact or length of their confinement are first required to exhaust state judicial remedies, either on direct appeal or through collateral proceedings, by presenting the highest state court available with a fair opportunity to rule on the merits of each and every claim they seek to raise in federal court. *See* U.S.C. § 2254(b), (c); *Rose v. Lundy*, (1982) 455 U.S. 509, 515-16; *Duckworth v. Serrano* (1981) 454 U.S. 1, 3; *McNeeley v. Arave* (9th Cir. 1988) 842 F.2d 230, 231. The state's highest court must be given an opportunity to rule on the claims even if review is discretionary. *See O'Sullivan v. Boerckel* (1999) 119 S.Ct. 1728, 1730. A district court may not grant the writ unless state court remedies are exhausted or there are exceptional circumstances. *See* 28 U.S.C. § 2254(b)(1); *Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585; *Phillips v. Vasquez* (9th Cir. 1995) 56 F.3d 1030, 1037-38; *Coe v. Thurman* (9th Cir. 1990) 922 F.2d 528, 530; *Sweet v. Cupp* (9th Cir. 1981) 640 F.2d 233, 236.

The exhaustion-of-state-remedies doctrine reflects a policy of federal-state comity to give the state "the initial 'opportunity to pass upon and correct alleged violations of its prisoner's federal rights.'" *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citations omitted). The exhaustion requirement is satisfied only if the federal claim (1) has been "fairly presented" to the state courts, *see id.; Crotts v. Smith*, 73 F.3d 861, 865 (9th Cir. 1996), or (2) the petitioner demonstrates that no state remedy remains available. *See Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996).

If available state remedies have not been exhausted as to all claims, the district court must dismiss the petition. *See Rose v. Lundy*, 455 U.S. at 510; *Guizar v. Estelle* (9th Cir. 1988) 843 F.2d 371, 372. A dismissal solely for failure to exhaust is not a bar to returning to federal court after exhausting available state remedies. *See Trimble v. City of Santa Rosa* (9th Cir. 1995) 49 F.3d 583, 386. When a petitioner returns to federal court after the dismissal of a prior petition without prejudice for failure to exhaust, the new petition should not be considered second or successive and abuse of the writ principles do not apply. *See Slack v. McDaniel* (2000) 120 S.Ct. 1595, 1604-05; *Anthony v. Cambra* (9th Cir. 2000) 236 F.3d 568, 572.

In this case, despite the lengthy amount of time that has passed since petitioner's conviction became final, as well as the fact

> that petitioner has previously filed at least two petitions for writs of habeas corpus in the California Supreme Court, the court finds that it has no choice but to hold that petitioner's claim of actual innocence based on the fact that two eyewitnesses to the crime have recanted their trial testimony has not been exhausted in state court.[7] Given the gravity of this allegation, the court finds that it cannot simply assume that the state court will refuse to review petitioner's claim despite its untimeliness.
>
> In addition, since the court cannot review the present petition because it alleges an unexhausted claim, the court defers ruling on petitioner's motion for an evidentiary hearing. The court finds that it is in the interests of justice to permit petitioner to attempt to exhaust his claim of actual innocence based on the recantation of eyewitness testimony before the state court prior to determining whether this court will hear evidence regarding this and other of petitioner's federal habeas claims.

(Informal Response, Exh. 8 at pp. 4-7, emphasis added; footnotes renumbered.)[8]

Petitioner undertook to exhaust his state remedies by filing the instant petition on April 4, 2002. On that occasion, he presented—for the *first time* to *any* court—the Wanda Diane Moore declaration dated December 21, 1991, the Tonia Moore declaration dated August 6, 1992, the Leroy Kelly declaration dated November 28, 1999, and the Dorothy Dorton declaration dated April 2,

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7. The court is *particularly troubled by the fact that petitioner's prior counsel learned of the purported recanting before the second exhaustion petition was filed in state court in January of 1995 and yet failed to advise the state court of the information*. [Fn. renumbered.]

8. On February 2, 2002, petitioner filed a "Second Amended Petition" in the district court which omits express reference to the allegations that the district court had determined were unexhausted. On March 29, 2002, the district court ordered petitioner's federal proceeding "h[e]ld . . . in abeyance until the conclusion of his pending state court habeas claim of actual innocence or further order of [the district] court."

2001. (Petition, Exhs. E - H.)[9/]

### *D. The Evidence Presented At The Reference Hearing*

Petitioner called only one witness: Leroy Kelly. (2 CT 290; 2 RT

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9. On February 4, 2002, Dorothy Dorton and Ruby Judge were interviewed by Senior Inspector Daryl Jackson of the Contra Costa County District Attorney's Office. Dorton reaffirmed that her trial testimony was truthful in every respect and that she harbors no ill-will toward petitioner. Similarly, Ruby Judge unequivocally confirmed her trial testimony: "Ronnie shot those two men, killing that one, that's the truth." (Informal Response, Exh. 1.)

On February 27, 2002, Senior Inspector Jackson and former Detective (and then Police Chief for the City of Hercules) Michael Tye interviewed Ernestine Jackson, who confirmed the truth of her trial testimony generally, and the accuracy of her identification of petitioner in particular. (Informal Response, Exh. 1.)

Dorton later grew less cooperative with investigators. (Informal Response, Exh. 2.) Jackson, on the other hand, was reinterviewed on June 14, 2002, and she again confirmed the truth of her trial testimony; she also denied having ever recanted that trial testimony in conversations with any third parties, denied harboring feelings of ill-will toward petitioner, and denied encouraging Dorton to lie. (*Ibid*.)

On July 29, 2002, Richmond Police Officer Neil Newton showed Dorton Petitioner's Exhibit H, the April 2, 2001 declaration signed in her name. Dorton denied having signed that document, and she produced what she represented to be her signature in an effort to convince Newton that the signature on the exhibit and her own handwriting are dissimilar. (Informal Response, Exh. 3.)

The referee authorized discovery, and the parties deposed Jackson, Dorton, and Judge. The evidence later considered at the reference hearing (a subject we outline in the next section) included the deposition testimony of Dorton and Judge, in which both again reaffirmed their trial testimony and denied any of the nefarious conduct petitioner has ascribed to Jackson. (7 CT 1450-1458, 1462-1463, 1466, 1492-1503, 1509-1512, 1515, 1518-1519.)

226.) Petitioner also introduced Kelly's 1999 declaration (7 CT 1439; 2 RT 250, 428), four letters attesting to Kelly's good character (7 CT 1440-1443; 2 RT 282, 428), photographs depicting the interior of Wolff's Jewelry store (7 CT 1529-1533; 2 RT 314, 428), and a photograph of an individual named Marchon King (7 CT 1536; 2 RT 359, 428).[10/]

Respondent called Tonia Moore (2 CT 292; 2 RT 291), Ernestine Jackson (2 CT 292; 2 RT 295), Ruby Judge (2 CT 292; 2 RT 345), Dorothy Dorton (2 CT 293; 2 RT 357), Michael Tye (2 CT 296; 2 RT 370), and Wanda Moore (2 CT 318; 3 RT 345). Respondent also introduced the deposition testimony of Dorton and Judge. (7 CT 1444-1484, 1485-1528; 1 RT 205-206; 2 RT 285, 428; 3 RT 451.)

Transcripts of investigative interviews with Jackson, Judge, and Dorton, as well as transcripts of those same witness's trial and preliminary hearing testimony, were also submitted for the referee's consideration, along with other investigative materials. (3 CT 425-6CT 1435; 2 RT 436-437; 3 RT 583; see 1 RT 133, 205-207, 215-219; 1 CT 263-264.)

The parties stipulated that handwriting expert Lloyd Cunningham had concluded that Dorothy Dorton likely signed Petitioner's Exhibit H, the Dorton declaration dated April 2, 2001. (1 CT 279-286; 2 RT 440-441.)

The declarations of Wanda Diane Moore and Dorothy Dorton, which petitioner had earlier submitted to this Court as Exhibits E and H, respectively, were withdrawn by petitioner at the reference hearing "because of Rule of Professional Conduct, Rule 5-200" (2 CT 311, 413; 3 RT 498, 515), which reads as follows:

**Rule 5-200. Trial Conduct**

In presenting a matter to a tribunal, a member:

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10. Neither party elected to call King at the hearing. (3 RT 485, 498.)

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness.

(Rules Prof. Conduct, rule 5-200.)[11/] Petitioner elected not to submit the declaration of Tonia Moore (Petition, Exh. F) to the referee "for the same reason." (1 RT 209; 3 RT 498.)[12/]

### *E. The Referee's Findings Made In Response To This Court's Questions Are Fully Supported By The Record*

**Question 1:** *In conversations with Wanda Diane Moore, Tanya Moore, Leroy Kelly, or any other person, did eyewitness Ernestine*

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11. Petitioner's investigators, Melody Ermachild and Pamela Siller, who had secured the declaration executed in Dorton's name, were later unable to identify Dorton as the individual who had actually signed the document. (1 RT 92-93; 2 RT 432-433, 439-441.) Wanda Moore, whose declaration was also secured by Ermachild, was called to testify at the reference hearing, but she invoked her Fifth Amendment privilege and refused to answer any questions posed by the People respecting Ernestine Jackson, petitioner, or the declaration that bore her name. (3 RT 516-518.)

12. In her testimony at the reference hearing, Tonia Moore denied signing Exhibit F, noting that the document contains two misspellings of her name, including in the signature itself. (2 RT 291-292.) She also denied that she and Jackson ever discussed petitioner's offense or that she had ever stated that they had. (2 RT 292-292.)

*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?*

The referee found that Jackson did not recant her testimony identifying petitioner as the perpetrator of the crimes at Wolff's Jewelry Store in conversations with Wanda Diane Moore, Tonia Moore, Leroy Kelly, or any other person. (2 CT 414.) No evidence was introduced that Jackson had recanted to Wanda Moore or Tonia Moore, and the latter testified that she never discussed the murder with Jackson at all. (2 RT 293.) Jackson herself also denied that she ever told "Tonia Moore, Wanda Diane Moore, Leroy Kelly or anybody else, that [she] fingered Ronnie not Larry because [she] wanted to get even with Ronnie for what he had done to Alcus Dorton." (2 RT 295-296; see also 2 RT 334-338.) Further, Jackson confirmed the truth of her trial testimony (with which any recantation of it would have been inconsistent (2 RT 295)), which testimony the referee found to be credible. (2 CT 423.) The *only* evidence that Jackson had recanted to *anyone* was Leroy Kelly's account of a conversation he had with Jackson in 1993 (see 2 RT 236-241, 243-244, 250-253), but the referee found that testimony to be *not credible* (2 CT 423), an assessment fully supported by Jackson's contrary account of her conversation with Kelly (2 RT 334-338), by Kelly's overt feelings of hostility toward Jackson, whom he disparaged for being a "dyke" (2 RT 243), and by the other circumstances surrounding his testimony specified by the referee: "Kelly knew Ronnie Lee Bell since childhood," and he "believed that petitioner was unfairly convicted and punished for killing Alcus Dorton." (2 CT 413; see also 2 RT 270.) Also, "Kelly's demeanor changed [during his testimony]"; "he crossed his arms and he became nervous, and was observed to actually begin sweating on his forehead." (2 CT 414; see generally 2 RT 276-277, 280, 284.)

**Question 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?*

The referee found that Jackson had not instructed Dorton or Judge to lie to the police or at trial about the identity of the perpetrator, or to identify petitioner, contrary to their actual perceptions or observations. (2 CT 415.) That finding was supported by testimony of all three witnesses to that exact effect. (2 RT 296, 345, 357.) The referee also found that Jackson did not tell anyone that she believed the true perpetrator to be petitioner's brother Larry. (2 CT 415.) Again, the only evidence that could support a contrary conclusion was provided by Kelly, and his testimony was found to be not credible. (2 CT 413-414.)

**Question 3:** *Has Dorothy Dorton ever recanted her trial testimony identifying petitioner as the perpetrator? If so, was her trial identification of petitioner nonetheless truthful?*

The referee found that Dorton did not recant her trial testimony. (2 CT 415.) Dorton so testified, specifically denying that she signed the document presented to this Court as Exhibit H (and later withdrawn at the reference hearing) (2 RT 361-364; 3 RT 498), and the referee found her testimony to be credible. (2 CT 414.)

**Question 4:** *Has Ruby Judge ever recanted her trial testimony identifying petitioner as the perpetrator? If so, was her trial identification of petitioner nonetheless truthful?*

The referee found that Judge never recanted her trial testimony. (2

CT 415.) Judge reaffirmed her trial testimony at the reference hearing (2 RT 345-346-350), and the referee found her testimony to be credible. (2 CT 414.) Petitioner presented no evidence that Dorton had ever recanted.

> **Question 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?*
>
> As the referee explained:
>
> > 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. Further, even if credited, any doubt so cast did **not** reflect fundamental doubt about the accuracy and reliability of the eyewitness testimony identifying the petitioner as the perpetrator.

(2 CT 415, emphasis by referee.) The referee specified his reasons for disbelieving Kelly (see 2 CT 413-414), and they find ample support in the record. Petitioner's failure to demonstrate that either Dorton or Judge had recanted further supports the referee's determination that no fundamental doubt has been cast on the eyewitness testimony adduced at trial, as does the testimony provided by those same witnesses as the reference hearing, where it was credited by the referee.

**Question 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?*

The referee having found that the trial testimony of Jackson, Dorton, and Judge identifying petitioner as the perpetrator was *not* false, the premise of the Court's sixth question is unfulfilled. "Hypothetically," however, the referee also observed that *if* those witnesses' testimony identifying petitioner *had been* false, their testimony would have been material and probative. (2 CT 415.) On this record, that characterization would appear unassailable, and whatever may be its consequence to the proceedings in light of the referee's other findings, we do not expect petitioner will contest it.

**Conclusion**

The referee's findings made in response to this Court's questions are fully supported by the record. Thus, each of those findings is entitled at least to great weight, and those amounting to credibility assessments merit special deference.

## IV. CONCLUSION

For more than 15 years, petitioner has strung along the state and federal courts with assertions of "factual innocence" and "false testimony." Although he undoubtedly hoped to squeeze still more delay from them, this Court's rules and procedures for testing the validity of habeas claims finally caught up with him. Afforded a full opportunity to prove his claims, petitioner failed miserably. Indeed, his counsel compelled by ethical constraints to withdraw much of his "evidence," petitioner offered the referee nothing to support most of the assertions that underlay his claims, and the little evidence he offered in support of one assertion was wholly unworthy of belief. The Third Petition for Writ of Habeas Corpus should be denied.

Dated: April 11, 2007

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS FOLLOWING SUBMISSION OF THE REPORT OF THE REFEREE uses a 13 point Times New Roman font and contains 8338 words.

Dated: April 11, 2007

Respectfully submitted,

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