In the Supreme Court of the State of California

In re **JARVIS J. MASTERS,** **On Habeas Corpus**	**CAPITAL CASE** Case No. S130495 (Related Appeal No. S016883)

Marin County Superior Court, Case No. SC10467
The Honorable M. Lynn Duryee, Judge

RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING THE APPLICATION OF THE REVISED NEW EVIDENCE STANDARDS UNDER PENAL CODE SECTION 1473, SUBDIVISIONS (b)(3)(A) AND (B)

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SARAH J. FARHAT
Deputy Attorney General
ALICE B. LUSTRE
Deputy Attorney General
State Bar No. 241994
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3821
Fax: (415) 703-1234
Email: Alice.Lustre@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

INTRODUCTION

On December 15, 2017, nearly one year after the effective date of the statute at issue, Masters submitted a supplemental brief addressing changes to Penal Code section 1473 regarding false and new evidence in habeas proceedings. On January 31, 2018, this Court directed respondent to file a response.

CHANGE IN THE LAW

On January 1, 2017, amendments to Penal Code section 1473 became effective. In addition to defining false evidence, both testimonial and physical, the section now defines "new" evidence:

> (3)(A) New evidence exists that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.
>
> (B) For purposes of this section, "new evidence" means evidence that has been discovered after trial, that could not have been discovered prior to trial by the exercise of due diligence, and is admissible and not merely cumulative, corroborative, collateral, or impeaching.

Masters asserts that this amendment calls into question the referee's finding that Dr. Leonard's testimony was not "new" evidence, and serves to reduce the burden of proof required to sustain his claims. For the reasons set forth below, he is mistaken.

ARGUMENT

I. DR. LEONARD'S TESTIMONY DOES NOT FALL WITHIN THE DEFINITION OF NEW EVIDENCE UNDER PENAL CODE SECTION 1473.

A. Dr. Leonard's evidence, although created after trial, was not "new," in that similar evidence could have been discovered and developed prior to trial through the use of due diligence.

Masters asserts that Dr. Leonard's testimony is new evidence because "authorship analysis was not widely used until the 1990's," relying on references in articles cited by respondent. (Pet's Supp. Br., p. 3.) This overlooks the nature of Leonard's testimony and the fact that people were seeking to offer similar evidence years before the start of Masters's trial. In *United States v. Hearst*, 412 F.Supp. 893 (N.D. Cal. 1976), the defendant sought to present testimony of an expert in psycholinguistics. The offer of proof was that the expert "would have testified that her expertise in this area enables her to conclude *from a stylistic comparison* of known writings and utterances of the defendant with certain writings and tape-recordings of the defendant's voice offered into evidence by the Government that these latter *writings or utterances could not have been authored by the defendant*." (*Id.* at p. 894 [emphasis added].) Although the court did not allow the expert to testify due to "the relative infancy of this area of scientific endeavor," *Hearst* nonetheless shows that such evidence was being considered for court use at least 13 years prior to Masters's trial.[1]

[1] The *Hearst* opinion also references two cases from the 1950's where psycholinguistics was an issue, although it is unclear whether the particular applications were similar to those used in Masters's case. (412 F.Supp. at p. 895.)

In 1982, the government sought to present testimony comparing anonymous threatening letters with known writings of the defendant. According to the report, following a forensic linguistic examination,

> ... The results indicate a strong likelihood that RUSSELL CLIFFORD is the author of the questioned documents. This conclusion is based on (1) the identical "peculiar" misspelling, "figuar," and the identical misspelling, "Explodsives," in both sets of documents, (2) the presence of relatively long sentences in both sets of documents, (3) the appeal in each set of documents to the receiver's presumed aversion to adverse publicity, and (4) the similarity in paragraphing format. It is noted that "Thur." appears in Qc5, while "Thursday" is the consistent misspelling in K11. Perhaps it could be determined from other known writing samples whether MR. CLIFFORD draws this spelling distinction between the abbreviation and the full word, or even if he sometimes reverses letters in the abbreviation.

(*United States v. Clifford* (W.D. Pa. 1982) 543 F. Supp. 424, 428.) In that case, the government was not seeking to use an expert witness, but merely to point out the noted similarities to the jury.

Although the district court refused to allow the evidence to be admitted, the Third Circuit reversed that decision, holding:

> The correspondence which the government wanted to present to the jury in this case is relevant. The similarities between the cursive correspondence and the threatening letters, particularly the unusual misspellings, clearly have some tendency to make Clifford's authorship of the threatening letters more probable…. We reject the district court's conclusion that the "jury will be seriously misled" by the evidence. 543 F.Supp. at 428. In reaching that conclusion the district judge relied on the testimony of Dr. Miron that the jurors "might not draw the proper conclusions if not assisted in how they are to interpret the evidence." App. at 125A. . . .We disagree. The jury's function in every case is "to weigh the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts." [Citations.] Clearly the weighing process which the jury will perform in this case is not the same scientific process which Dr. Miron performs. In his work Dr. Miron relies

> on computer programs in order to identify similarities in writings. He then uses standard "counts" of present American English, listings of the frequencies of occurrence of words, in order to assign weight to those similarities. App. at 92A-97A. We see no reason, however, why jurors cannot merely examine the documents for themselves and consider the similarities between the documents along with the rest of the evidence presented by the government.

(*United States v. Clifford* (3d Cir. 1983) 704 F.2d 86, 90.) The court went on to observe that "'the technique [of identifying a writer by the internal patterns of the writing]-without the aid of experts or computers-is one long used in the courts.'" (*Id.* at pp. 90-91, quoting 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 901(b)(4)[03] (1982).) The court provided a list of cases cited by the government going back a number of years where jurors were allowed to compare similarities in documents. (*Id.*)

Based on these cases, Masters could, at a minimum, have presented the evidence regarding the differences between his known writings and the kites that were found by Leonard by letting the jurors compare the documents, even if he were unable to have an expert testify.[2] The referee correctly concluded that this evidence was not new.

B. In addition to such evidence being available prior to Masters's trial, Leonard's testimony fails to meet the definition in section 1473 as it was not admissible, material, or presented without substantial delay.

1. For the reasons discussed in Argument III of respondent's opening brief, Leonard's testimony would have been inadmissible at trial.

Section 1473(b)(3)(B) requires new evidence be admissible. In Argument III of Respondent's Exceptions to Referee's Report and Brief on

[2] As noted below, respondent maintains that Leonard's testimony should have been precluded under *People v. Kelly*.

the Merits, respondent asserted that the referee erred in denying his motion for a hearing under *People v. Kelly* (1976) 17 Cal.3d 24, to determine the admissibility of Leonard's testimony. For the reasons set forth in that argument, respondent maintains that Leonard's testimony should not have been admitted at the reference hearing and would be inadmissible in trial. Therefore, even if it were otherwise found that Masters could not have discovered the evidence prior to trial, Leonard's failure to demonstrate that his methods satisfy *Frye*, or are in any way reliable given his admission that calculation of an error rate for his methods was not possible (18RT 979-980), and his statement that, as to authorship, "I have no idea to a scientific certainty, or any other kind of certainty, whether the defendant wrote the kites or not," (18RT 1070), shows that such evidence should be inadmissible. Because his testimony should be deemed inadmissible, it fails to qualify as new evidence under section 1473.

2. As the referee found, the evidence is not material in that, even if believed, it does not speak to Masters's intent in writing the kites.

In answering in the negative the question whether there was newly discovered, credible evidence indicating that Masters was not a participant in the murder, the referee found that aside from Leonard's testimony not being "new," it failed to exonerate Masters:

> Dr. Leonard's testimony does not exonerate petitioner. It may suggest that Masters was not a planner or leader of the conspiracy, but Masters was not tried as the planner or leader of the conspiracy; he was tried as the knife-sharpener and messenger. The fact that Masters wrote BGF kites about the murder - whether in his own words or those of a higher-ranking member - tends to implicate him in the conspiracy. At a minimum, it shows that he was willing to take orders from superiors and pass messages.

(Final Report, p. 15.) This is similar to the language used by the court in *Hearst* when discussing the inadmissibility of similar evidence in 1976.

There, after finding that the evidence was unreliable, the court went on to find:

> Even if it were to be conceded that Dr. Singer's field of expertise is sufficiently reliable to justify expert testimony and such testimony could show with a reasonable degree of certitude that by a psycholinguistic analysis the defendant could not have authored the writings offered against her, there remains a serious question as to the materiality of this expert opinion. The issue with respect to these writings or tape recordings is the defendant's state of mind at the time she wrote or uttered the words used. Whether or not the defendant herself authored or composed the sentences chosen to express the ideas conveyed in the writings is immaterial to the issue of whether she subscribed to these ideas—that is, whether she meant what she said. It is certainly not uncommon for one who wishes to express an idea to enlist the assistance of another, whose talents as a writer are superior to one's own, for the purpose of insuring felicity of expression. The fact that someone other than the speaker has written the words spoken does not mean that the speaker does not share the ideas expressed.

(*United States v. Hearst*, 412 F. Supp. at p. 895.) Even under the "more likely than not" standard of section 1473(b)(3)(A), the referee's finding is fully supported and the claim fails.

3. Even accepting Masters's claim that the linguistic evidence could not have been discovered prior to or at the time of trial, he failed to present the evidence without substantial delay.

Section 1473(b)(3)(A) also requires that any new evidence be presented without substantial delay. Masters's failure to timely present evidence relating to the linguistic analysis was the subject of a Motion to Preclude testimony filed by respondent on January 12, 2011. That motion contained a detailed history of the filings relating to Leonard's testimony. For purposes of this argument, respondent notes the following:

- 1998 – Masters receives preliminary report from Dr. Roger Shuy containing a linguistical analysis

- February 2001 – Willis signs declaration stating that Masters copied the relevant kites
- January 2005 – Petition for writ of habeas corpus filed, Willis's declaration is attached as Exhibit 1, Shuy's report is not
- April 2008 – this Court orders a reference hearing
- July 2008 – Masters submits requested catalog of expected witnesses, including the following statements:
    - "Petitioner will introduce the testimony of a linguist and/or a document specialist, … to establish that the kites were grossly misinterpreted by the State's witnesses." (Petitioner's Catalog of Known Witnesses, p. 23.);
    - "A linguist to interpret the two kites allegedly written (but not authored) by Jarvis Masters." (Petitioner's Catalog of Known Witnesses, pp. 27 and 36.)
- August 2008 – respondent files his catalog and specifically requested that Masters identify his proposed expert, or that if not yet identified, he do so as soon as possible
- August 2010 – respondent filed a motion in limine to preclude expert testimony based on Masters's failure to provide either the identity or a summary of testimony for any proposed experts other than Graham McGruer, a CDCR expert.
- October 2010 – Masters states he has not yet retained an expert regarding the kites

- November 5, 2010 – Masters identifies Dr. Leonard by name as a forensic linguist, but states only that "Dr. Leonard may be called to testify regarding the authorship of the two kites in Masters' handwriting which Willis testified had been authored by Masters. [and] Dr. Leonard may also be asked to testify regarding the authorship of the Johnson kites that implicated Masters." (Petitioner's List of Names, CV's and General Description of Testimony of Retained Experts, pp. 2 and 3.)
- November 23, 2010 – Masters states that Leonard has been provided a copy of the writ, along with the declaration of Rufus Willis and Exhibits 5 and 6 to the writ, and 14 pages of materials identified as having been authored by Masters
- December 2010 – Masters provides five additional documents (12 pages) that had been forwarded to Leonard
- January 10, 2011 –
  - At close of court Masters indicates that a 1998 report by Dr. Roger Shuy had been submitted to Leonard
  - 9:00 p.m. – respondent receives a draft report by Leonard dated January 9, 2011, along with a note indicating that Leonard's final report would "probably incorporate some of Dr. Shuy's 1998 analysis."

From the above, it is clear that at least as early as 1998, Masters had information from a recognized expert in the field that was similar to the testimony Leonard presented at the 2011 reference hearing. Despite having that report in hand, Masters did not include the report as an attachment to his 2005 petition, nor did the petition reference the report. The report was neither provided nor referenced in the July 2008 catalog of witnesses and exhibits. It was again withheld following respondent's August 2008

request that Masters identify his experts. The report was similarly absent from any of the responses or disclosures provided to respondent from October through December 2010. It was not until January 10, 2011, after the hearing had begun, and twelve years after the Shuy report was prepared and given to Masters, that it was first disclosed, four days before Masters intended to call his expert witness. While Leonard's report was lengthier, and included review of some additional documents, Leonard did consider the information in Shuy's report and the two contain some similar findings.[3]

Failure to present evidence for twelve years cannot be deemed to be bringing forth evidence without substantial delay. Even allowing for the fact that the evidentiary hearing was not held until 2011, nothing justifies the failure to attach the report and incorporate it into the petition filed in 2005. This Court has long held that "[t]o satisfy the initial burden of pleading adequate grounds for relief, … [t]he petition should both (i) state fully and with particularity the facts on which relief is sought [citations omitted], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations." (*People v. Duvall* (1995) 9 Cal. 4th 464, 474.) Nor does anything in the record explain why Masters, who had both Shuy's report and the Willis declaration in 2001, waited another four years to file his habeas petition. Given the timeline of this case, Masters cannot satisfy the requirements of section 1473 as to the linguistic evidence.

---

[3] The report and cross-examination of Leonard regarding the findings is discussed in some detail in Argument III of Respondent's Exceptions to Referee's Report and Brief on the Merits.

II. WHERE THE ALLEGATION IS THAT THE TESTIMONY OF WILLIS AND EVANS WAS FALSE, I.E. PERJURED, SECTION 1473 DOES NOT ALTER THE STANDARD TO BE APPLIED AND HAS NO IMPACT ON THE REFEREE'S FINDINGS.

In Arguments II, III and IV, Masters simply reiterates the arguments he raised in his prior briefing. Nothing in section 1473 alters the way in which such evidence should be considered. As the court of appeal has noted in the past, "[w]hile, of course, the discovery of perjured testimony will almost necessarily involve the discovery of new evidence, these constitute distinct grounds for habeas corpus relief, are subject to different legal standards and must be considered separately." (*In re Wright* (Ct. App. 1978) 78 Cal. App. 3d 788, 802.) Where a claim is based on the use of false testimony to obtain a conviction, relief may be granted only if the false evidence is "substantially material or probative," i.e., "if there is a 'reasonable probability' that, had it not been introduced, the result would have been different. [citation]" (*In re Roberts* (2003) 29 Cal.4th 726, 741-742.) This is the same standard to be applied even if the evidence proffered is considered "new" rather than false. The passage of the amendments to section 1473 did not alter the standard of review to be applied. The referee specifically found that both Willis and Evans, along with the other inmate witnesses, lacked credibility and had motives to lie both at trial and at the reference hearing. As discussed in the primary briefing, the referee correctly applied the law of this Court, which holds that where it is not clear that the lie was in the trial testimony, this Court "will not disturb the jury's verdict based upon a recantation that must be viewed with suspicion and was subsequently disavowed." (*In re Roberts, supra,* 29 Cal.4th at p. 743.)

CONCLUSION

For the reasons set forth above, as well as the arguments contained in Respondent's Exceptions to Referee's Report and Brief on the Merits, the petition should be denied.

Dated: March 2, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SARAH J. FARHAT
Deputy Attorney General

/S/ *ALICE B. LUSTRE*

ALICE B. LUSTRE
Deputy Attorney General
Attorneys for Respondent

SF2005XH0003
21083260.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING THE APPLICATION OF THE REVISED NEW EVIDENCE STANDARDS UNDER PENAL CODE SECTION 1473, SUBDIVISIONS (b)(3)(A) AND (B)** uses a 13 point Times New Roman font and contains 2,914 words.

Dated: March 2, 2018

XAVIER BECERRA
Attorney General of California

/S/ *ALICE B. LUSTRE*
ALICE B. LUSTRE
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

Case Name: ***In re Jarvis Masters, On Habeas Corpus.*** Case No. **S130495 (Related Appeal No. S016883)**

I hereby certify that on March 2, 2018, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

RESPONDENT'S SUPPLEMENTAL BRIEF REGARDING THE APPLICATION OF THE REVISED NEW EVIDENCE STANDARDS UNDER PENAL CODE SECTION 1473, SUBDIVISIONS (b)(3)(A) AND (B)

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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

I further certify that some of the participants in the case are not registered CM/ECF users. On March 2, 2018, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Joseph Baxter
Attorney at Law
645 Fourth Street, Suite 205
Santa Rosa, CA 95404-4436

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 2, 2018, at San Francisco, California.

M. Mendiola	/s/ *M. Mendiola*
Declarant	Signature

SF2005XH0003
21085344.docx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **MASTERS (JARVIS J.) ON H.C.**
Case Number: **S130495**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **alice.lustre@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	Respondents Supplemental Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Alice Lustre California Dept of Justice, Office of the Attorney General 241994	alice.lustre@doj.ca.gov	e-Service	3/2/2018 11:03:59 AM
California Department of Justice Docket Unit California Dept of Justice, Office of the Attorney General	SFAG.Docketing@doj.ca.gov	e-Service	3/2/2018 11:03:59 AM
Chris Andrian Andrian & Gallenson 53073	andgal@sonic.net	e-Service	3/2/2018 11:03:59 AM
eService California Appellate Project California Appellate Project 000000	filing@capsf.org	e-Service	3/2/2018 11:03:59 AM
Gerald Engler California Dept of Justice, Office of the Attorney General 104400	gerald.engler@doj.ca.gov	e-Service	3/2/2018 11:03:59 AM
Richard Targow Attorney at Law 87045	rtargow@sonic.net	e-Service	3/2/2018 11:03:59 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

--
Date

/s/Alice Lustre

Signature

Lustre, Alice (241994)

Last Name, First Name (PNum)

California Dept of Justice, Office of the Attorney General

Law Firm