

O

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

BARRY GLENN WILLIAMS,
Petitioner,
v.
RON DAVIS*,
Warden, California State Prison
at San Quentin,
Respondent.

Case No. CV 00-10637 DOC
DEATH PENALTY CASE
[REDACTED]
ORDER GRANTING HABEAS
RELIEF CLAIMS 1(E), 6(B),
11(E) AND 5(C)

The Court has conducted an evidentiary hearing regarding the prosecutorial misconduct claims set forth in the Court’s December 10, 2013 Order, and has considered the post-hearing briefing submitted by the parties. Now, the Court issues the following Order.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

Following a trial by jury, Petitioner was convicted of the first degree murder of

* Ron Davis is substituted for his predecessors as Warden of California State Prison at San Quentin, pursuant to Federal Rule of Civil Procedure 25(d).

1 Jerome Dunn.¹ The sole special circumstance was that Petitioner had been previously
2 convicted of the June 16, 1981 murder of Donald Billingsley.

3 The charges against Petitioner originally arose out of two incidents: the shooting
4 deaths of Billingsley in June 1981, and Dunn in March 1982. Petitioner was initially
5 charged with Billingsley's murder but the information for that crime was dismissed for
6 insufficiency of the evidence presented at the preliminary hearing. After the prosecution
7 filed a new complaint charging Petitioner with the Billingsley murder and adding another
8 charge for the Dunn murder, the California Supreme Court ordered that the trial court sever
9 the two murder charges. Williams v. Superior Court, 36 Cal. 3d 441, 446 (1984). A .

10 **Guilt Phase Trial**

11 Prior to his trial for the Dunn murder, Petitioner was found guilty of one count of first
12 degree murder for the death of Billingsley, as well as two counts of attempted murder and
13 one count of conspiracy to commit murder. Petitioner was sentenced to 34 years to life in
14 state prison for the Billingsley murder. Petitioner's trial for the Dunn murder commenced
15 on October 16, 1985.

16 The principal witnesses against Petitioner were Patricia Lewis, an eyewitness, and
17 Arthur Cox and John Gardner, two jailhouse informants who testified regarding Petitioner's
18 comments to them about the Dunn murder. At the time of Dunn's murder, Petitioner, also
19 known as "Big Time," was a member of the 89th Street Family Bloods, a street gang in
20 South Central Los Angeles. Its rival gang was the Crips, especially the Avalon Garden
21 Crips. Bloods wore red; Crips wore blue. On the morning of March 25, 1982, Petitioner
22 led a meeting of Bloods in order to "protect" the neighborhood from various Crips and it
23 was stated at the meeting that anyone who wanted to shoot rival gang members could go out
24 and shoot.

25 On the afternoon of the same day, Marcellus Gray (deceased by the time of trial),
26

27 ¹ These facts are set forth in the Court's December 10, 2013 Order and the California Supreme
28 Court's decision on direct appeal, set forth in People v. Williams, 16 Cal. 4th 153, 176-86 (1997).

1 along with Kathleen Gurley, drove in Gray's blue van to a Food Barn near the corner of
2 Rosecrans and Central. Gurley testified that around 6:30 p.m., Gray came running into the
3 market and recounted that his van had just been stolen from him at gunpoint by two
4 African-American men. Gurley and Gray returned home after reporting the theft to the
5 police.

6 Shortly after the van was stolen, it was driven towards the intersection of 88th Place
7 and McKinley Avenue. When the van arrived at the intersection, Kenneth Hayes, and the
8 victim, Dunn, were riding on their bicycles. Both Hayes and Dunn associated with the
9 Grape Street Crips gang, and both were dressed in blue clothing, which was typical for Crip
10 gang members.

11 At that time, Lewis was a passenger in a station wagon driven by Jean Rivers which
12 was stopped at the stop sign on 88th Place. Lewis identified Gray's van as the one she had
13 seen at that intersection, and described seeing two young men riding on their bicycles.
14 When the van began to turn, she looked at the driver, whom she identified as Petitioner.
15 She saw that Petitioner had something shiny in the upper right side of his mouth, because
16 the occupants of the van were laughing. She also testified that as Dunn rode by, the driver
17 of the van said, "Let's go f___ him up," and that they drove to the place where Dunn had
18 stopped on his bicycle and spoke with Dunn. (Later, years after the trial concluded,
19 Petitioner discovered that Lewis's testimony identifying the driver of station wagon as Jean
20 Rivers was false; the true identity of this woman was Arlene McKay.)

21 As Hayes rode closer on his bicycle, he heard chattering and laughter, and stopped
22 within three or four feet of the driver's door and could see the driver's hands on the wheel.
23 Then, a person's hand and right arm came out of the van driver's window, holding a
24 handgun, with the muzzle four or five inches from Dunn's head. Hayes watched as the
25 shooter fired about four shots at Dunn, who fell from his bicycle after the first shot. Dunn
26 jumped and blood came from his mouth and nose. In all, the shooter fired five .38-caliber
27 bullets into Dunn's head and upper body, killing him.

28 Lewis testified that, as she watched the van, she leaned over and rolled down the

1 driver's side window because she was "nosey." Petitioner was wearing a dark jacket and
2 Lewis saw his hand come out through the driver's side window of the van holding a gun.
3 At that point, Rivers drove the station wagon forward and Lewis heard three or four
4 gunshots. Rivers then drove to Lewis's home on 87th Place. Prior to entering her home,
5 Lewis saw the van again, and Curtis Thomas (aka Bongo) and Mark Williams were in the
6 van with Petitioner.

7 Less than an hour later, police recovered Gray's van approximately four blocks from
8 the scene of the shooting. Hayes identified it as the van from the shooting.

9 John Gardner testified that, at about 9:00 p.m. on the evening Dunn was shot, he saw
10 Petitioner and Petitioner told him that he had taken a rival Crip member from "out of the
11 box" (gang jargon meaning that Petitioner had killed him). Gardner testified that Petitioner
12 stated that it was "Silky" he had killed, but muttered under his breath that the victim was
13 actually "Bone" (Dunn's gang name). Petitioner also discussed the murder again with
14 Gardner a week and a half later.

15 Cox testified that, while he and Petitioner were in Los Angeles County Jail together,
16 Petitioner told Cox that Blood gang member Thomas (aka Bongo), who was in the van with
17 Petitioner when Dunn was killed, actually shot Dunn, but Petitioner had told him to shoot.
18 Petitioner also told Cox that all of the Crips in the jail were trying to "get" him for killing
19 Bone.

20 Following his arrest and prior to trial, Petitioner attempted to intimidate Lewis by
21 arranging for a fellow gang member, Mark Williams (no relation to Petitioner and also
22 known as "Snoop Dog") to shoot at Lewis's home while she and her family were inside.
23 This shooting occurred on an evening in January 1983. Lewis was at home with her
24 husband and grandson, and 45 to 50 shots were discharged into the house. Lewis, holding
25 the baby, crawled to safety in a back bedroom. Lewis had never experienced anything
26 similar to this event and feared for her life. Consequently, she testified falsely at the
27 preliminary hearing that she did not know whose arm had held the gun that was used to
28 shoot Dunn.

1 Kenneth Simmons, a former member of the 89th Street Family Bloods, first testified
2 that he did not remember having a conversation with Mark Williams, but later testified that
3 Williams had told him that Petitioner wanted Williams to scare “the lady on 87th Street who
4 was going to court on him.” Specifically, Simmons testified that, on January 7, 1983,
5 Simmons was “getting high” with Williams and Williams told him that he and others had
6 gone to “take care of some business” involving a witness who was testifying against
7 Petitioner, but it “wasn’t done right.” Simmons testified that Williams told him it was
8 Petitioner who wanted this “business” taken care of and that the witness lived on 87th Street.
9 However, Mark Williams testified and denied shooting at Lewis’s house and any
10 conversation with Simmons regarding any shooting. Nevertheless, Williams admitted that
11 he was a member of the 89th Street Family Bloods at the time of the Dunn murder and that
12 he knew Petitioner.

13 Petitioner’s counsel presented an alibi defense that Petitioner was with Jeanette
14 Houston, the mother of his child, on the night of the murder and stayed overnight at the
15 home of Petitioner’s aunt, Lena Bridges. Bridges testified that, on that night, she was
16 preparing to go to a cosmetics sales party and Petitioner and Houston stayed together that
17 night in one of the bedrooms of the house. Edward Sanchez, a private defense investigator,
18 testified that Houston told him these facts during an interview in August 1982. However,
19 Houston (née Jeanette Renee King), testified that her relationship with Petitioner ended in
20 October 1981, although she continued to see Petitioner after that. Houston further testified
21 she did not recall seeing Petitioner on March 25, 1982, but remembered hearing about a
22 shooting that occurred that day. Houston also testified that she and Petitioner were together
23 on the night after the shooting, but not on the night of the shooting. Bridges testified that
24 Petitioner and Houston were in her home together on the evening of March 25, 1982. She
25 also testified that Petitioner came out of the bedroom to take a call around 6:30 p.m. and
26 then reentered the bedroom. She last saw Petitioner and Houston around 7:30 to 7:45 p.m.
27 when she was preparing to attend a cosmetics party. To corroborate this testimony, the
28 defense presented a receipt for cosmetics that were ordered by Bridges dated March 25,

1 1982.

2 The defense also challenged the prosecution's eyewitness testimony and offered Dr.
3 Shomer, a psychologist, as an expert on eyewitness identification. When questioned
4 hypothetically with factors about the night of the murder described in Lewis's identification
5 of Petitioner, Dr. Shomer opined that those factors might cause misidentification. The
6 defense also presented Dr. Golden, a forensic dentist, who testified that approximately one-
7 eighth of the African-American male teenagers he had examined while working at a
8 dentistry clinic had a stainless steel crown in the front of the mouth, like Petitioner.

9 In addition, Hayes testified that, on the evening of the murder, he had to steer around
10 the station wagon and noticed that there was a person sitting on the passenger side and the
11 windows were foggy and rolled up.

12 Joe Lewis, Patricia Lewis's husband, testified that Petitioner had been a member for
13 four to five years of a neighborhood youth "cadet corps" he had organized. As part of the
14 cadet corps, Petitioner had been in the Lewis's backyard every day during that period and
15 Lewis was sometimes there. Mr. Lewis maintained a photo album containing pictures of
16 the cadets, and Mrs. Lewis, he was sure, had seen the album. Los Angeles Police Detective
17 Michael Mejia, an investigating officer, testified that he was shown the album and noted that
18 it contained Petitioner's picture.

19 Los Angeles Police Officer Jerry Jones testified that, on the night Dunn was shot,
20 Hayes told him that the van driver's hands were on the steering wheel and it was the
21 passenger in the van who had extended his arm holding a gun.

22 Furthermore, the defense questioned the motives of the prosecution's informant
23 witnesses, Arthur Cox and John Gardner. Mejia testified that Arthur Cox had sought to "cut
24 a deal for information," and Petitioner had told Cox that Curtis Thomas had shot Dunn,
25 although no charges were brought against Thomas. Moreover, Ernest Cox testified that
26 when he was housed in the same cell in the Los Angeles County Jail with his brother,
27 Arthur Cox, he saw Arthur reading Petitioner's preliminary hearing transcript. In addition,
28 Ernest testified that Arthur told him that Arthur could receive a sentence of probation,

1 instead of a prison term, on a robbery charge pending against him if he could provide
2 information that would help the District Attorney convict Petitioner in this case. Ernest
3 further testified that Arthur told him that Arthur had only pretended to know something
4 about Petitioner's case when speaking with Deputy District Attorney Jacobs and would need
5 to "find something." On cross-examination, the prosecution questioned Ernest if he was
6 testifying against his brother to avoid gang retaliation in Folsom prison where he was
7 serving a life sentence, although Ernest denied the allegation.

8 Defense counsel attempted to discredit Gardner in his cross-examination by
9 suggesting it was Gardner, rather than Petitioner, who said it was "Bone" (Dunn) who had
10 been killed. Defense counsel also sought to expose Gardner's motivation for testifying
11 against Petitioner for benefits. Although Gardner testified that the only thing he received
12 was relocation for himself and his mother, he acknowledged that he only received a
13 sentence of eight days in jail when he pled guilty to a charge of possession of marijuana for
14 sale.

15 Finally, Petitioner attempted to cast doubt on the thoroughness of the investigation
16 conducted into the available fingerprint evidence.

17 At the conclusion of the guilt phase trial, the jury found Petitioner guilty of first
18 degree murder of Dunn, and found true the allegations that he was a principal armed with
19 a firearm and he personally used a firearm in the commission of the offense. Subsequently,
20 Petitioner admitted a prior murder special circumstance allegation in the Dunn case.

21 **B. Penalty Phase Trial**

22 At the penalty trial, the prosecution submitted evidence regarding Petitioner's
23 involvement in a shooting at a church carnival (cakewalk incident), through the testimony
24 of Karry Island (aka, Kerry Island), Mary Nixon, Barbara Nixon, and Deontray Turner. The
25 prosecution's evidence showed that Petitioner was the leader of the attack, and the one who
26 fired the first shot and yelled, "This is Neighborhood Family Blood 89th Street." There were
27 criminal charges filed against Petitioner in connection with this incident, but the case
28 ultimately was not prosecuted.

1 In addition, the prosecution submitted evidence regarding the Billingsley murder in
2 Green Meadow Park through the testimony of Arthur Cox and eyewitnesses, including Lea
3 Stoneham. Arthur Cox also testified that he attended a meeting at Margot Bridges's house
4 in June 1981, which was attended by seven or eight 89th Street Family Bloods and led by
5 Petitioner and Junior Bridges. The purpose of the meeting was to plan a shooting of the
6 members of the Green Meadows Park Boys gang and the Avalon Garden Crips gang at
7 Green Meadows Park. Petitioner selected a .357-caliber handgun to use from shotguns and
8 handguns laid out on the floor at the meeting. They were planning to go to the park in a
9 blue Cadillac belonging to a fellow gang member known as "Hang Bang."

10 Stoneham testified that she had known Petitioner since elementary school and worked
11 as a pool attendant at Green Meadows Park. In addition, she testified that she saw a blue
12 Cadillac, which she recognized from the neighborhood, that belonged to "Bang." Five or
13 ten minutes later, Stoneham saw Petitioner and one other person walk towards the stage.
14

15 Carol Freeman testified that she was among a group of about 10 people around an
16 outdoor stage at Green Meadows Park that night, and no one had weapons. Freeman
17 testified that she saw Petitioner and one other person shooting at a group of people from
18 behind nearby bushes. Specifically, she described how Petitioner fired through a gap in the
19 bushes. Carol Freeman and Anthony Debose sustained shooting injuries, and Billingsley
20 was killed by a bullet that Petitioner's weapon was capable of firing.

21 Arthur Cox testified that he went back to Margot Bridges's house after Billingsley
22 had been shot, and Petitioner and others were there discussing what had happened the prior
23 night at Green Meadows Park. Petitioner said he did not shoot the person who died from
24 a shotgun wound, as he had been carrying a .357-caliber weapon.

25 In addition, the prosecution entered into evidence a certified copy of Petitioner's
26 guilty plea in connection with a charge of possessing a handmade "shank" while he was in
27 Los Angeles County Jail awaiting trial.

28 In Petitioner's defense at the penalty phase, Petitioner's aunt, Lena Bridges testified

1 that Petitioner's mother had abandoned him when he was three days old and Petitioner was
2 raised by Bridges and Petitioner's grandmother. Various residents of Petitioner's
3 neighborhood testified that Petitioner was a person of good character and did not deserve
4 the death penalty.

5 Petitioner's wife, Dawn Williams, testified that they had known each other for more
6 than five years and they were married while Petitioner was in custody. She testified that she
7 married him because she loved him and liked the way he understands people and is warm-
8 hearted. She did not believe he should receive the death penalty.

9 Joe Lewis, Patricia Lewis's husband, testified that he ran a youth community group
10 called the Southeast Cadet Corps in 1967 after the Watts riots. It was a quasi-military
11 group, teaching only discipline and control, not weaponry. The members drilled five days
12 a week, and Petitioner was a member of the Cadet Corps until he became a gang member.
13 Mr. Lewis testified that Petitioner was one of the better boys in the group, moving from
14 "private" to "second lieutenant." In order to achieve such a promotion, a cadet was required
15 to have recommendation letters from teachers and people in the neighborhood.

16 Jeanette Houston was the mother of Petitioner's son, Damien, who was five years old
17 at the time of trial. When she was eight months' pregnant with Damien, Houston was shot
18 by a Crip gang member. Even though he had been shot, Petitioner had tried to protect her.

19 Finally, Petitioner testified at the end of the penalty phase. He testified that the
20 weapon he possessed in jail was for his protection because he had been placed in a Crips
21 section. He further testified that he was not the shooter at the cakewalk incident, although
22 he could not recall where he had been on the day the incident occurred. He voluntarily went
23 to the police station when he learned the police were looking for him in connection with that
24 incident and spent 12 days in custody. He had ongoing disputes with Karry Island, a
25 principal witness against him in the cakewalk incident, because Island originally had wanted
26 Petitioner and his friends to become Crips.

27 In addition, Petitioner testified that he dropped out of the Bloods when his son was
28 born. Petitioner worked to support his son and often spent time with him. Petitioner

1 testified that items the police had taken from his home indicating gang membership after
2 1980 were simply relics of his past gang association.

3 Margaret Bennett, a clinical psychologist, testified that she had evaluated Petitioner
4 and her tests and interviews were not consistent with the charges against him. She testified
5 that Petitioner did not appear to have the “personality structures” or “levels of violence or
6 anger” to indicate his capability to commit the murders with which he was charged. She
7 could only explain Petitioner’s behavior as resulting from his long-term association with
8 gangs. Although she acknowledged that gang involvement in prison would enhance the risk
9 that an inmate would be violent, she did not anticipate that Petitioner would be violent or
10 hostile in prison.

11 After the penalty trial, Petitioner was sentenced to death on July 11, 1986.

12 **II. Procedural Background**

13 On appeal, the California Supreme Court affirmed Petitioner’s conviction and
14 sentence. Williams, 16 Cal. 4th 153. Shortly thereafter, the United States Supreme Court
15 denied certiorari. Williams v. California, 522 U.S. 1150 (1998). Petitioner filed his first
16 state habeas petition on November 21, 1995, which the California Supreme Court denied
17 on September 18, 2000.

18 This case commenced on January 4, 2000, when Petitioner filed his request for
19 counsel. On September 18, 2001, Petitioner filed his initial Petition. On that same day, he
20 also filed an exhaustion petition in the California Supreme Court. On March 7, 2002,
21 Respondent filed a motion to dismiss the Petition and, on April 5, 2002, Petitioner filed a
22 motion to stay the federal proceedings pending resolution of state habeas proceedings. In
23 an October 10, 2002 Order, the Court granted a stay of the federal litigation.

24 Following the denial of Petitioner’s exhaustion petition in state court, proceedings
25 resumed in this Court and Petitioner’s First Amended Petition (FAP) was deemed filed as
26 of December 23, 2003.² Respondent filed an Answer on May 13, 2004. Thereafter,

27
28 ² The 2001 exhaustion petition presented the same claims set forth in the FAP. (FAP at 7.)

1 Respondent filed a Motion to Dismiss various claims on the grounds that they were
2 procedurally defaulted, and the Court issued an order striking it without prejudice on
3 February 15, 2007. On December 26, 2007, the Court granted discovery of the agreed-upon
4 items set forth in the parties' Joint Stipulation and, on February 19, 2008, resolved the
5 remaining discovery disputes.

6 On July 31, 2009, Petitioner filed the Motion for Evidentiary Hearing (MEH), and
7 this briefing closed on January 28, 2010. The MEH briefing was based in part on discovery
8 taken during these federal habeas proceedings. While the MEH was under submission, the
9 Supreme Court issued opinions in Cullen v. Pinholster, 563 U.S. 170 (2011), and Walker
10 v. Martin, 562 U.S. 307 (2011). The Court then directed the parties to brief any impact
11 these decisions might have on the MEH. In a March 6, 2012 Order, the Court rejected
12 Petitioner's arguments that Pinholster had no impact on his entitlement to an evidentiary
13 hearing and, instead, found that an evidentiary hearing should not be granted unless
14 Petitioner satisfied 28 U.S.C. § 2254(d) based solely on the state court record. (March 6,
15 2012 Order at 12.) In addition, the Court denied Petitioner's ineffective assistance claims
16 and juror-related claims, and directed the parties to brief the merits on the record that was
17 before the California Supreme Court as to all other claims on which Petitioner sought an
18 evidentiary hearing. (Id. at 69.) On December 10, 2013, the Court issued an order granting
19 discovery and an evidentiary hearing as to certain prosecutorial misconduct claims, and
20 denying the remaining claims.

21 **III. Evidentiary Hearing, March 12, 2015 through April 30, 2015**

22 On March 12, 2015, an evidentiary hearing as to certain prosecutorial claims
23 commenced. John Gardner testified regarding his involvement in Petitioner's trial, but his
24 health was poor he did not have a good memory. (March 12, 2015 Reporter's Transcript
25 (RT) Vol. 1 at 1-83, 259-63.)

26 Dr. Beth Chrisman testified as a handwriting expert and compared various
27 handwriting exemplars in order to determine the author of several documents. (March 12,
28 2015 RT Vol. 1 at 104-15.) The parties stipulated that Dr. Chrisman's direct examination

1 could proceed through her report.

2 Mark Hammond, a paralegal from the Office of the Federal Public Defender (FPD),
3 testified that he had reviewed trial counsel's files and testified as to whether certain
4 documents were contained in those files. (March 12, 2015 RT Vol. 1 at 116-30.) Hammond
5 further testified about his participation in a crime scene reconstruction that was conducted
6 on March 25, 2014, the same day and time as the Dunn murder. (Id. at 130-38.) A video
7 was played of the crime scene reconstruction. (Id. at 138.) In addition, Bob Snook testified
8 regarding the creation of the crime scene reconstruction video. (Id. at 161-75.)

9 Frank Ferguson testified regarding his interview of Cox in June 1994 while he was
10 working with the ACLU representing Petitioner in his state habeas proceedings. (March 12,
11 2015 RT Vol. 1 188-207.)

12 Alvin Henley, a retired Los Angeles County Deputy Sheriff who worked at the Los
13 Angeles Central Jail from 1981 to 1992, testified regarding the jail's practices of placing
14 informants within the jail. (March 12, 2015 RT Vol. 1 213-53.)

15 James Jacobs, a former Deputy District Attorney testified. (March 12, 2015 RT Vol.
16 2 at 284-319.)

17 Alexandra Natapoff, a professor at Loyola Law School, testified about the misuse of
18 jailhouse informants in the Los Angeles County Jail system during the 1980s. (March 12,
19 2015 RT Vol. 2 at 319-64.)

20 At the conclusion of proceedings on March 12, 2015, the Court issued a bench
21 warrant for Arthur Cox, who failed to appear at the hearing after being subpoenaed. An
22 officer for the United States Marshall Service located Arthur Cox and Cox agreed to appear
23 in Court to testify. Consequently, the evidentiary hearing resumed on April 23, 2015, for
24 the purpose of obtaining Cox's testimony. (April 23, 2015 RT at 9-83.)

25 On April 30, 2015, the evidentiary hearing continued. John Hammond again testified
26 regarding his interview of Arthur Cox and his draft of a declaration summarizing the
27 interview that Cox signed in June 2001. (April 30, 2015 RT Vol. 1 at 7-34.)

28 James Jacobs again testified regarding the use of Arthur Cox as an informant in the

1 Dunn murder case. (April 30, 2015 RT Vol. 1 at 34-170.)

2 Carmen Trutanich testified regarding his prosecution of Petitioner in the Dunn
3 murder case, as well as the investigation of the second eyewitness (Arlene McKay, aka Jean
4 Rivers) in the car with Patricia Lewis and the use of John Gardner and Arthur Cox as
5 informants. (April 30, 2015 RT Vol. 1 RT at 170-212; April 30, 2015 RT Vol. 2 at 4-87;
6 April 30, 2015 RT Vol.3 at 4-45.)

7 Jim Bell, an investigator for the District Attorney’s Office, testified regarding his
8 investigation of witnesses in connection with Petitioner’s trial. (April 30, 2015 RT Vol. 3
9 at 46-78.)

10 Joe Holmes, a retired Los Angeles Deputy Sheriff’s investigator, testified regarding
11 his discussions with John Gardner and the use of Gardner as an informant in the Dunn
12 murder case. (April 30, 2015 RT Vol. 3 at 79 -124.)

13 **IV. Post-Evidentiary Hearing Briefing**

14 Following the evidentiary hearing, Petitioner’s Post-Hearing Brief was filed on
15 September 14, 2015; Respondent’s Post-Hearing Evidentiary Hearing Brief was filed on
16 October 12, 2015; and the Reply in Support of Petitioner’s Post-Hearing Brief was filed on
17 October 26, 2015. In addition, on September 14, 2015, Petitioner filed a Motion for Order
18 to Expand the Record Pursuant to Habeas Rule 7; on October 30, 2015, Respondent filed
19 an Opposition To Petitioner’s Motion to Expand the Record Pursuant to Habeas Rule 7
20 (MTE); and on November 13, 2015, Petitioner filed a Reply. On November 17, 2015, the
21 Court granted the MTE in part and denied it in part.

22 **DISCUSSION**

23 **I. Standards**

24 The amendments to 28 U.S.C. § 2254 effected by the Anti-Terrorism and Effective
25 Death Penalty Act of 1996 (AEDPA) govern the FAP, because this case was filed after the
26 effective date of that statute. Woodford v. Garceau, 538 U.S. 202, 210 (2003). Under the
27 AEDPA, a state prisoner whose claim has been “adjudicated on the merits” cannot obtain
28 federal habeas relief unless that adjudication: “(1) resulted in a decision that was contrary

1 to, or involved an unreasonable application of, clearly established Federal law, as
2 determined by the Supreme Court of the United States; or (2) resulted in a decision that was
3 based on an unreasonable determination of the facts in light of the evidence presented in the
4 State court proceeding.” 28 U.S.C. § 2254(d)(1) and (2). Because Petitioner’s claims in the
5 FAP were adjudicated on the merits, he was required to satisfy either § 2254(d)(1) or §
6 2254(d)(2) in order to obtain relief in this case.

7 As set forth in the December 10, 2013 Order, for the claims that Petitioner
8 demonstrated a violation of either § 2254(d)(1) and/or § 2254(d)(2) on the basis of the
9 record that was before the state court, the Court granted an evidentiary hearing. (December
10 10, 2013 Order at 69-70); See Pinholster, 131 S. Ct. at 1400 (holding that a district court
11 must make the § 2254(d) determination prior to eliciting further evidence at an evidentiary
12 hearing, because “evidence introduced in federal court has no bearing on § 2254(d)(1)
13 review.”).

14 Now, in rendering the following decision, the Court reviews de novo the evidence
15 elicited through discovery and at the evidentiary hearing in these proceedings and is no
16 longer constrained by the limitations imposed by § 2254(d). Frantz v. Hazey, 533 F.3d 724,
17 737 (9th Cir. 2008) (“In sum, where the analysis on federal habeas, in whatever order
18 conducted, results in the conclusion that § 2254(d)(1) is satisfied, then federal habeas courts
19 must review the substantive constitutionality of the state custody de novo.”); See also, e.g.,
20 Williams v. Woodford, 859 F. Supp. 2d 1154, 1161 (E.D.Cal. 2012) (Kozinski, J., sitting
21 by designation).

22 **II. Prosecutorial Misconduct**

23 In these proceedings, the Court must determine whether Petitioner has established
24 certain prosecutorial misconduct claims that he alleges pursuant to Napue v. Illinois, 360
25 U.S. 264, 269 (1959), and Brady v. Maryland, 373 U.S. 83 (1963).

26 In Napue, the Supreme Court held that a prosecutor’s knowing presentation of false
27 evidence violates a defendant’s right to due process. Napue, 360 U.S. at 269; United States
28 v. Agurs, 427 U.S. 97, 120-21 (1976). “[T]he knowing use of false testimony to obtain a

1 conviction violates due process regardless of whether the prosecutor solicited the false
2 testimony or merely allowed it to go uncorrected when it appeared.” United States v.
3 Bagley, 473 U.S. 667, 679 n.8 (1985). In order to prevail on a Napue claim, a petitioner
4 must demonstrate that: (1) the testimony or evidence was actually false; (2) the prosecution
5 knew or should have known that the testimony or evidence was actually false; and (3) the
6 false testimony was “material.” Hayes v. Brown, 399 F.3d 972, 984 (9th Cir. 2005) (en
7 banc) (quoting United States v. Zuno-Arce, 339 F.3d 886, 889 (9th Cir. 2003)).

8 In Brady, the Supreme Court held that “the suppression by the prosecution of
9 evidence favorable to an accused upon request violates due process where the evidence is
10 material either to guilt or to punishment, irrespective of the good faith or bad faith of the
11 prosecution.” 373 U.S. at 87. “There are three components of a true Brady violation: The
12 evidence at issue must be favorable to the accused, either because it is exculpatory, or
13 because it is impeaching; that evidence must have been suppressed by the State, either
14 wilfully or inadvertently; and prejudice must have ensued.” Strickler v. Greene, 527 U.S.
15 263, 281-82 (1999).

16 In order to assess their materiality, Napue and Brady violations should be considered
17 collectively. Jackson v. Brown, 513 F.3d 1057, 1071 (9th Cir. 2008) (stating that courts
18 should evaluate the “cumulative effect of the prosecutorial errors for purposes of materiality
19 separately and at the end of the discussion.”) (citing Kyles v. Whitley, 514 U.S. 419, 436
20 n.10 (1995)) (internal quotation marks omitted). Specifically, Napue errors should be
21 considered collectively first. Jackson, 513 F.3d at 1076. If the Napue errors are not
22 material standing alone, the Court must consider the Napue and Brady errors together and
23 determine whether “there is a reasonable probability that, but for counsel’s unprofessional
24 errors, the result of the proceeding would have been different.” Id.

25 **III. Prosecutorial Misconduct Claims in connection with John Gardner’s Testimony**

26 In the December 10, 2013 Order, the Court found that Petitioner had demonstrated
27 a violation of § 2254(d) and was entitled to explore at an evidentiary hearing his Napue
28 allegations in Claims 1(B), 4(B) and (E), and 11(E) pertaining to Gardner’s testimony

1 implicating Petitioner in the Dunn murder and additional benefits Gardner received in
2 connection with a robbery. (December 10, 2013 Order at 27.) In addition, the Court
3 allowed Petitioner to explore allegations as to whether Gardner received drug rehabilitation
4 from the prosecution as an additional benefit for providing testimony. (Id. at 27 (citing
5 Townsend, 372 U.S. at 318).) The Court further found that Petitioner was entitled to
6 explore at an evidentiary hearing his Brady allegations regarding Gardner’s false testimony
7 and additional benefits, as well as his Brady allegations that the prosecution “coached”
8 Gardner’s testimony. (December 10, 2013 Order at 52-53.)

9 Prior to trial, on Mach 25, 1985, the prosecution videotaped Gardner’s statement to
10 Deputy Holmes and Gardner also signed a written statement implicating Petitioner in the
11 Dunn murder. (Pet.’s Evid H’g Ex. 78.) At trial, Gardner testified that he saw Petitioner
12 on the evening after the Dunn murder around 9:00 p.m. and a week and a half later, and
13 Petitioner told him on both occasions that he “took someone out of the box” -- a street term
14 meaning that he had killed someone. (RT at 7035-38.) Gardner testified that Petitioner
15 identified this person as “Silky” but later said under his breath that it was “Bone.” (RT at
16 7039-40.) Gardner further testified that the only benefit provided to him by law
17 enforcement in exchange for testifying against Petitioner was “relocation” of Gardner and
18 his mother from Compton to another location. (RT at 7046, 7070.)

19 On cross-examination, Gardner testified that he had told Holmes about his
20 participation in a burglary or robbery of a bakery occurring on the same day as the Dunn
21 murder, but he was never charged or prosecuted for that crime. (RT at 7064-67.) When
22 asked if it was a “favor” from Holmes, Gardner responded “[c]all it what you want.” (RT
23 at 7066.) In his closing argument, defense counsel reminded the jury that Gardner and his
24 family were relocated, and that the record supported further inferences that Gardner had
25 received favorable treatment from law enforcement in connection with his marijuana
26 conviction and robbery for testifying against Petitioner. (RT at 8274, 8340.)

27 In these federal habeas proceedings, Petitioner supported this claim with the
28 following evidence: 1995 State Pet., Ex. 158 (May 11, 1994 Declaration by Gardner

1 stating that: as part of his agreement to testify against Petitioner, a robbery case against him
2 was not prosecuted; Gardner never heard Petitioner say that he was responsible for killing
3 anyone; Gardner was relocated along with his family to public housing as part of his
4 agreement to testify and Detective Bell bought him \$300 worth of groceries and paid the
5 mover's fee; and Gardner received a check for \$400 to \$500 after he testified); 1995 State
6 Pet., Ex. 165 (handwritten note stating: "Patricia Lewis, 884 E. 50th, LA, CA, Wed. Noon,
7 Re-locate + Dry-out program, Dry-out cocke program, B.B. Baby-Boy [Gardner's gang
8 name], Withers Assistance"); and FAP, Ex. 18 (July 24, 2001 Declaration signed by
9 Gardner stating that: "Trutanich basically told me that either Barry was going to do time for
10 the murder or I was going to do time for the robbery"; Gardner agreed to testify against
11 Petitioner and "Trutanich and his people coached me and told me what to say on the stand"
12 even though "I have never heard Barry Williams say that he was responsible for killing
13 anyone"; "I am absolutely certain that Barry Williams was not part of [the] group" of Blood
14 gang members who went to the Green Meadows Park on the night Billingsley was killed;
15 and Junior Bridges came to the home of the Moody family on the night Dunn was killed and
16 had a recently-fired gun that he wanted hidden and was never found.)

17 In addition, Petitioner deposed Gardner in this case in 2008. In his deposition,
18 Gardner testified that Holmes initially approached him in connection with a murder, and
19 then he met with Holmes, Bell, and Trutanich. (Resp.'s Evid. H'g Ex. 2 (Gardner Depo. at
20 14-15).) Gardner stated that, in exchange for his testimony, these men offered him
21 "[r]elocation, a drug program and no jail time" in connection with a robbery for which he
22 faced up to five years in prison. (Id. at 16.) Gardner stated that the officers told him that
23 they wanted him to specifically testify that "Barry was the one who did the shooting." (Id.)
24 Prior to that, Gardner had not told these men or anyone else that Petitioner was responsible
25 for shooting Dunn. (Id.) Gardner further said that Bell and Trutanich told him "how to say
26 what happened that didn't happen." (Id. at 18.) His testimony at trial that Petitioner told
27 Gardner that he had shot Dunn was not truthful. (Id. at 22.) After Gardner found out about
28 the verdict, he tried to call the prosecutor to tell him that he had lied but nothing was done.

1 (Id. at 23-24.) Gardner remembered being approached by the ACLU and signing a
2 declaration stating that his trial testimony was not truthful because he wanted to “set
3 everything straight” and “make everything right.” (Id. at 41-42.) Gardner also remembered
4 signing a similar declaration in 2001, stating that he wanted to “set the record straight” and
5 that he was “coached” and “lied” at Petitioner’s trial. (Id. at 47.)

6 At the evidentiary hearing on March 12, 2015, Gardner testified that his health was
7 poor and he was taking numerous medications which impacted his memory. (March 12,
8 2015 RT Vol. 1 at 15-16.) He did not recall testifying at Petitioner’s trial in 1986, nor that
9 he was facing charges for any crimes at that time. (Id. at 19-20, 56.) He did not recall
10 having previously been in counseling for a drug problem. (Id. at 33.) However, Gardner
11 testified that he smoked “sherm” (PCP) daily in 1985. (Id. at 28.) Despite counsel’s
12 attempts to refresh his recollection by showing Gardner his deposition testimony, Gardner
13 did not have any independent recollection of his statements to law enforcement in 1985, the
14 substance of his testimony at Petitioner’s trial, the Dunn murder, his 1994 declaration, or
15 any statements that he had made indicating that his trial testimony was not true. (Id. at 56-
16 60, 64, 80.) Gardner recalled Petitioner, and remembered that Petitioner was a member
17 of the Bloods street gang, but did not recall whether he told law enforcement that he saw
18 Petitioner with a gun. (Id. at 76.) Gardner recalled that he moved, but does not remember
19 being in protective custody. (Id. at 69.) Gardner did not recall being an informant for
20 Deputy Holmes in other cases. (Id. at 77.)

21 Kevin Fletcher testified at the evidentiary hearing that he knew Gardner growing up
22 as “Baby Boy,” and they had similar friends. (March 12, 2015 RT Vol. 1 at 92-93.)
23 Although Gardner had stated that Fletcher was present when Petitioner told Gardner that he
24 shot Bone, Fletcher testified that Petitioner had never said anything to that effect. (Id. at
25 94.) In March 1982, Fletcher was 12 years old and affiliated with the Bloods. (Id. at 96.)
26 Petitioner was over 18 years old at that time. (Id.)

27 Jim Bell testified that he did not remember much about this case due to the passing
28 of time. (April 30, 2015 RT Vol. 3 at 59.) He recalled that drug rehabilitation for Gardner

1 was something that might have been discussed prior to Petitioner’s trial. (Id. at 60.)

2 Joe Holmes, a retired Los Angeles County Deputy Sheriff, testified regarding his
3 investigation of the Dunn murder and his interviews with Gardner. (April 30, 2015 RT Vol.
4 3 at 79-124.) Holmes recalled that Gardner was a reliable informant who was affiliated with
5 the 84 Swans (Bloods) street gang and, between 1983 and 1984, Gardner had provided
6 Holmes 25 pieces of information that led to 15 search warrants. (Id. at 80, 87.) At the time
7 the Holmes contacted Gardner regarding information on the Dunn murder in 1985, Holmes
8 recalled that Gardner was on probation for a marijuana violation. (Id. at 81-83.) Holmes
9 spoke to Gardner’s probation officer about Gardner’s assistance, but Holmes never made
10 any inducements or promises in connection with Gardner’s assistance with the Dunn
11 murder. (Id.) Holmes recalled that Gardner had committed a marijuana violation and had
12 broken into a bakery to steal pies, cakes, and drinks in 1982. (Id. at 89.) Holmes never
13 knew Gardner to be a drug user. (Id. at 97.)

14 When counsel questioned Holmes about the videotaped interview on March 25, 1985,
15 Holmes testified that no one else was present during the videotaped interview with Gardner,
16 aside from the videographer. (April 30, 2015 RT Vol. 3 RT at 114, 116.) Nevertheless, in
17 a tape of this interview, there is a knock on the door and Trutanich’s name is heard. (Id. at
18 114-15.) Despite the fact that the video shows that Holmes looks away from the camera
19 to read something and Holmes’s statement to Cox in the video appears to be the instructions
20 written in a note identified to be Trutanich’s handwriting by Dr. Chrisman, Holmes testified
21 that he did not remember being handed any notes. (Id. at 115-16.) Although a transcript
22 of Gardner’s interview with the prosecution team identifies Trutanich as present, Holmes
23 did not recall it. (Id. at 114-16.)

24 In determining this claim, a pivotal issue is whether the Court should credit Gardner’s
25 statements in his 1994 and 2001 declarations and Gardner’s 2008 deposition testimony
26 recanting his trial testimony that Petitioner admitted the Dunn murder to him and his trial
27 testimony that he received nothing aside from relocation as a benefit in exchange for his
28 testimony. Generally, recanted testimony is viewed with suspicion. See, e.g., Dobbert v.

1 Wainwright, 468 U.S. 1231, 1233, 105 S. Ct. 34, 36 (1984) (Brennan, J., dissenting from
2 denial of certiorari and stating “Recantation testimony is properly viewed with great
3 suspicion”); United States v. Leibowitz, 919 F.2d 482, 483 (7th Cir. 1990) (“Judges view
4 recantation dimly”).

5 **A. Napue Claims pertaining to Gardner**

6 Here, Petitioner cannot establish that the prosecution knowingly elicited false
7 testimony from Gardner in violation of Napue. Moreover, Petitioner has not met the heavy
8 burden to show that Gardner ever effectively recanted his trial testimony implicating
9 Petitioner in the Dunn murder. Gardner’s testimony at trial was subjected to thorough
10 cross-examination and was consistent with his March 25, 1985 videotaped and written
11 statements. (Pet.’s Evid. H’g Ex. 77; Resp.’s Evid H’g Ex. 3.) Furthermore, Gardner’s
12 testimony at the evidentiary hearing that he had no independent memory of testifying at
13 Petitioner’s trial provides no basis to conclude that Gardner’s trial testimony implicating
14 Petitioner was false.

15 Aside from relocation, the evidence does not establish that Gardner received
16 additional benefits from the prosecution in connection with a bakery robbery.³
17 Respondent’s point is well-founded that, aside from Gardner’s statements, Petitioner fails
18 to present any evidence showing Gardner’s involvement in a robbery of a bakery. This
19 petty theft of baked goods and drinks described by Gardner was likely never reported and,
20 because it occurred three years before Gardner spoke with Holmes, the statute of limitation
21 had probably expired. See Cal. Penal Code § 802(a) (stating generally that the statute of
22

23 ³ To the extent that Holmes testified at the evidentiary hearing that Trutanich was not present
24 during the March 25, 1985 videotaped interview with Gardner and that Holmes did not read a note provided
25 by Trutanich stating that Gardner was not promised anything in exchange for his testimony, Holmes’s
26 testimony was not credible. (See also Resp.’s Post-Evid. H’g Br. at 17 n.24 (conceding Trutanich was
27 present and citing RT 7177 (Holmes’s trial testimony that Trutanich was present at the beginning of
28 Gardner’s interview)).) Although it would be unusual for Trutanich as the prosecutor in Petitioner’s case
to participate and/or be present at this interview, it would not have been improper. Thus, Holmes’s
testimony on this point does not impact the Court’s conclusion as to whether Petitioner’s Napue claim
based on Gardner’s testimony is meritorious.

1 limitations for crimes not punishable by death or imprisonment is one year). Moreover,
2 Holmes testified that he reported the robbery to the appropriate authorities and was not
3 aware that a case was ever brought against Gardner. (April 30, 2015 RT Vol. 3 at 89.) In
4 any event, the testimony from Holmes at trial and the evidentiary hearing further confirms
5 that Gardner was a seasoned informant with an obvious motive to testify in view of his
6 probable need for the relocation he received in exchange for testifying against Petitioner.
7 Gardner's trial testimony reiterating the statements that Gardner provided to law
8 enforcement three years following Dunn's murder was not significantly persuasive by itself
9 and mostly served to corroborate the more compelling evidence provided by Lewis and
10 Cox. To the extent that there is some evidence that the prosecution helped Gardner to get
11 assistance with a drug problem, it appears to be nothing more than minimal assistance
12 routinely by the prosecution provided in order to ensure Gardner's testimony at Petitioner's
13 trial. Thus, Petitioner is not entitled to relief on these allegations.

14 **B. Brady Claims pertaining to Gardner**

15 For the reasons set forth above, the Court finds that Petitioner cannot demonstrate a
16 violation of Brady in connection with his allegations pertaining to Gardner. The evidence
17 elicited at the evidentiary hearing failed to establish that Gardner received additional
18 benefits in connection with a bakery robbery or drug rehabilitation. Furthermore, the
19 evidence does not support Petitioner's allegation that Gardner's testimony was "coached"
20 by the prosecution. Accordingly, no relief is warranted as to the allegations that the
21 prosecution withheld material information pertaining Gardner's testimony.

22 Accordingly, the allegations in Claims 1(B), 4(B) and (E), and 11(E) are denied.

23 **IV. Prosecutorial Misconduct Claims in connection with Arthur Cox's Testimony**

24 In the December 10, 2013 Order, the Court granted an evidentiary hearing based on
25 Petitioner's Napue allegations set forth in Claims 5(F) and 11(E) that Cox was given
26 immunity for the Billingsley murder. (See December 10, 2013 Order at 30.) The Court also
27 granted an evidentiary hearing on Petitioner's Napue allegations set forth in Claims 1(C),
28 5, and 11(E) pertaining to Cox's false testimony implicating Petitioner in the Dunn murder,

1 additional benefits Cox received in connection with a marijuana violation, and the false
2 testimony presented at the pre-trial Massiah hearing on Cox’s testimony. (Id. at 32.) In
3 addition, the Court granted an evidentiary hearing based on Petitioner’s Brady allegations
4 in Claim 5(F) that Cox was provided additional benefits by the prosecution. (December 10,
5 2013 Order at 55-56 (citing Milke v. Ryan, 711 F.3d 998, 1008 (9th Cir. 2013).) The Court
6 further allowed Petitioner to explore at an evidentiary hearing his Brady allegations in
7 Claim 1(C) and Claim 5 pertaining to the prosecution’s failure to disclose that it “coached”
8 Cox’s testimony. (Id. at 56.)

9 At trial, Cox testified that, several months after he was incarcerated for a robbery
10 charge, Cox spoke to Petitioner, and Petitioner said that Curtis Thomas had shot “Bone”
11 (Dunn) after Petitioner had told him to do so. (RT at 7284, 7301.) Cox also testified that
12 Petitioner said that he was having someone shoot one of the witnesses. (RT at 7287.) Cox
13 stated that the only benefit he received for testifying against Petitioner was relocation and
14 probation on the robbery charge (for which he had faced about 7 years), and he had received
15 less than \$500 for his relocation expenses. (RT at 7301, 7304, 7307-08.)

16 **A. Napue Claim based on False Testimony implicating Petitioner in the Dunn**
17 **murder and regarding an Undisclosed Deal Given to Cox in connection**
18 **with the Billingsley Murder**

19 In his state habeas proceedings, Petitioner presented the following evidence in
20 support of this claim: 2001 State Pet., Ex. 10 (August 18, 2001 Declaration from John
21 Hammond, an investigator with the FPD, stating that Cox told Hammond that: (1) Deputy
22 District Attorney Jacobs had approached Cox and threatened to prosecute him as an
23 accessory to the murder of Billingsley, which could result in a 15-25 year sentence to run
24 consecutive with the time Cox would receive for his then-pending robbery charge, unless
25 Cox agreed to testify against Petitioner; and (2) Jacobs offered Cox immunity regarding the
26 Billingsley murder and a cash payment for his testimony); and 2001 State Pet., Ex. 13
27 (handwritten declaration dated July 31, 2001, signed by Cox, stating that the District
28 Attorney initially approached him regarding the Billingsley murder and offered Cox

1 immunity if he testified against Petitioner, and further stating that “I lied on the stand
2 against [Petitioner] because I didn’t want to do the 25 years which would have run
3 concurrently with my armed robbery case.”).

4 In his 2008 deposition, Cox testified that Detective Mejia contacted him about
5 testifying against Petitioner while Cox was in the Los Angeles County Jail. (Pet.’s Evid.
6 H’g Ex. 118 at 12-13.) Cox testified that the police told him that they could charge Cox as
7 an accessory before and after the fact in connection with Billingsley’s murder, such that he
8 would face 25 years for the accessory charge in addition to the time Cox would receive for
9 his armed robbery. (Id. at 13, 18-19.) Cox testified that he could not remember whether
10 Petitioner told him that he killed “Bone” (Dunn). (Id. at 23-24.) He also testified that he
11 could not remember whether Petitioner told him that he had plotted to have a witness shot.
12 (Id. at 26.) He testified that he remembered that Mejia and Jacobs came to talk to him about
13 the Dunn murder in the Los Angeles County Jail, but he did not remember giving a recorded
14 statement in connection with the Dunn murder. (Id. at 27-29.)

15 At the evidentiary hearing, Cox testified that recently was homeless and had been in
16 drug rehabilitation, and his prior drug and alcohol abuse have impacted his memory. (April
17 23, 2015 RT at 11-12.) In addition, he testified that he had cancer and HIV, and had a “bag
18 of medications” which have caused him not to be able to remember things as well as he did
19 several years ago. (Id.) Cox testified at evidentiary hearing that he testified truthfully
20 against Petitioner at Petitioner’s trial. (Id. at 13-14, 41.) Cox did not recall his 2008
21 deposition or his 2001 declaration. (Id. at 39.) When shown a 2001 declaration stating that
22 he did not testify truthfully at Petitioner’s trial, Cox said that it was not accurate. (Id. at 41.)
23 Although Cox agreed that he signed this declaration, Cox explained that “they’re not my
24 words” because the declaration was written by someone else (Id. at 78.) After refreshing
25 his memory with his 2008 deposition, Cox testified that he thought that law enforcement
26 would have been able to charge him with “accessory after the fact” for the Billingsley
27 murder when they first questioned Cox. (Id. at 36.) When questioned about what law
28 enforcement asked Cox about the Dunn murder in 1982, Cox testified that “they knew what

1 I knew.” (Id. at 38.) Cox testified that he had been living on the street prior to the trial for
2 the Dunn murder, and that he had been housed in a motel and provided food during the trial.
3 (Id. at 47.)

4 Jim Jacobs, who was the prosecutor investigating the Dunn and Billingsley murders
5 prior to Trutanich’s involvement, testified at the evidentiary hearing that he interviewed Cox
6 and determined that Cox was “the fly on the wall” but was not an accessory or participant
7 in the Billingsley murder. (April 30, 2015 RT at 49.) Jacobs testified that he told Cox
8 during the July 1982 meeting at the Los Angeles County Jail that, if Cox had been at a
9 planning meeting, “now is the time to come clean.” (Id. at 52.) However, Jacobs testified
10 that Cox never asked for immunity and Jacobs never offered it at this meeting. (Id.)

11 Frank Ferguson testified regarding his interview of Cox in June 1994 while he was
12 working at the ACLU, which represented Petitioner in his state habeas proceedings. (March
13 12, 2015 RT at 189.) Ferguson testified that he interviewed Cox regarding his testimony
14 at Petitioner’s trial. (Id.) Specifically, Cox told Ferguson that law enforcement had told him
15 that he would receive prosecutorial immunity for the Billingsley murder in exchange for
16 providing testimony in the Dunn murder case. (Id. at 198.) Ferguson drafted a declaration
17 after meeting with Cox. (Id. at 205.)

18 Hammond, an investigator with the FPD, testified that he met with Cox at his
19 apartment in 2001. (March 12, 2015 RT Vol. 1 at 209-10.) Although Cox “rambled a bit”
20 during the interview, Hammond could understand him and Cox appeared sober. (Id. at 209.)

21 Trutanich testified that Cox had been housed in a motel during the trial for the
22 purpose of “keep[ing] him alive to testify.” (April 30, 2015 RT Vol. 2 at 78.) Whatever
23 money had been given to Cox was for meals and not a substantial amount. (Id.) On July
24 15, 1982, when Mejia and Jacobs met with Cox and recorded his statement, Trutanich was
25 not involved in the case; Trutanich was not transferred to “hardcore” gang prosecutions
26 until 1983. (Id. at 42.)

27 Here, Petitioner has not shown a Napue violation based on these allegations. Similar
28 to Petitioner’s allegations regarding Gardner, Petitioner is seeking the Court to find that Cox

1 recanted his trial testimony regarding Petitioner’s incriminating statements to him and that
2 Cox received no additional benefits in connection with his testimony. Nevertheless,
3 Petitioner has not met the heavy burden to succeed on these allegations. Despite the fact
4 that Cox’s 2001 declaration supports the conclusion that he testified falsely about the
5 incriminating statements Petitioner made to him and that Cox was promised immunity for
6 the Billingsley murder, Cox’s deposition and evidentiary hearing testimony do not.
7 Moreover, the Court found credible Jacobs’s evidentiary hearing testimony that, although
8 he encouraged Cox to “come clean” during their interview, he did not promise immunity
9 in connection with the Billingsley murder.⁴ Thus, neither the testimony of Jacobs nor Cox
10 suggests that Cox was promised immunity for this crime. Accordingly, Petitioner is not
11 entitled to habeas relief on these allegations.

12 **B. Napue Claim based on False Testimony regarding an Undisclosed Deal**
13 **Given to Cox in connection with Cox’s Marijuana Violation**

14 At trial, the defense argued that Cox was given a reduced sentence on the marijuana
15 charge in exchange for testifying. The probation report recommended that Cox be
16 sentenced to one year of incarceration at the Los Angeles County Jail and three years of
17 probation in connection with his February 6, 1984 offense for selling marijuana to an
18 undercover police officer. (1995 State Pet., Ex. 197.) However, Petitioner was sentenced
19 to only three years of probation and 162 days in Los Angeles County Jail for his offense.
20 (1995 State Pet., Ex. 90, 197.)

22 ⁴ Petitioner relies upon United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986), for the
23 assertion that “[a]n implied threat of prosecution, in combination with the fact that such a prosecution never
24 occurs, is exactly the kind of tacit promise that must be disclosed under Brady.” (Pet.’s Post H’g. Br. at
25 14.) However, Petitioner’s reliance upon Shaffer is misplaced. In Shaffer, the government failed to
26 disclose that the informant had acquired significant assets through drug profiteering for which the
27 government had failed to initiate asset forfeiture proceedings to acquire. The Ninth Circuit found that these
28 coupled facts “implied a tacit agreement was reached” between the informant and government in
exchange for his cooperation. Id. Unlike the evidence establishing the informant’s acquisition of drug
profits in Shaffer, there was no evidence establishing Cox’s participation in the Billingsley murder to
support a tacit, implied agreement between the prosecution and Cox.

1 In response to this questioning, the prosecution elicited testimony from Judge Shook
2 that he sentenced Cox in connection with this marijuana violation and Cox did not receive
3 any special consideration in connection with this violation.⁵ (RT at 7677-79.) Judge Shook
4 testified that he sentenced Cox after reviewing the file and listening to the attorneys, and
5 that the district attorney never asked for any special consideration because Cox was a state
6 witness. (Id.) In his closing argument, Trutanich specifically pointed to Judge Shook’s
7 testimony as compelling evidence that the prosecution had made no deal with Cox regarding
8 the marijuana charge. (RT at 8324.) However, in his state habeas proceedings, Petitioner
9 presented evidence showing that Judge Thomas, not Judge Shook, presided over Cox’s
10 sentencing for this marijuana charge. (1995 State Pet., Exs. 87, 90 (state court files
11 confirming that Judge Robert W. Thomas presided over Cox’s guilty plea and sentence for
12 the 1984 marijuana offense).)

13 In opposing these allegations, Respondent concedes that Judge Shook’s testimony
14 that he sentenced Cox was incorrect but has contended that Judge Thomas’s testimony in
15 the Billingsley trial⁶ demonstrates that the substance of Judge Shook’s testimony was
16 correct. (See Resp.’s Post-Evid. H’g Br. at 12 n.20.) Specifically, Respondent pointed out
17 that: Judge Thomas sentenced Cox for this violation; there was no deal in place; and Cox’s
18 sentence was standard punishment for his offense. (See Resp.’s Opp. to Mot. for Evid. H’g
19 at 84 (citing Green Meadows Park (GMP) RT at 57–59).)

20 At the evidentiary hearing, Trutanich testified that he asked Judge Shook to testify
21 at trial based on the representations made by defense counsel that Judge Shook had
22

23 ⁵ Specifically, Judge Shook stated: “I placed the defendant on probation for a period of three
24 years and one of the conditions of his probation was that he serve 162 days in the Los Angeles County
25 Jail.” (RT at 7678.) Judge Shook further explained his sentence: “Because that was the time he had
26 already had in custody and I felt after reviewing the file and listening to the attorneys that that was
sufficient time in jail.” (Id.)

27 ⁶ Trutanich served as the prosecutor in the Billingsley murder trial, which preceded the Dunn
28 trial, when this testimony was elicited from Judge Thomas. (See RT at 6472; April 30, 2015 RT at 7-10.)
.)

1 sentenced Cox in connection with his marijuana violation. (April 30, 2015 RT Vol. 3 at 7-
2 9.) Trutanich further testified that, had he realized that Judge Thomas had sentenced Cox
3 for this violation, he would have clarified the mistake. (Id. at 41.) Trutanich did not dispute
4 that he called Judge Thomas to testify regarding the same thing (i.e., whether Cox received
5 a deal in connection with his marijuana violation) at the Billingsley trial. (Id. at 7-9.)
6 Trutanich even conceded that this was an unusual and “ballsy” move to have Judge Shook
7 testify. (Id. at 9.) When questioned about his error in bringing the wrong judge to testify,
8 Trutanich simply responded, “I brought the judge whose name they used.”⁷ (Id. at 10.)

9 Here, Petitioner has shown under the first prong of Napue that the prosecution
10 presented false testimony from Judge Shook that he (not Judge Thomas) sentenced Cox for
11 the marijuana violation and Cox received no deal. Trutanich’s actions in eliciting testimony
12 from the wrong judge to testify as to Cox’s marijuana sentence -- even though he had sought
13 the same testimony from Judge Thomas the prior year -- was a negligent, yet inadvertent
14 oversight in this case. Nevertheless, because Trutanich should have known that Judge
15 Shook’s testimony was not true, Petitioner has satisfied the second prong of Napue.⁸
16 However, in view of the fact that Judge Thomas testified similarly regarding Cox’s
17 marijuana violation at the Green Meadows trial the year before, the error resulting from
18 Judge Shook’s testimony would have been minimal and does not demonstrate that the
19 prosecution offered Cox an undisclosed “deal” in connection with this offense. But because
20 the Court must consider materiality of Napue and Brady errors collectively, the Court will
21 reserve judgment as to the ultimate error on this after reviewing all the prosecutorial
22 misconduct claims. Jackson, 513 F.3d at 1071; Kyles, 514 U.S. at 436 n.10.

24 ⁷ The record does not show any statements by defense counsel indicating that Judge Shook
25 sentenced Cox for this crime. (See RT at 7595-97.)

26 ⁸ Respondent again maintains that there is no error because the defense had access to the court
27 file regarding Cox’s marijuana offense, relying up Routly v. Singletary, 33 F.3d 1279, 1286 (10th Cir.
28 1994). (Resp.’s Post-Evid. H’g Br. at 12 n.20.) However, the Court previously rejected this argument.
(See December 10, 2013 Order at 32.)

1 **C. Napue Claim based on False Testimony in connection with Petitioner’s**
2 **Massiah Motion**

3 **1. Standards regarding Massiah**

4 The Supreme Court has found that the government violates the Sixth Amendment’s
5 guarantee of a right to counsel when it uses an undisclosed agent to “deliberately elicit”
6 incriminating information from a defendant after he has been indicted and his right to
7 counsel has attached. Massiah v. United States, 377 U.S. 201, 206 (1964); United States
8 v. Henry, 447 U.S. 264, 270 (1980) (extended the rule in Massiah to the use of jailhouse
9 informants). In order to prevail on a Massiah violation, the defendant must show that: (1)
10 the informant was acting as an agent of the State when he obtained the incriminating
11 statements; and (2) the informant made some effort to stimulate conversations about the
12 crime charged. Randolph v. California, 380 F.3d 1133, 1144 (9th Cir. 2004).

13 In order to show that an informant is acting on behalf of the government, the court
14 must look to the “likely . . . result” of the government’s acts, not necessarily the
15 government’s intent or overt acts. Id. (citing Henry, 447 U.S. at 271). In Randolph, there
16 was no explicit deal under which the informant was promised compensation in exchange
17 for his testimony. Id. Although the Ninth Circuit accepted as true the State’s contention
18 that the informant was told not to expect a deal in exchange for his testimony, it found that
19 “[i]t is clear that [the informant] hoped to receive leniency and that, acting on that hope, he
20 cooperated with the State.” Id. Thus, law enforcement knew or should have known that the
21 informant hoped to received leniency if he provided useful testimony against the petitioner
22 at trial, which was “precisely what happened,” despite the lack of an express agreement
23 between the informant and the government. Id. Furthermore, the Ninth Circuit found that
24 an explicit agreement was unnecessary, because there was “sufficient undisputed evidence
25 to show that the State made a conscious decision to obtain [the informant’s] cooperation and
26 that [the informant] consciously decided to provide that cooperation,” which rendered him
27 an agent of the State. Id.

28 In addition, the Ninth Circuit in Randolph rejected the district court’s finding that

1 there was no evidence that the informant took action to deliberately elicit incriminating
2 statements from the petitioner. Specifically, in his testimony before the district court, the
3 informant testified that he encouraged the petitioner to provide information by “being
4 friendly and talkative” and by “lead[ing] [the petitioner] on” to provide him with
5 information. Id. In finding that the petitioner had potentially established a Massiah
6 violation, the Ninth Circuit explained:

7
8 In this case, however, there is substantial evidence to support a
9 conclusion that Opplinger and Chavez knew or should have known that [the
10 informant] believed that he would receive leniency if he elicited incriminating
11 statements from [the petitioner], circumstances sufficient to make [the
12 informant] a government agent. Further, there is substantial evidence that, after
13 meeting with Opplinger and Chavez, [the informant] took affirmative steps to
14 elicit information from [the petitioner.]

15 Id. at 1117.⁹

16 **2. Petitioner’s Pre-trial Massiah Motion and Trial Testimony by**
17 **Arthur Cox**

18 On July 15, 1982, prior to trial, Cox made a statement at the Los Angeles County Jail
19 with Mejia and Jacobs present. (Pet.’s Evid. H’g Ex. 12.) In response to questioning about
20 the Dunn murder, Cox responded that “Yes, Barry told me about this one” and that the
21 victim was a Crip named “Bones or something like that.” (Id. at 30.) Cox stated that
22 Petitioner had told him that Petitioner had told Curtis to shoot Dunn. (Id. at 31 (“[H]e told
23 Curtis to bust on him but he didn’t shot [sic] him. . . . he said Curtis didn’t know the dude
24

25 ⁹ However, in Randolph, because the district court did not find precisely when the informant
26 first met with law enforcement and what the informant did to stimulate conversations with the petitioner
27 about his crime, the Ninth Circuit held that it was unable to ultimately determine whether a Massiah
28 violation occurred. Id. at 1145. There, the informant testified that he met with law enforcement twice,
once before he obtained the incriminating statements and once after; however, the law enforcement
deputies testified that they met with the informant after he had obtained the incriminating statements from
the petitioner. Id. The district court was therefore directed to render a specific finding as to whether the
petitioner’s admission was made to the informant prior to the informant’s meeting with law enforcement.
Id.

1 so I guess Barry knew him so Barry told him to bust on him.”.)

2 After learning that the prosecution intended to call Cox as a witness at trial, the
3 defense brought a pre-trial motion challenging the admissibility of Cox’s statements to the
4 prosecution and seeking to examine whether the prosecution fully and adequately notified
5 the defense of Petitioner’s incriminating statements to Cox. (Clerk’s Transcript (CT) at
6 618; RT at 6489-27.) The defense maintained that they had not been made aware of Cox’s
7 involvement at the time of the preliminary hearing. (RT at 6488.) The questioning was
8 outside the presence of the judge and jury, and Cox was not sworn but a court reporter
9 recorded the questions and answers. (RT 6485-87.)

10 At this pre-trial hearing, Cox testified that after he met with Jacobs and Mejia on July
11 15, 1982, Cox had another conversation with Petitioner in August or September of 1982,
12 in which Petitioner told him that he was going to have “Curtis” shoot Lewis. (RT at 6491.)
13 In response to questioning about what preceded Petitioner making this statement, Cox stated
14 that “we were just talking about how he was going to beat his case.” (RT at 6515.) When
15 questioned about why Petitioner would talk to Cox, Cox stated that “we were always talking
16 about our cases together.” (RT at 6516.) Cox testified that he was alone with Petitioner
17 when Petitioner made this statement. (RT at 6514.) Cox testified that he called Mejia the
18 next day or day after Petitioner’s statement to him. (RT at 6492-93.)

19 Following the questioning of Cox, the defense objected to the admissibility of the
20 purported statements made by Petitioner that Cox relayed to Mejia on September 2, 1982,
21 based on the rule in Massiah. (RT at 6527.) At that point, Trutanich offered to call both
22 Mejia and Jacobs to testify as to whether Cox was an agent of the State at the time Petitioner
23 made the purported incriminating statements to Cox. (RT at 6587.)

24 Next, Jacobs testified at the pre-trial hearing that when he was handling this case,
25 Mejia contacted him about Cox’s information about this case and Jacobs knew of Cox
26 because Cox was a victim in the Boyd/Garrett case that Jacobs had handled. (RT at 6594-
27 95.) Jacobs testified that he did nothing to facilitate Cox in obtaining information from
28 Petitioner while Cox was housed in the Los Angeles County Jail with Petitioner. (RT at

1 6680.) Jacobs testified that the July 15, 1982 interview was conducted pursuant to an offer
2 by Cox to supply more information in return for assistance with his pending robbery case.
3 (RT at 6798.) However, as Jacobs further testified, he told Cox that there would be no
4 consideration given for information, but only for testimony. (RT at 6798.) In response to
5 cross-examination about Jacobs's statement to Cox during the July 15, 1982 interview that
6 he "would be interested to know what [Petitioner's] reaction is now," Jacobs testified that
7 he was not asking Cox to get information from Petitioner and, in any case, Cox would not
8 be able to obtain any information from Petitioner regarding that question because Cox was
9 in a different module than Petitioner. (RT at 6634-36.) Jacobs testified that, to his
10 knowledge, Cox had not been put in the informant tank and "the only reason I would move
11 somebody in County jail would be to put them in protective custody." (RT at 6908-09.) In
12 addition, Jacobs testified that no deal was in place until September 24, 1982, when Cox was
13 offered a deal that limited the term on his robbery conviction. (RT at 6798, 6803.)

14 District Attorney Peter Berman testified at the pre-trial hearing that he was in charge
15 of authorizing deals with informants within the District Attorney's Office in September
16 1982. (RT at 6750.) Deals were conditioned upon an informant providing testimony. (RT
17 at 6749.) Berman first became aware of Cox on September 24, 1982, when he received a
18 memo from Trutanich regarding information supplied by Cox in Petitioner's case. (RT at
19 6751-52.) He granted the proposed disposition requested by Trutanich in the memo. (RT
20 at 6753.) He further testified that there was no attempt to persuade Cox to obtain
21 information from Petitioner. (RT at 6753.)

22 Mejia testified at the pre-trial hearing that Cox initiated the first contact with him a
23 week or a day prior to July 15, 1982, probably on July 10, 1982. (RT at 6676.) Mejia
24 testified that this conversation with Cox occurred *after* the preliminary hearing in this case
25 on July 7 and 8, 1982, which Mejia attended, and Mejia was simply responding to Cox's
26 telephone call. (RT at 6712-15.) Mejia further testified that, although Cox stated that he
27 wanted a deal for information, Cox was not promised anything of any nature and simply
28 freely and voluntarily provided information. (RT at 6677-79.) Mejia confirmed that he did

1 nothing to facilitate Cox in obtaining any information from Petitioner. (RT at 6680.) The
2 next time Mejia spoke with Cox was on July 15, 1983, and he once again told Cox that there
3 would be no deal or promises given to him. (RT at 6684.) In September 1982, Cox called
4 Mejia to tell him that Petitioner said he was going to use a friend by the name of Curtis
5 Thomas to “get rid” of Lewis by killing her. (RT at 6686-87.)

6 After this pre-trial hearing, the trial court denied the motion. (RT at 6785-87.) The
7 trial court found that the evidence indicated that Cox had initiated the first interview on July
8 15, 1982, as well as the September 2, 1982 interview. (RT at 6785-86.) The trial court
9 further reasoned that Cox was not promised anything until his robbery charge was resolved
10 on September 24, 1983. (RT at 6786.)

11 At trial, Cox testified that, several months after he was incarcerated at the Los
12 Angeles County Jail for a robbery charge, Cox spoke to Petitioner, who told Cox that Curtis
13 Thomas had shot Bone and Petitioner had told Thomas to shoot. (RT at 7284, 7301.) Cox
14 further testified that when he first told Jacobs and Mejia about the Dunn shooting in June
15 or July, no one spoke with him about being a witness. (RT at 7280-85.) After Petitioner
16 made this statement to Cox, Cox testified that he called the detectives the next day or day
17 after and relayed his conversation with Petitioner to Mejia and Jacobs. (RT at 7292-93.)
18 Cox further testified that he did not receive a deal on his robbery charge for which he was
19 facing seven years of incarceration until after Cox provided this information. (RT at 7291-
20 92.) After Cox spoke with Mejia in September 1982, he was moved from the Bloods
21 module. (RT at 7290-91.)

22 On direct review, the California Supreme Court rejected this claim, reasoning that
23 “Cox’s telephone contact with the police regarding [Petitioner’s] case was initiated by Cox
24 himself”; “[t]here was no evidence prosecutors or police deliberately placed Cox in
25 proximity to [Petitioner] in jail”; and Petitioner “failed to establish that Cox deliberately
26 elicited [Petitioner’s] statements.” Williams, 16 Cal. 4th at 204-06.

27 **3. Evidence Presented in connection with This Claim in State and**
28 **Federal Habeas Proceedings**

1 In his state habeas proceedings, Petitioner presented handwritten notes, jail records,
2 and Mejia's sworn affidavit, indicating that Mejia interviewed Cox before the preliminary
3 hearing in Petitioner's case on July 7 and 8, 1982. (1995 State Pet., Ex. 26, p. 65 (chart
4 reflecting Cox was housed in module 2700 from June 22, 1982, to June 27, 1982, and
5 transferred to module 4400 on June 28, 1982 to July 3, 1982); 1995 State Pet., Ex. 29
6 (handwritten notes of an interview of Cox while housed in module 2700); 1995 State Pet.,
7 Ex. 51, p. 216 (affidavit to search warrant completed by Mejia stating that he spoke with
8 Cox prior to the preliminary hearing and that "Cox stated that he talked with Barry Williams
9 while in custody at County Jail and that Williams told him if he (Williams) could get rid of
10 witness Lewis he could beat both murders. Williams further stated that he would get Curtis
11 Thomas (a neighbor of witness Lewis) to shoot her while she was hanging clothes."))
12 Petitioner also presented Cox's testimony at the November 8, 1982 Thomas and Whitfield
13 preliminary hearing that, in contrast to Mejia's testimony at Petitioner's trial, law
14 enforcement "came to [him]" and he did not initiate contact with them. (1995 State Pet., Ex.
15 106.)

16 Petitioner also presented the Grand Jury findings in the wake of the jailhouse
17 informant scandal confirming that prosecutors offered informants rewards, and that "[t]he
18 most significant rewards obviously involve a dismissal of charges, imposition of a lesser
19 sentence, or reduction of a sentence already imposed." (1995 State Pet., Ex. 307, p. 75.))

20 Because this report documented abuses from 1976 to 1990, it covered the time period
21 during which Cox testified. (*Id.* at 4.) The California Supreme Court summarily denied
22 both Petitioner's 1995 and 2001 habeas petitions.

23 After concluding that the California Supreme Court erred in denying this claim, the
24 Court granted an evidentiary hearing and further fact development in connection with this
25 claim. (December 10, 2013 Order at 44-46.) Although Mejia would have been a necessary
26 witness at this hearing, counsel for Respondent informed the Court at the evidentiary
27 hearing that Mejia had passed away.

28 At the evidentiary hearing, Petitioner's handwriting expert, Beth Chrisman testified

1 that the module chart (Pet.'s Evid. H'g Ex. 22) was written by Jacobs and the handwritten
2 notes referencing a meeting with Cox in Module 2700 (Pet.'s Evid. H'g Ex. 86) was written
3 by Mejia. (March 12, 2015 RT Vol. 1 at 109; Pet.'s Evid. H'g Ex. 4 (Chrisman Report.)

4 Jacobs testified at the evidentiary hearing that he went to meet with Cox after Mejia
5 first met with Cox in order to "get an eyeball on him." (March 12, 2015 RT Vol. 1 at 287.)
6 At that time, Cox was a victim in the Boyd/Garrett case, another case Jacobs was
7 prosecuting. (Id.) Mejia contacted Jacobs about talking to Cox about information "several"
8 days, or maybe "a week or two" before they met with Cox in the Los Angeles County Jail
9 on July 15, 2015. (April 30, 2015 RT Vol. 1 at 62.) Jacobs confirmed that he created a
10 hand-written chart in connection with the Garrett/Boyd case (Pet.'s Evid. H'g Ex. 22),
11 which shows where Cox was housed in the Los Angeles County Jail from the time he was
12 arrested until he was released. (Id. at 62.) Although Jacobs did not know where Cox was
13 housed when Mejia first spoke with him about Cox, Jacobs later knew after creating his
14 chart where Cox was housed "pretty much every day from the time he was arrested to the
15 time he was released." (Id. at 62, 64.)

16 However, Jacobs testified that he had "no independent knowledge" that Cox was
17 moved between the first time Mejia interviewed Cox and the time that Mejia called Jacobs
18 to go with him to the Los Angeles County Jail to go interview Cox. (Id. at 66.) Jacobs
19 never spoke with Cox prior to any movement around the jail before Cox was in Petitioner's
20 module (Module 4400). (Id. at 70.) Jacobs also testified that he did not request to move
21 Cox to Module 4400 (Petitioner's Module) from Module 2700, and would have wanted to
22 know why it was done. (Id. at 66-67.) Furthermore, Jacobs testified that he worked in
23 homicides for 40 years and "never in his career" would have moved an informant next to
24 a target. (Id. at 83-84.) (Jacobs identified Joe Reid as the officer who worked at the Los
25 Angeles County Jail and was knowledgeable as to movements between modules at this time.
26 (Id. at 145.) However, counsel for Respondent later informed the Court that Mr. Reid was
27 deceased).

28 In addition, Jacobs testified that he had filed the charges for the Dunn murder against

1 Petitioner that were dismissed for lack of evidence on June 16, 1982. (April 30, 2015 RT
2 Vol. 1 at 75-77.) Then, the defense presented evidence to the Court indicating that Mejia
3 met with Cox between June 22 and June 27, 1982.¹⁰ (Id. at 79-81; Pet.’s Evid. H’g Exs. 22,
4 86.) After that, there was a preliminary hearing for the Dunn murder on July 7 and 8, 1982,
5 in which Petitioner was arraigned. (Id. at 75.)

6 Defense counsel next questioned Jacobs at the evidentiary hearing about various
7 statements he made during the July 15, 1982 interview with Cox. During that interview,
8 after Cox said that Petitioner “didn’t want to talk about” the Dunn murder, Jacobs asked
9 Cox “Well, how do you know he doesn’t want to talk about it then, right?” (April 30, 2015
10 RT Vol. 1 at 96.) Jacobs testified that this statement was not an invitation for Cox to go
11 talk to Petitioner about the Dunn murder. (Id.) In addition, when Jacobs said, “I wonder
12 what [Petitioner] thinks now” in the interview with Cox, Jacobs explained that he was
13 “joking around” about “how strong the case was.” (Id. at 155.) Jacobs testified that he was
14 transferred from the Compton Hardcore Gang Unit to Norwalk in February 1983 and no
15 longer worked on the case after that. (Id. at 116, 164.)

16 Trutanich testified at the evidentiary hearing that he recalled that Mejia and Jacobs
17 testified at the pre-trial hearing regarding Cox’s testimony in 1985, but that he was not
18 assigned to the case when Mejia and Jacobs met with Cox on July 15, 1982. (April 30, 2015
19 RT Vol. 2 at 48.)

20 Cox testified at the evidentiary hearing that when he was in jail in 1982, he did not
21 initiate contact with law enforcement; law enforcement contacted him first. (April 23, 2015
22 RT at 14-15, 19.) Cox testified that Mejia contacted him after he was moved from
23 Petitioner’s module, when he was placed in the “snitch” unit, also known as “canary row.”
24 (Id. at 23.) Prior to the evidentiary hearing, Cox had testified at a deposition in 2008 that
25 Mejia initiated contact with him, and that he would go to see Petitioner and discuss
26 Petitioner’s case while the trial for Cox’s robbery charge was pending. (Pet.’s Evid. H’g
27

28 ¹⁰ Respondent concedes that Mejia wrote these notes. (Resp.’s Post-Evid. H’g Br. at 9.)

1 Ex. 118 (Cox Depo. at 12–17).)

2 In addition, Petitioner presented expert testimony at the evidentiary hearing from
3 Alvin Henley and Alexandra Natapoff regarding the placement of prisoners at the Los
4 Angeles County Jail during the time Petitioner was there. Henley testified that Module
5 4400 was a Bloods gang module; Module 2700 was the “trustee” or disciplinary module;
6 and Module 5900 was a “trustee” and recent bookings module. (March 12, 2015 RT Vol.
7 1 at 216-17.) Henley was part of “Liaison,” who were “seasoned” officers and had the
8 authority to place and move inmates; however, Operation Safe Streets (OSS), which was
9 a unit of “rooky” deputies, worked within the jail and had similar authority. (Id. at 217-18.)
10 Although Liaison officers were “routinely” requested to place prisoners next to a “friendly”
11 (i.e., informant), the request was always flatly refused. (Id. at 226-27.) Nevertheless, a
12 sheriff’s deputy working at the jail could move an informant next to an inmate. (Id.)
13 Although it was considered improper, it was not reported or considered to be misconduct.
14 (Id. at 241-42.) In April 1982, there were not computerized records tracking the movement
15 of inmates. (Id. at 235-36.) Henley did not remember Cox. (Id. at 238.)

16 Alexandra Natapoff, a law professor at Loyola Law School, testified as an expert as
17 to the use of jailhouse informants in Los Angeles County. (March 12, 2015 RT Vol. 2 at
18 319-64.) She opined that, given the sequence of events, Cox’s movement into Petitioner’s
19 module represented a “classic example of Los Angeles jail practices” of placing informants
20 next to prisoners for the purpose of obtaining a conviction. (Id. at 325-26.) She further
21 stated that, between 1982 and 1985, the Los Angeles County District Attorney found 150
22 cases where an informant was placed next to an inmate and the informant testified against
23 that inmate. (Id. at 332.) The defense bar found more than 200 such cases. (Id. at 333.)
24 In addition, Natapoff testified that, during this time period, there was no mechanism for
25 keeping records of the movements of inmates. (Id. at 335.)

26 **4. Analysis of Petitioner’s Napue Claim based on a Massiah Violation**

27 Here, in order to resolve Petitioner’s claim, the Court first determines whether there
28 was a Massiah violation, and next, whether there was a Napue violation in connection with

1 the testimony offered by the prosecution at the pre-trial hearing on the admissibility of
2 Cox's testimony. As an initial matter, there is no dispute as to the threshold requirement
3 of Massiah that Petitioner was in custody for a murder charge without counsel present at the
4 time Cox engaged in conversation with Petitioner.

5 Thus, the Court must first determine under Massiah: (1) whether Cox was acting on
6 behalf of the government when Petitioner told him about the Dunn murder; and (2) whether
7 Cox deliberately elicited these statements from Petitioner. Randolph, 380 F.3d at 1144.
8 Mejia testified at trial that Cox contacted him first about providing information about the
9 Dunn murder. (RT at 6676.) However, Cox's deposition testimony, Cox's July 31, 2001
10 Declaration, Cox's testimony in this case and other proceedings, and the evidentiary hearing
11 testimony all suggest that it was Mejia who initiated contact with Cox. (Pet.'s Evid. H'g
12 Ex. 118 (Cox Depo.) at 1201; 2001 State Pet., Ex. 13 (Cox's July 31, 2001 Declaration);
13 April 23, 2015 RT Vol. 1 at 14, 33-35); see also (MTE Ex. 4 at 293-94, 298 (RT in People
14 v. Thomas, Case No. A382739 (Cox's testimony that Mejia came to visit him in the Los
15 Angeles County Jail "two or three" times before Cox began providing Mejia with
16 information and that Mejia suggested that Cox would get his "time cut" if he cooperated));
17 1995 State Pet., Ex. 106 (Cox's testimony at the 1982 Whitfield preliminary hearing that
18 the police "came to [him]" and he did not initiate contact with the police.¹¹) Furthermore,
19 the prosecution's own evidence indicates that Mejia met with Cox during a five-day period
20 when Cox was housed in Module 2700, which occurred *prior* to Cox's move into
21 Petitioner's module (Module 4400) on June 28, 1982, and *before* Cox obtained
22 incriminating statements from Petitioner that Cox provided to law enforcement on July 15,
23

24
25 ¹¹ Petitioner also contends that Cox was already known to the Los Angeles Police Department
26 and Los Angeles District Attorney as a "cooperator" and 89 Family Blood member, in view of the fact that
27 Cox had previously testified at a preliminary hearing on September 14, 1981, as a victim in another gang
28 shooting case that was prosecuted out of the LADA's Compton office and investigated by the LAPD.
(Pet.'s Post H'g Br. at 6 (citing MTE, Ex. 3 (RT of Cox's testimony in the preliminary hearing in People
v. Garrett, Case No. A621116)).)

1 1982.¹² (Pet.’s Evid. H’g Ex. 86 (Mejia’s notes reflecting meeting with Cox in Module
2 2700), Pet.’s Evid. H’g Ex. 86 (Jacobs’s handwritten chart noting the module placement in
3 the Los Angeles County Jail for certain inmates, including Cox and Petitioner, from May
4 to September 1982); 1995 State Pet., Ex. 51, p. 216 and Pet.’s Evid. H’g Ex. 15 (February
5 18, 1983 affidavit to search warrant completed by Mejia stating that he spoke with Cox
6 prior to the preliminary hearing); MTE Ex. 5 at 464, 467-68 (RT in People v. Boyd, Case
7 No. A621116 (Ernest Cox’s testimony that he was on the same row of Module 4400 as his
8 brother Arthur, and that Arthur arrived in that module in July 1982, after being a trustee));
9 see also (March 12, 2015 RT Vol.1 at 235-36 (Henley’s testimony that there were no
10 computerized records tracking the movements of inmates in 1982 at the Los Angeles
11 County Jail); (March 12, 2015 RT Vol. 2 at 335-38 (Natapoff’s testimony that there were
12 no records maintained by the Los Angeles County Jail of inmates’ movements within the
13 jail).)

14 Furthermore, as in Randolph, where the informant had hoped to receive leniency and
15 provided useful testimony for which he later received leniency even though there was no
16 express agreement between the informant and the government, Cox did the exact same thing
17 in this case. Mejia’s notes (Pet.’s Evid. H’g Ex. 86) of his initial meeting with Cox in
18 Module 2700 discuss others, such as Danny Horn, Craig Whitfield, and “Big Mike,” but the
19 notes do not discuss Petitioner; this further suggests that Cox was taking affirmative steps

21 ¹² The Court agrees that Cox’s testimony at the evidentiary hearing as to his movements or
22 discussions at the Los Angeles County Jail in 1982 was unreliable. (Pet.’s Post H’g Br. at 10-11; Resp.’s
23 Post-Evid. H’g Br. at 6 n.10.) Cox acknowledged at the hearing that he has not “thought about this case
24 in 30 years” and cannot accurately remember dates and times. (April 23, 2015 RT Vol. 1 at 16, 51.) Cox’s
25 memory was also impacted by his alcohol and cocaine addictions, for which he was in rehabilitation several
26 weeks before the evidentiary hearing. (Id. at 11-12.) For instance, Cox testified that the first time he spoke
27 with Mejia was when he was moved to “Canary Row” or the “snitch” module (Module 3300), and Cox
28 remained there after speaking with Mejia. (Id. at 26-28, 29, 62.) This is at odds with the statements Cox
made in his July 15, 1982 recorded statement, as well as Jacobs’s chart. (Pet.’s Evid. H’g Exs. 86, 104.)

In addition, in view of Cox’s July 15, 1982 recorded statement, the testimony at trial, Jacobs’s
testimony at the evidentiary hearing, and Jacobs’s module chart, it appears Cox spoke with law
enforcement before he was transferred to the “snitch” module (Module 3300) in September 1982.

1 to cooperate with the prosecution after he was placed in Module 4400. Although
2 Respondent maintains that “agency” with Cox cannot be established because there is no
3 direct evidence showing that members of the prosecution team instructed Cox in any way
4 to gather evidence from Petitioner (Resp.’s Post-Evid. Hr’g Br. at 4-5), Respondent fails to
5 acknowledge or address the authority holding that no such direct evidence is necessary to
6 prove a Massiah violation. Thus, as in Randolph, because there is sufficient evidence to
7 show that “the State made a conscious decision to obtain [the informant’s] cooperation and
8 that [the informant] consciously decided to provide that cooperation,” Cox was acting an
9 agent of the prosecution when he spoke to Petitioner in Module 4400.

10 In addition, there is ample evidence, including the evidence presented by the experts
11 at the evidentiary hearing, suggesting that the practice of misusing informants was
12 widespread during the period of June to September 1982 when Cox was meeting with law
13 enforcement to negotiate a deal in exchange for his testimony against Petitioner. Indeed,
14 as Jacobs himself conceded at the evidentiary hearing, the movement of Cox in June 1982
15 from Module 2700 to Module 4400 -- where Petitioner was located -- was questionable.
16 (April 30, 2015 RT Vol. at 66-67.) It is difficult to believe that Cox’s move to Petitioner’s
17 module within at most a few days after Cox met with Mejia and nearly three months after
18 Cox was incarcerated for his robbery charge was purely coincidental.¹³ See also Henry, 447
19 U.S. at 271 (“Even if the [government] agent's statement that he did not intend that Nichols
20 would take affirmative steps to secure incriminating information is accepted, he must have
21 known that such propinquity likely would lead to that result.”) There also is evidence
22 reflecting negatively on the credibility of Mejia, who primarily worked with Cox to obtain
23 his testimony in this case. The Court is aware of one instance where Mejia was found to

24
25 ¹³ In view of the testimony provided by the experts, there is ample pattern and practice
26 evidence suggesting that the abuse of informants that Petitioner alleges here was occurring during the time
27 period at issue. By way of background, it is worth further noting that Mejia was a member of the
28 Community Resources Against Street Hoodlums (CRASH) unit, an anti-gang unit within the Los Angeles
Police Department found to have engaged in a pattern and practice of improper investigative tactics. See
United States v. City of Los Angeles, California, 288 F.3d 391 (9th Cir. 2002).

1 have lied in connection with an official investigation in an attempt to avoid being
2 reprimanded.¹⁴ Although Jacobs’s testimony was credible that he neither requested or knew
3 of any request to move Cox from Module 2700 into Module 4400 next to Petitioner, the
4 evidence points to the conclusion that Mejia had a hand in that move.

5 Moreover, as in Randolph, where the Ninth Circuit found that informant deliberately
6 elicited evidence by simply “being friendly and talkative,” Cox was a fellow gang member
7 from Petitioner’s neighborhood. Thus, Cox already was in a position of confidence when
8 he joined Petitioner in Module 4400, such that Petitioner felt comfortable sharing the details
9 of the crime with which he had been charged. See Henry, 447 U.S. at 273 (“When the
10 accused is in the company of a fellow inmate who is acting by prearrangement as a
11 Government agent, . . . [c]onversation stimulated in such circumstances may elicit
12 information that an accused would not intentionally reveal to persons known to be
13 Government agents.”). Accordingly, there is evidence sufficient to establish that the
14 prosecution placed Cox next to Petitioner for the purpose of obtaining incriminating
15 statements and Cox deliberately elicited these statements from Petitioner in violation of
16 Massiah.

17 Next, in order to prove a Napue violation in connection with the testimony offered
18 by the prosecution at the pre-trial hearing on the admissibility of Cox’s statements,
19 Petitioner must demonstrate that the prosecution elicited testimony that was actually false
20 and knew or should have known that the testimony was false. Given the Court’s analysis
21 that a Massiah violation occurred, the first prong under Napue that the prosecution
22 presented testimony that was “actually false” at the pre-trial hearing is met. As the Court
23

24 ¹⁴ [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 found above, Mejia’s testimony that he met with Cox after Cox initially contacted him and
2 after Cox had already been moved into Petitioner’s module (Module 4400) was not true.
3 Moreover, the trial court relied upon this testimony in denying the motion, as it proved the
4 absence of a Massiah violation.

5 Furthermore, because the prosecutor is responsible for investigating representations
6 made by members of the prosecution team, including law enforcement officers, the second
7 prong under Napue is met. Jackson, 513 F.3d at 1071 (rejecting the State’s argument that
8 there was no Napue violation where the prosecutor himself did not know of the informant’s
9 perjury and finding that the prosecutor “should have known” of the false testimony under
10 Giglio’s requirement to know of all promises made by the police, who are “spokespersons
11 for the government”); Lisker v. Knowles, 651 F. Supp. 2d 1097, 1138-39 (C.D. Cal. 2009)
12 (finding Napue violation despite prosecutor’s personal ignorance of the falsity of the
13 evidence, stating, “[w]here the prosecutor’s investigator has the responsibility for the
14 integrity of the State’s evidence, it cannot be the case that the prosecutor’s technical
15 ignorance of the falsity of that evidence insulates the proceedings against a due process
16 violation.”); Mastroacchio v. Vose, 274 F.3d 590, 600 (1st Cir. 2001) (“[A]s a legal matter,
17 the Supreme Court precedent on this issue is clear. When any member of the prosecution
18 team has information in his possession that is favorable to the defense, that information is
19 imputable to the prosecutor.”). Thus, in view of Mejia’s false testimony presented at the
20 pre-trial hearing, the prosecutor (both Trutanich and Jacobs) should have known that the
21 testimony was “actually false.”¹⁵

22 Nevertheless, because materiality under Napue must be considered cumulatively with
23

24 ¹⁵ Notwithstanding the law that imputes knowledge of Mejia’s false statements at the Massiah
25 hearing to Trutanich, Trutanich himself testified that he reviewed the murder book and prosecution file
26 which contained Mejia’s notes evidencing his meeting with Cox in Module 2700 (Pet.’s Evid. H’g Ex. 86)
27 and the module chart prepared by Jacobs showing that Cox was in Module 2700 from June 22 through 27,
28 1982 (Pet.’s Evid. H’g Ex. 86). (April 30, 2015 RT Vol. 1 at 117, 129-30; April 30, 2015 RT Vol. 3 at
174-76.) In addition, Trutanich testified that he would have read Mejia’s sworn affidavit regarding the
timing of his first meeting with Cox prior to the Massiah hearing. (April 30, 2015 RT Vol. 3 at 43-44.)

1 other Napue and Brady claims, the Court will reserve judgment as to whether relief should
2 be granted as to Claim 5(C) after reviewing all of Petitioner’s prosecutorial misconduct
3 claims. Jackson, 513 F.3d at 1071; Kyles, 514 U.S. at 436 n.10.

4 **D. Brady Claims pertaining to Cox**

5 Here, for the reasons set forth above, the Court finds that Petitioner cannot
6 demonstrate a violation of Brady in connection with his allegations pertaining to Cox. There
7 was no evidence elicited at the evidentiary hearing that established that Cox received
8 additional benefits from the prosecution in terms of making promises in connection with the
9 Billingsley murder or his marijuana violation. Furthermore, there was no evidence
10 supporting Petitioner’s allegations that Cox was “coached” by the prosecution.
11 Accordingly, no relief is warranted as to the allegations that the prosecution withheld
12 material information pertaining Cox’s testimony.

13 **V. Prosecutorial Misconduct Claims in connection with Lewis’s Testimony**

14 **A. Factual Background of Petitioner’s Napue Claim based on Lewis’s**
15 **Testimony**

16 In the December 10, 2013 Order, the Court granted an evidentiary hearing based on
17 Petitioner’s Napue allegations pertaining to Lewis’s testimony regarding the identity of the
18 woman in the car with her on the night of the murder. (December 10, 2013 Order at 21-23.)

19 At the preliminary hearing, Lewis testified that the driver of the car wished to remain
20 unknown, and that she lived “a pretty good ways out.” (CT at 17-18, 21.) At trial, Lewis
21 testified that the car was being driven by “Jean Rivers,” a woman who Lewis only had
22 known for approximately a month before the shooting and had not seen since the murder.
23 (RT at 7695-96, 7735-77.) Trutanich told the jury that the prosecution had attempted to
24 locate this driver, but was unable to do so. (RT at 6847.) However, the true identity of the
25 driver of the car was Arlene McKay, not Jean Rivers; Lewis knew McKay and where she
26 lived and, like Lewis, McKay was a member of the Eastern Stars. (1995 State Pet., Ex.
27 136.) Furthermore, evidence obtained from the prosecution’s file indicated that the
28

1 prosecution might have been aware of McKay's identity, address, and her telephone number
2 before Petitioner's trial. (1995 State Pet., Ex. 136 ("witness information provided by Joe
3 Lewis, Arlene McKay – lives around 41st Pl. and Figueroa, is a member of S. Eastern
4 Star"); 1995 State Pet., Ex. 143 ("Arlene McKay: 750-5867 1126 W. 75th Street").)

5
6 Prior to the evidentiary hearing, Petitioner presented the following evidence in
7 support of this claim: (1) a witness subpoena directed to Arlene McKay at 41st Pl. and
8 Figueroa (Pet.'s Evid. H'g Ex. 39); (2) notes identified by Chrisman as Mejia's handwriting
9 referencing "Arlene McKay aka Jane Rivers," "41st and Figueroa." and "Pastor R. Kelly,
10 St. Anthony Grand Lodge, 232-9865" (Pet.'s Evid. H'g Ex. 33; Pet.'s Evid. H'g Ex. 4
11 (Chrisman Report)); (3) telephone messages for Jacobs from Lewis with a note as to Arlene
12 McKay under Kenneth Hayes on the back of one of three memo pads (Pet.'s Evid. H'g Ex.
13 72); (4) Trutanich's handwritten notes on a page of yellow legal pad written in black ink
14 listing witness and noting, "Passenger in Lewis car 'Arlene McKay' 'Jean Rivers,'" with
15 the entry crossed out in blue ink (Pet.'s Evid. H'g Ex. 68); (5) Trutanich's notes identifying
16 Arlene McKay under "things to do" (Pet.'s Evid. H'g Ex. 52); (6) handwritten note with
17 Arlene McKay on it (Ex. 54); (7) handwritten note with Kenneth Hayes and Arlene McKay
18 (Pet.'s Evid. H'g Ex. 74); (8) handwritten note (partly legible) with "Dunn Homicide"
19 written at the top and listing Patricia Lewis, Arthur Cox, and Arlene McKay (with " __ Jane
20 R__" next to her name) and with contact information: "St. Anthony Grand Lodge, 4126
21 So. Figueroa" (Pet.'s Evid. H'g Ex. 83); (9) handwritten note with "Dunn Homicide"
22 written at the top, noting "wit info given by wit Joe Lewis" and noting "Arlene McKay -
23 lives around 41st & Figueroa, is a member of S. Eastern Star, St. Anthony Grand Lodge 232-
24 9865, Mr. Bobby Kelly, 582-6919" (Pet.'s Evid. H'g Ex. 84); (10) handwritten note listing
25 Arlene McKay and Patricia Lewis with Lewis's contact information (Pet.'s Evid. H'g Ex.
26 85); (11) notes identified by Chrisman as Mejia's handwriting listing Arlene McKay with
27 address 1126 W. 75th Str., 750-5867 and November 21, 1995 memorandum from Mark
28 Silverstein (ACLU) noting that they did not receive a copy of this page because it was on

1 the back of one of the pages in the murder book (Pet.'s Evid. H'g Ex. 87; Pet.'s Evid. H'g
2 Ex. 4 (Chrisman Report)); and (12) Arlene McKay's death certificate listing 1126 W. 75th
3 Street as her home address (Pet.'s Evid. H'g Ex. 103).
4

5 In addition, Trutanich testified at the evidentiary hearing regarding the evidence he
6 provided to defense counsel about the trial witnesses. (RT at April 30, 2015 RT Vol. 3 at
7 18 (stating that "I went beyond Brady").) Trutanich testified that the handwritten list of
8 witnesses, including a reference to "Passenger in Lewis car 'Arlene McKay' 'Jean Rivers'"
9 that was crossed out in blue ink (Pet.'s Evid. H'g Ex. 68), was his handwritten pre-trial
10 witness list. (April 30, 2015 RT Vol. 2 at 10-11.) Trutanich further testified that he was not
11 able to serve this witness with a trial subpoena because he could not locate her. (Id.)
12 Nevertheless, Trutanich testified that the trial subpoena, which listed Arlene McKay's name
13 and the address of 41st Place and Figueroa, was given to the defense. (April 30, 2015 Vol.
14 1 at 192-95 and Pet.'s Evid. H'g Ex. 39.) However, at the deposition of Bernard Gross,
15 Petitioner's trial counsel who is now deceased, Gross testified that he was not aware at the
16 time of trial that the second eyewitness was also known as Arlene McKay or where she
17 lived. (Pet.'s Evid. H'g Ex. 117 at 13-16.¹⁶)
18

19 ¹⁶ At his deposition, Gross was questioned regarding his cross-
20 examination of Lewis at the preliminary hearing and trial, and he
21 answered:

22 A: [E]very answer was negative. Didn't know, didn't
23 remember, and had no idea where she was. I asked her where
24 she was picked up, she didn't know. Did she know the name,
25 no. She knew nothing whatsoever, completely. And I asked her
26 question after question, and it was negative all the way that
27 she didn't know anything or anybody, the name of the other
28 person in the vehicle that was with Mrs. Lewis.

* * *

[W]e would have checked out the name, the address and the
location of the lady that was with Mrs. Lewis at the time of
the alleged murder. You don't have to be a genius to know

1 Following the evidentiary hearing, the Court inspected the original murder book in
2 this case,¹⁷ and determined that the information contained in Petitioner’s Evidentiary
3 Hearing Exhibit 87 (Mejia’s notes listing Arlene McKay’s correct address) was on the back
4 of Petitioner’s Evidentiary Hearing Exhibits 33 and 83 (Mejia’s notes listing “Arlene
5 McKay aka Jane Rivers” at 41st and Figueroa). The murder book contained the original
6 version of Petitioner’s Evidentiary Hearing Exhibits 33, 83, 84, 85, and 87. The Court also
7 inspected the original set of copies of all pre-trial discovery provided by the prosecution to
8 trial counsel following the evidentiary hearing.

9
10 **B. Analysis of Petitioner’s Napue Claim Based on Patricia Lewis’s Testimony**

11 Here, there is no dispute as to the first prong of Napue: Lewis’s testimony that “Jean
12 Rivers” was the driver of the car was untrue. The Los Angeles County death certificate
13 confirms that this woman’s name was Arlene McKay, and it lists her address as the same
14 home address noted in Mejia’s notes for this woman that were contained in the murder
15 book. (Pet.’s Evid. H’g Exs. 87, 103.) Other evidence in this case suggests that McKay was
16 a friend of Lewis and Lewis lied in order to protect her friend because McKay was afraid
17 and did not want to get involved as a witness. (See 1995 State Pet., Ex. 186 (Decl. of James
18 Lewis at ¶ 19 (stating that he was Patricia’s stepson and noting that, after hearing shots in
19 the neighborhood on the day of the Dunn murder, his stepmother returned home in a car
20 driven by her friend, Arlene McKay, who also was a member of the Eastern Star).). Thus,
21 Lewis’s testimony on this point was “actually false” within the meaning of Napue.

22 Next, under Napue, Petitioner must show that the prosecution knew or should have
23

24 that. It’s common sense.

25 (Pet.’s Evid. H’g Ex. 117 at 14, 16.)

26
27 ¹⁷ The “murder book” was a binder that the prosecution routinely used in murder cases to
28 prepare for trial, and contained relevant documents, such as police reports, photographs, Dunn’s autopsy,
and handwritten investigative notes.

1 known that Lewis's testimony was actually false. Hayes, 399 F.3d at 984. Respondent
2 argues that Trutanich did not know that Lewis's testimony as to the identity of the driver
3 of the station wagon was false and, regardless, the prosecution had provided evidence of the
4 alternate identity of this witness through pre-trial discovery such that defense counsel
5 should have been aware of her identity. (See Resp.'s Post-H'g Br. at 22-25.) Nevertheless,
6 both the record at trial and trial counsel's deposition testimony show that trial counsel did
7 not know that the second eyewitness might also be known as Arlene McKay or where this
8 woman lived. (See RT at 7735-77; Pet.'s Evid. H'g Ex. 117 (Gross Depo. at 13-16).) At
9 trial, trial counsel questioned Lewis extensively about the identity of her friend, and asked
10 a series of questions designed to elicit information that would enable counsel to locate
11 Rivers. (RT at 7735-77.) For instance, counsel asked Lewis: how Lewis met Rivers;
12 whether she had seen or spoken with Rivers since the murder; whether Lewis knew where
13 Rivers lived; and what sort of an automobile Rivers drove. (Id. at 7735-40.) Furthermore,
14 despite Trutanich's assertion at the evidentiary hearing that McKay's subpoena would have
15 been sent to the defense, the subpoena does not indicate, by an "aka" or otherwise, that
16 McKay was the same person as Rivers, and it does not list her correct home address.

17
18 The Court's review of the original pre-trial discovery provided by the prosecution to
19 trial counsel confirms that the prosecution did not provide to the defense copies of the notes
20 pertaining to McKay and/or Rivers that were contained in the murder book, or any other
21 information indicating that McKay was the same person as Rivers or her correct address.
22 In fact, in state habeas proceedings, Petitioner explained that the prosecution's notes
23 pertaining to Arlene McKay and Jean Rivers and identifying them as the same person were
24 disclosed for the first time during informal discovery when Mark Silverstein, Petitioner's
25 state habeas counsel at the ACLU, inspected the original murder book.¹⁸ In sum, the
26 evidence demonstrates that the prosecution failed in its constitutional obligation under

27 ¹⁸ Specifically, Silverstein found the page of notes referring to "Arlene McKay aka Jane
28 Rivers." (August 15, 1997 Pet.'s Reply to Inf. Response at 17-18; see also Pet.'s Evid. H'g Ex. 83.)

1 Brady to provide the defense information showing that the true identity of Jean Rivers was
2 Arlene McKay, as well as Arlene McKay’s correct home address. Strickler, 527 U.S. at
3 281-82 (finding that Brady is violated where evidence that is impeaching is suppressed by
4 the State, “either wilfully or inadvertently”).

5
6 Despite the fact that trial counsel indicated no knowledge that “Jean Rivers” might
7 not be the name of this second eyewitness, at no point did Trutanich make clear for the
8 record during trial that “Jean Rivers” was also known as “Arlene McKay.” At the
9 evidentiary hearing, Trutanich agreed that his handwritten notes on a page from a yellow
10 legal pad noting “Passenger in Lewis car ‘Arlene McKay’ ‘Jean Rivers’” was likely a
11 witness list he had made to prepare for trial. (April 30, 2015 RT Vol. 2 at 10-11, Pet.’s
12 Evid. H’g Ex. 68.) Indeed, the use of quotes around both names in his notes suggest that
13 Trutanich questioned the identity of this witness, and that he had some idea that Lewis was
14 not being truthful about the name of the driver. As a matter of fact, Trutanich testified at
15 the evidentiary hearing, as Respondent concedes, that he was not certain which was the
16 correct name (i.e., Rivers or McKay) for the driver in the car. (See Resp.’s Post-Evid. H’g
17 Br. at 23 (citing April 30, 2015 RT Vol. 3 at 23, 29-30, 33).¹⁹) Respondent also concedes
18 that Trutanich at a minimum “suspected” that the driver’s name was McKay. (Resp.’s Post
19 Evid. H’g Br. at 24.) See also Morris v. Ylst, 447 F.3d 735, 744 (9th Cir. 2006) (holding
20 that a prosecutor must investigate perjured testimony and may not avoid the obligation to
21 do so by “remaining willfully ignorant of the facts.”) (citations omitted). Furthermore,
22 Mejia’s notes in the murder book containing McKay’s correct address (Pet.’s Evid. H’g Ex.
23 87) indicate that Mejia knew who McKay was and that he likely would have interviewed

24
25 ¹⁹ To the extent that Respondent maintains that Trutanich was not certain there was a second
26 eyewitness in the car based on portions of Trutanich’s evidentiary hearing testimony (Resp.’s Post-H’g Br.
27 at 23 (citing April 30, 2015 RT Vol.3 at 27-28, 33)), his argument is disingenuous. Ample evidence
28 demonstrated that Lewis was a passenger in the station wagon, not the driver, including trial testimony
which Trutanich himself elicited. (See RT at 7695-97.) Thus, there is no credible evidence that Trutanich
questioned the existence of a second eyewitness.

1 her about the evening of the Dunn murder.²⁰ Thus, under Napue's second prong, the
2 evidence, including Trutanich's own handwritten pre-trial witness list, demonstrates that the
3 prosecution either knew or at least should have known that Lewis's testimony as to identity
4 of the woman in the car with her on the night of the murder was actually false.
5 Consequently, even if Trutanich's assertion at trial was true that he was unable to locate the
6 second eyewitness, Trutanich was constitutionally obligated to make clear for the record
7 when Lewis was testifying that the second eyewitness was also known as Arlene McKay.
8

9 Lastly, Petitioner must show that Lewis's false testimony on this point was
10 "material." Hayes, 399 F.3d at 984. By the time of the evidentiary hearing -- more than 30
11 years after the trial -- both McKay and Mejia, the primary investigating officer, had passed
12 away. Trutanich's detective, Bell, claimed not to remember this witness or much of the
13 investigation at all at this juncture. (April 30, 2015 RT Vol. 3 at 49, 52.) The sole evidence
14 elicited by Petitioner as to these allegations was the crime scene reconstruction.²¹ However,
15 this evidence fails to confirm that McKay's accounts of the events on the evening of the
16 murder would have differed with the account offered by Lewis. Indeed, similar evidence
17 was presented at trial, when Lewis was cross-examined with a diagram regarding the
18 placement of the vehicles and about the rainy conditions of the evening of the murder

19 ²⁰ Significantly, Petitioner correctly points out that Trutanich indicated that this witness was
20 important and stated that he had two investigators trying to find her. (Pet.'s Reply at 14 (citing April 30,
21 2015 RT Vol. 1 at 210-12.) In addition, Petitioner points to the Lewis's 2008 declaration, in which she
22 states that McKay was interviewed by the police. (Pet.'s Post H'g Br. at 28 n.9 (citing Mot. For Evid. H'g,
23 Ex. 1328).) Respondent contends that this statement is hearsay. (Resp.'s Post-Evid. H'g Br. at 26 n.30.)
24 Regardless, whether or not Mejia or any other member of the prosecution team interviewed McKay does
25 not change the outcome of this claim; there is ample evidence indicating that the prosecution knew or
26 should have known that Lewis's testimony regarding the identity of the driver was false, as discussed
27 above.

28 ²¹ At the evidentiary hearing, Petitioner elicited expert evidence from Robert Snook, as well
as John Hammond, an investigator with the FPD, regarding a crime scene reconstruction filmed on March
25, 2014, during the hours around 6:30 in the evening -- the same date and time that the Dunn murder in
1982. (March 12, 2015 RT Vol. 1 at 131-33.) The Court also viewed the videotape of Snook's crime scene
reconstruction. (Id. at 133.)

1 occurred that could have affected her ability to see the crime. (RT at 7737-38 (Lewis’s
2 testimony on cross-examination that it was “misting” at the time the crime occurred); RT
3 at 7742-43 (Lewis’s testimony on cross-examination that it was “getting pretty dark” at the
4 time the crime occurred), RT at 7749-70 (Lewis’s cross-examination regarding the position
5 of automobiles and Dunn based on a diagram).)

6
7 Nevertheless, the Court recognizes that Petitioner is not responsible for his inability
8 to elicit any testimony as to what McKay witnessed on this evening by the time he was
9 given the chance to do so. Instead, Petitioner’s inability to elicit this evidence resulted from
10 a combination of factors beyond his control: the prosecutor’s inadvertent failure to provide
11 trial counsel sufficient information to identify the driver as Arlene McKay and her
12 whereabouts at the time of trial; the prosecutor’s knowing failure to correct Lewis’s
13 testimony regarding the identity of the driver at trial; and the California Supreme Court’s
14 error in failing to grant record expansion and/or an evidentiary hearing as to this claim on
15 habeas review more than a decade ago. Especially in view of his pre-trial witness notes,
16 Trutanich’s failure at trial to point out for the record during Lewis’s testimony that the
17 alternate identity of “Jean Rivers” was Arlene McKay was deeply troubling. However, the
18 California Supreme Court’s summary denial of Petitioner’s allegations given the evidence
19 that was presented to it in state habeas proceedings was inexplicable. As it did in this case,
20 the California Supreme Court routinely summarily denies state habeas petitions in capital
21 cases.²² Yet, the federal courts grant habeas relief in California capital cases in well over
22

23 22

24 See CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE,
25 REPORT AND RECOMMENDATIONS ON THE ADMINISTRATION OF THE DEATH PENALTY
26 IN CALIFORNIA (2008) (CCFAJRRADPCA),
27 <http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>
28 at 90 n.118 (“The California Supreme Court issues an order to show cause requiring the Attorney
General to respond in *only 8% of death penalty habeas corpus petitions*, and orders an evidentiary
hearing before a referee *in only 4.5% of the cases.*”) (emphasis added).

1 half the cases they review.²³ Nevertheless, by the time a California capital case reaches the
2 federal courts in habeas proceedings, often decades have passed and critical evidence is no
3 longer available.²⁴

4 In this case, whether relief is warranted hinges upon the definition of
5 “materiality” under Napue. It is well-established that a Napue violation is “material” and
6 results in the reversal of a conviction “if the false testimony could in any reasonable
7 likelihood have affected the judgment of the jury.” Dow v. Virga, 729 F.3d 1041, 1047 (9th
8 Cir. 2013) (citing Napue, 360 U.S. at 271; and Giglio v. United States, 405 U.S. 150, 153
9 (1972)). See also Jackson, 513 F.3d at 1076; Hayes, 399 F.3d at 984.

10 Although the government’s knowing use of false testimony does not per se require
11 reversal, the Napue materiality standard is “less demanding” than “ordinary” harmless error
12 review. See Dow, 729 F.3d at 1048 (citations omitted). A Napue violation is established
13

14 ²³

15 Jones v. Chappell, 31 F. Supp. 2d 1050, 1055 (C. D. Cal. 2014), rev’d, 806 F.3d 538 (9th Cir.
16 2015) (noting that, between 1978 and 1997, “60 percent of all inmates whose habeas claims have been
17 finally evaluated by the federal courts [] *were each granted relief from the death sentence by the*
18 *federal courts.*”) (citing statistics from Cal. Dep’t of Justice, Criminal Justice Statistics Center,
19 <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/homicide/hm11.pdf>)
20 (emphasis added); CCFAJRRADPCA at 4 (noting that, in cases where federal courts have rendered
21 final judgments in habeas corpus challenges to California death penalty judgments for the period from
1977 to 2008, *federal courts have recommended relief in the form of a new guilt or penalty phase trial*
in 38 cases, or 70 percent of those cases) (emphasis added).

22 ²⁴ See also, e.g., Jones, 31 F. Supp. 2d at 1055 (noting that, “[f]or those whose challenge to
23 the State’s death sentence is ultimately denied at each level of review, the process will likely take 25 years
24 or more.”) (citing Gerald Uelmen, *Death Penalty Appeals and Habeas Proceedings: The California*
Experience, 93 Marq. L. Rev. 495, 496 (2009) (“Typically, the lapse of time between sentence and
25 execution is twenty-five years, twice the national average, and is growing wider each year.”)).

26 In addition, the time for a capital case to proceed through the California state court system ranges
27 between 14.7 and 19.17 years. CCFAJRRADPCA at 22-24. Although federal courts have an average
28 delay of 8.4 years from the filing of a habeas petition to the grant or denial of petition, including appeals,
“[m]uch of this delay is attributable to the absence of a published opinion and/or an evidentiary hearing
in state courts.” Id. at 24.

1 where there is “any reasonable likelihood that the false testimony *could* have affected the
2 judgment of the jury.” Jackson, 513 F.3d at 1076 (quoting Hayes, 399 F.3d at 985)
3 (emphasis added in Jackson). Moreover, “Napue requires us to determine only whether the
4 error *could* have affected the judgment of the jury, whereas ordinary harmless error review
5 requires us to determine whether the error *would* have done so.” Dow, 729 F.3d at 1048
6 (emphasis in original). Cf. Brecht v. Abrahamson, 507 U.S. 619, 636-37 (1993) (holding
7 that federal habeas review requires higher standard of harmless error than “beyond a
8 reasonable doubt” standard used on direct review; and holding that, on federal habeas
9 review, standard of whether error “had substantial and injurious effect or influence in
10 determining the jury’s verdict” applies). Where a Napue error is deemed to be material, the
11 analysis ends; there is no further harmless error analysis under Brecht. Hayes, 399 F.3d at
12 984.

13
14 Furthermore, in discussing materiality under Napue, the Ninth Circuit has “gone so
15 far as to say that ‘if it is established that the government knowingly permitted the
16 introduction of false testimony, reversal is *virtually automatic*.’” Jackson, 513 F.3d at 1076
17 (quoting Hayes, 399 F.3d at 978) (emphasis added). Thus, the question of materiality is not
18 whether the defendant would more likely than not have received a different verdict with the
19 evidence, but whether in its absence he received a fair trial, understood as a trial resulting
20 in a “*verdict worthy of confidence*.” Hayes, 399 F.3d at 984 (citations omitted) (emphasis
21 added).

22 Here, the false testimony regarding the true identity of the second eyewitness directly
23 impacted the fairness of Petitioner’s trial, and now casts grave doubt on whether the verdict
24 can be viewed as “worthy of confidence” given the evidence presented to this Court. Even
25 according to Trutanich, Lewis’s testimony was the lynchpin of the case. (See Pet.’s Mot.
26 For Evid. Hr’g, Ex. 1323 (Trutanich Depo.) at 61, 71 (stating that Lewis was “remarkable”;
27 given her testimony, the only way to lose the case was through “bad lawyering”; and her
28 testimony was “riveting.”) By presenting evidence as to the identity and whereabouts of the

1 second eyewitness that the prosecution knew or should have known was false, the State
2 effectively forever precluded Petitioner from being able to find out with certainty what
3 McKay saw on the night of the Dunn murder.
4

5 To assess the materiality of this error, the Court must consider the range of possible
6 impacts on the jury if Trutanich had pointed out Lewis's false testimony regarding the
7 identity and whereabouts of the driver after Lewis testified. It is possible, as Respondent
8 suggests, that the jury would have thought only that Lewis was lying in order to protect her
9 friend. Nevertheless, it is also possible that the jury could have formed a negative
10 impression of Lewis's credibility. Moreover, the jury already had been made aware that
11 Lewis had testified inconsistently regarding a key fact: the identity of the shooter. At trial,
12 Lewis explained that she failed to identify Petitioner as the shooter at the preliminary
13 hearing because she was scared after her home was attacked with gunfire. However, if the
14 jurors had known that Lewis not only had testified inconsistently about the identity of the
15 shooter but also had testified falsely about the identity of the driver of the station wagon,
16 the jurors would have been more inclined to distrust Lewis's testimony. In fact, the jury was
17 instructed to discount Lewis's testimony if she perjured herself on key facts. (CT at 665;
18 RT at 8400 ("A witness, who is willfully false in one material part of his or her testimony,
19 is to be distrusted in others. You may reject the whole testimony of a witness who willfully
20 has testified falsely as to a material point"); Silva v. Brown, 416 F.3d 980, 987 (9th
21 Cir. 2005) ("Impeachment evidence is especially likely to be material when it impugns the
22 testimony of a witness who is critical to the prosecution's case."); Carriger v. Stewart, 132
23 F.3d 463, 480 (9th Cir. 1997) (holding that impeachment evidence was material when it
24 pertained to the "prosecution's star witness"); United States v. Jernigan, 492 F.3d 1050,
25 1055-56 (9th Cir. 2007) (holding that prejudice is particularly strong when a falsehood
26 undermines the only testifying eyewitness); Hayes, 399 F.3d at 986 ("The jury's estimate
27 of the truthfulness and reliability of a given witness may well be determinative of guilt or
28 innocence, and it is upon such subtle factors as the possible interest of the witness in

1 testifying falsely that a defendant's life or liberty may depend.").

2 Furthermore, if Trutanich had pointed out Lewis's false testimony and thereby caused
3 the jury to discredit Lewis's trial testimony, the jury might not have believed that Petitioner
4 was in fact the actual shooter. Indeed, the account given by Hayes that the jury heard,
5 through the testimony of both Hayes and Officer Jones, suggests that the passenger in the
6 van with Petitioner -- Curtis Thomas (aka Bongo) -- was the shooter. This is also consistent
7 with the testimony Lewis initially provided at the preliminary hearing when she testified
8 that she did not see whose arm came out of the window with the gun that shot Dunn, which
9 she later contradicted in her trial testimony identifying Petitioner as the shooter.

10 The only other evidence suggesting that Petitioner was the shooter was the dubious
11 testimony provided by Gardner, a career informant whose credibility was greatly damaged
12 on cross-examination. Although Gardner had worked as an informant for Holmes for three
13 years and had provided information on 25 other crimes, it was three years after the Dunn
14 murder before Gardner told Holmes about Petitioner's statements about the Dunn murder.
15 (April 30, 2015 RT Vol. 3 at 80, 87.) Considering that Gardner was a seasoned "snitch"
16 with an obvious self-serving motive to testify, as well as the length of time that elapsed
17 between the Dunn murder and the time Gardner provided Petitioner's incriminating
18 statements to the prosecution, it is doubtful that the jury gave his testimony much weight.
19 See, e.g., Lisker, 651 F. Supp. 2d at 1140 (granting relief pursuant to Napue where the
20 remaining evidence, which consisted of the testimony of an informant with an "obvious
21 motive to fabricate the confession [such] that its value was minimal," left the court with "no
22 confidence in the jury verdict" rendered against the petitioner).

23 Consequently, if the jury had believed that Thomas was the shooter instead of
24 Petitioner, the jury only could have convicted Petitioner of first degree murder under an
25 aider and abetter theory of liability. At trial, the jury was instructed on aiding and abetting,
26 as follows:

27
28 A person aids and abets the commission of a crime when he or she, with

1 knowledge of the unlawful purpose of the perpetrator and with the intent or
2 purpose of committing, encouraging, or facilitating the commission of the
3 offense by act or advice aids, promotes, encourages or instigates the
4 commission of the crime.

5 A person who aids and abets the commission of a crime need not be
6 personally present at the scene of the crime.

7 Mere presence at the scene of a crime which does not itself assist the
8 commission of the crime does not amount to aiding and abetting.

9 Mere knowledge that a crime is being committed and the failure to
10 prevent it does not amount to aiding and abetting.

11 (RT at 8313-14, see also CT at 681, 682.) Given that Cox's testimony implicating
12 Petitioner in the Dunn murder (i.e., Petitioner told Cox that he had told Thomas to shoot
13 Dunn) and implicating Petitioner in shooting Lewis's home was procured by a violation of
14 Massiah, its presentation to the jury was error and the jury should have been instructed to
15 disregard it entirely. Accordingly, assuming that the jury believed Thomas was the shooter,
16 there would have been no admissible evidence suggesting that Petitioner had the specific
17 intent necessary under these instructions to convict him of first degree murder under an
18 aider and abetter theory of liability.²⁵ Thus, there is a reasonable likelihood that the jury
19 would not have convicted Petitioner of first degree murder at the guilt phase. Moreover,
20 even if the jury in this scenario somehow still found Petitioner guilty of first degree murder
21 at the guilt phase, it seems impossible that the jury would have imposed the death penalty
22 upon Petitioner at the penalty phase if they believed that Thomas was the actual shooter.

23 In addition, if Trutanich had corrected Lewis's testimony regarding the identity of the
24 driver, counsel could have had a chance to subpoena McKay as a witness at trial. It is
25 possible that McKay could have testified consistently with Lewis as to the events of the

26 ²⁵ Although Lewis also testified that she heard the driver of the van (Petitioner) say "Let's go
27 f___ him up" when Dunn first rode by the van on his bicycle and before the van stopped, such words by
28 themselves did not constitute an action by Petitioner that would have "instigated" or "encouraged" Thomas
to go as far as to murder Dunn. In any case, especially given Lewis's prior inconsistent about the identity
of the shooter, Lewis's testimony on other material facts would have been far less persuasive if the jury
had also known about her false testimony regarding the identity of the driver of the station wagon.

1 evening and the identity of the shooter. Indeed, Respondent argues that “any trial testimony
2 by McKay would have only served to corroborate the particulars of Lewis’s testimony, not
3 undermine it.” (Resp. Post-H’g Br. at 26-27.) This argument, however, begs the question
4 as to why the prosecution did not present McKay as a witness if in fact her testimony was
5 helpful. The testimony of two eyewitnesses who corroborate each other is obviously better
6 than testimony from only one eyewitness. Thus, Petitioner’s response -- that the answer to
7 this question is that McKay’s testimony was not helpful to the prosecution -- is a reasonable
8 conclusion.

9 It is also possible that McKay could have testified that it was so dark and rainy that
10 it was impossible to see the driver’s face, as the reconstruction evidence suggested. Had she
11 done so, McKay’s testimony could have further undercut Lewis’s testimony identifying
12 Petitioner as the shooter to the extent that the jury would have had more reason to doubt
13 Lewis on that point. See, e.g., Napue, 360 U.S. at 269 (“It is of no consequence that the
14 falsehood bore upon the witness’ credibility rather than directly upon defendant’s guilt.”).
15 McKay’s testimony could have also bolstered Petitioner’s alibi defense at trial and the
16 evidence he presented at trial that he was not in the van on the night of the murder. Thus,
17 under these alternate scenarios, there is a reasonable likelihood that the jury would not have
18 convicted Petitioner of the first degree murder of Dunn or that the jury would not have
19 imposed the death penalty upon him.

20 **C. Collective Impact of Napue and Brady Violations**

21 As a next step, the Court must consider the Napue violation based on Lewis’s false
22 testimony regarding the second eyewitness collectively with the Napue violation based on
23 the false testimony presented by the prosecution at the pre-trial hearing regarding the
24 admissibility of Cox’s testimony. See Jackson, 513 F.3d at 1076. While Lewis’s testimony
25 was the most important testimony in this case, Cox’s testimony was the next most important
26 testimony; it corroborated Lewis’s testimony that Petitioner was responsible for the Dunn
27 murder and demonstrated that Petitioner was responsible for shooting Lewis’s home.
28 Indeed, as Trutanich stated at the pre-trial hearing on Cox’s testimony:

1 . . . Mr. Cox’s evidence ties into [] Patricia Lewis’s statement in that her
2 house was shot. It ties in with the 89 Family Bloods. It ties into a gang search
3 warrant. Mr. Cox’s statement is the underlining corroboration of every piece
4 of evidence that we will produce in this trial other than the eyewitness herself
5 Patricia Lewis.

6 (RT at 6590.)

7 Moreover, after excluding Cox’s testimony pursuant to a Massiah violation, the only
8 other testimony as to Petitioner’s responsibility for the Dunn murder was provided by
9 Gardner, whose testimony was probably of little value to the jury. See Lisker, 651 F. Supp.
10 2d at 1140. Thus, in view of the false testimony offered by Lewis and members of the
11 prosecution team pertaining to Cox which led to the improper admission of Cox’s testimony
12 in violation of Massiah, the collective error was substantial and leaves this Court with no
13 confidence in the jury’s verdict.²⁶ See also Hayes, 399 F.3d at 978 (“Deliberate deception
14 of a judge and jury is ‘inconsistent with the rudimentary demands of justice’”) (quoting
15 Mooney v. Holohan, 294 U.S. 103, 122 (1935)).

16 Furthermore, the devastating impact of collective error becomes clearer by imagining
17 what the jury would have thought if Trutanich would have pointed out the false testimony
18 provided by Lewis and the incorrect testimony provided by Judge Shook, and if the jury had
19 been instructed to completely disregard the testimony of Cox after these witnesses testified
20 at the trial. If Trutanich had done so in accordance with his constitutional duty, the jury
21 likely would have had rejected the credibility of the prosecution’s entire case against
22 Petitioner. See Hayes, 399 F.3d at 988 (finding materiality of a Napue error pertaining to
23 an informant’s secret deal which, if had been disclosed to the jury by the prosecutor after
24 the informant testified, “would have had a devastating effect on the credibility of the entire
25 prosecution case.”); Sivak, 658 F. Supp. at 916 (quoting Jackson, 513 F.3d at 1077) (noting

26 ²⁶ However, as noted above, the impact of the Napue error resulting from Judge Shook’s
27 testimony would have been minimal in view of the fact that Judge Thomas testified similarly regarding
28 Cox’s marijuana violation at the Green Meadows trial the year before, and does not show that the
prosecution offered Cox an undisclosed “deal” in connection with this offense. Nevertheless, it does bear
on the overall credibility of the prosecution’s case.

1 that, “if a witness’s false testimony is corrected by the prosecution, his ‘willingness to lie
2 under oath’ is exposed and his credibility is irreparably damaged.”). Thus, there is
3 definitely a reasonable likelihood that these Napue errors could have changed the jury’s
4 ultimate decision. See also Jackson, 513 F.3d at 1076 (noting that each additional Napue
5 violation “further undermines our confidence in the jury’s decision”).

6 Finally, even though these Napue errors more than suffice as grounds for habeas
7 relief, the Court must next consider the Napue errors and the Massiah violation together
8 with the Brady violation based on the prosecution’s failure to provide the correct identity
9 and address of the second eyewitness. Under Brady, evidence is material where “there is
10 a reasonable probability that, had the evidence been disclosed to the defense, the result of
11 the proceeding would have been different.” Strickler, 527 U.S. at 280 (quoting United
12 States v. Bagley, 473 U.S. 667, 682 (1985); see also Wood v. Bartholomew, 516 U.S. 1, 5
13 (1995). “A ‘reasonable probability’ of a different result is shown when the government’s
14 evidentiary suppression undermines confidence in the outcome of the trial.” Kyles, 514
15 U.S. at 434 (quoting Bagley, 473 U.S. at 678). Thus, a “reasonable probability” does not
16 require finding that the suppressed evidence would have led to the petitioner’s acquittal.
17 Kyles, 514 U.S. at 434; see also Jackson, 513 F.3d at 1071 (stating that a “reasonable
18 probability” may be found “even where the remaining evidence would have been sufficient
19 to convict [the petitioner].”) (citing Strickler, 527 U.S. at 290). By failing to provide the
20 correct identity and address of the second eyewitness as it was constitutionally required, the
21 prosecution permanently prevented Petitioner from discovering what McKay saw on the
22 night of the murder. In view of the paramount importance of eyewitness testimony in this
23 case, this additional error by the prosecution further and significantly undermined the
24 integrity of the outcome of Petitioner’s case.

25 In conclusion, given the magnitude of the prosecution’s combined substantial errors
26 in this case, this Court cannot agree that Petitioner’s verdict was one “worthy of
27 confidence.” Jackson, 513 F.3d at 1076 (citing Kyles, 514 U.S. at 434) (holding that at both
28 stages of evaluating Napue and Brady errors, “we must ask whether the defendant ‘received

1 . . . a trial resulting in a verdict worthy of confidence.”); see also Commonwealth of The
2 Northern Mariana Islands v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992) (citations
3 omitted), overruled on other grounds by George v. Camacho, 119 F.3d 1393 (9th Cir. 1997)
4 (en banc) (“The prosecuting attorney represents a sovereign whose obligation is to govern
5 impartially and whose interest in a particular case is not necessarily to win, but to do
6 justice.”).

7 Accordingly, Petitioner is entitled to habeas relief as to the allegations set forth in
8 Claims 1(E), 6(B), and 11(E) regarding Lewis’s false testimony regarding the identity of the
9 driver of the car, and the allegations in Claim 5(C) as to the testimony presented at the pre-
10 trial Massiah hearing regarding Cox’s testimony.


11 CONCLUSION

12 For the foregoing reasons, the Court hereby finds that the FAP is GRANTED and
13 Petitioner is entitled to habeas relief on the following claims: (1) the Napue allegations in
14 Claim 5(C) as to the false testimony presented at the pre-trial Massiah hearing regarding
15 Cox’s testimony; and (2) the Napue allegations in Claims 1(E), 6(B), and 11(E), as to
16 Lewis’s false testimony regarding the identity of the driver of the car. The judgment of
17 conviction and sentence of death in the matter of People v. Barry Glenn Williams, Case No.
18 A623377, in the California Superior Court for the County of Los Angeles shall be
19 VACATED.
20
21
22
23
24
25
26
27
28

1 The Court denies as without merit the other claims upon which the Court granted an
2 evidentiary hearing in the December 10, 2013 Order, and dismisses as moot all remaining
3 claims in the FAP.

4 IT IS SO ORDERED.

5
6 Dated: March 29, 2016

7
8 
9

DAVID O. CARTER
United States District Judge

10 cc California Attorney General's Office -docketinglaawt@doj.ca.gov
11 Federal Public Defender - Hilary_Potashner@fd.org
12 Ninth Circuit Court of Appeals - Cathy_Catterson@ca9.uscourts.gov
13 California Department of Corrections - brandy.ebert@cdcr.ca.gov
14 California State Public Defender - helft@ospd.ca.gov