No: S130495 **DEATH PENALTY**

Related Automatic Appeal: No. S016883
(Superior Court of Marin County, Case No. 10467)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

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

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I. RESPONDENT'S OBJECTIONS TO DR. LEONARD'S TESTIMONY, WHETHER UNDER THE "NEW EVIDENCE" RUBRIC OR UNDER *KELLY*, SHOULD BE REJECTED

A. Respondent is Mistaken that Defense Counsel, Exercising Reasonable Due Diligence, Would Have Discovered the Process Used by Dr. Leonard to Exclude Masters as the Author of the Kites

Respondent asserts that forensic linguistics and stylistic comparisons would have been discoverable by Mr. Masters' counsel, through the exercise of due diligence, by reference to a 1976 case which refers to "a

stylistic comparison of known writings." (*United States v. Hearst* (N.D. Cal. 1976) 412 F. Supp. 893, 894; RSB[1] at pg. 5.) In citing this case, however, respondent conveniently ignores two salient facts: The first is that the expert was an expert in *psycholinguistics*, and so counsel would have had to know both that there was such a field and that it in fact included stylistic comparisons. Whatever psycholinguistics is, it was not a part of the broadening of the field of comparative forensic linguistics which came to fruition in the 1990's, after the trial herein.[2]

Second, even if counsel had somehow happened across *Hearst*, the district court rejects the testimony of the expert because of the "paucity of

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[1]The abbreviations which will be used in the brief are as follows:

–PEB – Petitioner's Exceptions Brief

–REB – Respondent's Exceptions Brief

–PRREB – Petitioner's Reply to Respondent's Exceptions to the Referee's Report and Brief on the Merits

–PSB – Petitioner's Supplemental Brief Regarding the Application of the Revised New Evidence Standards Under Penal Code section 1473, Subdivisions (b)(3)(A) and (B)

–RHRT – Reference Hearing Reporter's Transcrip

–RSB – Respondent's Supplemental Brief Regarding the Application of the Revised New Evidence Standards Under Penal Code section 1473, Subdivisions (b)(3)(A) and (B)

[2]Unfortunately, *Hearst, supra,* says nothing about the methods proposed and rejected in this case other than that they involved "a stylistic comparison of known writings and utterances of the defendant with certain writings and tape-recordings of the defendant's voice[.]" (412 F.Supp at p. 894.)

authority cited by defense counsel for the admissibility of psycholinguistic testimony." (*Id.*, at 895.) The "relative infancy of this area of scientific endeavor," (*ibid.*), respondent would seem to urge, was entirely cured by the time of this trial by the existence of one other federal case, from Pennsylvania. But *United States v. Clifford* (W.D. Pa. 1982) 543 F.Supp. 424 merely extended very slightly a long history of the use of such markers as misspellings and handwriting characteristics to identify authorship, none of which involved the sort of in-depth syntactical analysis used in this case. (*E.g., State v. Kent* (1909) 83 Vt. 28, 74 A. 389, 391, 392 [admitting date inscribed on door as similar in form defendant's other writings]; *Josephs, Executor v. Briant* (1914) 115 Ark. 538, 172 S.W. 1002, 1005 [upholding admission of witness testimony by friends of the deceased regarding deceased's method of writing and constructing sentences to prove questioned letters were written by him]; *Fleming's Estate* (1919) 265 Pa. 339, 109 A. 265, 266 [will challenge upheld due to misspelled words where deceased was English scholar and good speller]; *Murphy v. Murphy* (1920) 144 Ark. 429, 222 S.W. 721, 723-724 [expert was qualified to testify that will was forgery due to spelling and handwriting characteristics for deceased]; *State v. Hauptmann* (1935) 115 N. J. L., 180 A. 809 [defendant in Lindbergh kidnaping case was asked about similarities of errors in

ransom note and his own writings]; *Hughes v. United States* (10th Cir. 1963) 320 F.2d 459, *cert. den.*, 375 U.S. 966) [lewd letter was compared to known documents of defendant to show tendency to misspell certain words]; *United States v. Pheaster* (9 Cir. 1976) 544 F.2d 353, *cert. den.* 429 U.S. 1099 [misspelled words].)

Each of these cases used classic, *non-expert* methods of comparison to *include* the questioned writings – that is, to show that they were likely written by the same author as the known writings, by use of such methods as handwriting comparison, common misspellings or sentence construction, and the like. Even *Clifford, supra,* was limited to similar methods to find *similarities* between the questioned and known documents: identical peculiar misspellings; the presence of relatively long sentences; "the appeal in each set of documents to the received presumed aversion to adverse publicity," and the similarity in paragraphing format. (543 F. Supp at p. 428.)

All of the foregoing cases, however, are using *similarities* between the known and questioned documents to determine that the author of the questioned documents is the *same* as the author of the known writings.

What Dr. Leonard did in this case was to use methods developed after the trial herein to show not inclusion but exclusion – that by use of a

far more sophisticated set of linguistic tools, Jarvis Masters could be *excluded* as the author of the two questioned kites in comparison with the 14 known samples of his writings.

Dr. Leonard used eight different markers:

1. Type/Token Ratios (later removed from consideration by Dr. Leonard in his testimony (18 RHRT 990-992))
2. Words per Sentence Ratios
3. Word Frequencies
4. Key Words
5. Distribution of Modals; Deontic *Must*
6. The Idiosyncratic Nonstandard Contraction *I'am*
7. Distribution of the Indefinite Article *A/An*
8. Distribution of the Alternation *And/Or*

Dr. Leonard's use of word frequency analysis, significant word analysis, an analysis of the common word "must", and idiosyncratic features goes far, far beyond the methods used in any of the cases cited by respondent or set forth above. His testimony and analysis are more fully discussed in Petitioner's Reply to Respondent's Exceptions to the Referee's Report and Brief on the Merits (PRREB), at pages 58-72.

As that discussion, and the brief summary above make clear, neither *Hearst* (which *rejected* the use of the "psycholinguistics") nor *Clifford*, nor

any of the cases cited above would have alerted a diligent attorney at the time of the trial herein that there were experts available with the linguistic tools to exclude Jarvis Masters as the author of the questioned kites. At least not in 1989. (See Exhibits A and B to Respondent's Exceptions to Referee's Report and Brief on the Merits ("REB"), discussed more fully in Petitioner's Supplemental Brief ("PSB"), at pgs. 3-4.)

Finally, Respondent's two-page discussion of *United States v. Clifford* (W.D. Pa. 1982) 543 F.Supp. 424 is entirely misplaced. (RSB at 6-7.) That case, and the quotation from Weinstein's Evidence involve the long use of *similarities* among documents, discussed in the cases cited *supra* at pages 2-3, to provide an inference of a defendant's guilt. This conflation of linguistic similarities and linguistic differences was rejected by the referee, after hearing from Dr. Leonard why, in a closed society such as a prison gang, similarities only reflected the reality of adopting common modes of speaking and syntax and did not overcome the inherent and discoverable differences that he found between the two kites at issue and Mr. Masters' other writings. (19 RHRT 1155-1158.) As the referee noted, respondent presented no expert testimony to refute Dr. Leonard's, and ought not be heard to refute it here. (Referee's Report, at 15 ["Dr. Leonard testified convincingly, and no opposing expert was offered by respondent."].)

B. Respondent's Attempt to Overcome the Referee's Denial of Their *Kelly* Motion on the Grounds That *Kelly* Would Apply in a Trial to Preclude Dr. Leonard's Testimony Should Be Rejected

Respondent's reiteration of their exceptions-brief argument, that *People v. Kelly* would have precluded admission of Dr. Leonard's testimony and findings, is untimely, forfeited, and flawed. A highly detailed response appears in the aforementioned PRREB, at pages 73-147. Nevertheless, respondent raises the point again, so a much briefer response follows:

Respondent took exception to the Referee's *in limine* ruling denying its motion to preclude Dr. Leonard's report and testimony on the basis of *People v. Kelly* (1976) 17 Cal.3d 24. (REB at 57, *et seq.*) Prior to Dr. Leonard's testimony, respondent filed its motion to preclude. (Respondent's Motion to Preclude the Testimony of Dr. Robert Leonard Pursuant to *People v. Kelly* (1976) 17 Cal.3d 24, filed Feb. 18, 2011.) Petitioner filed his response, limited to the preliminary question of whether *Kelly* applied to Dr. Leonard's testimony at all. (*See* Petitioner's Response to Respondent's Motion to Preclude Testimony of Dr. Robert Leonard Pursuant to *People v. Kelly* (1976) 17 Cal.3d 24, filed Mar. 4, 2011.) The parties stipulated to a ruling on this preliminary question, and the Referee

ruled the *Kelly* did not apply. (Stipulation and Order re: Preliminary Ruling on the Pleadings, filed Mar. 21, 2011, p. 2.)

Respondent's exceptions brief sought to both relitigate the propriety of the referee's ruling against the application of *Kelly*, and to litigate the *Kelly* motion itself in this court, all in lieu of introducing expert evidence at the hearing to counter Dr. Leonard. Both should be rejected.

1. Respondent's Failure to Renew its Objection to Dr. Leonard's Testimony When it Was Introduced, and Their Concession During Argument, Forfeits the Issue Before this Court

Having lost the *in limine* motion to preclude Dr. Leonard's testimony, respondent had a duty to object when it was introduced at the hearing below in order to preserve the issue for this Court. (*People v. Morris* (1991) 53 Cal. 3d 152, 189 (parallel citations omitted), overruled on other grounds, *People v. Stansbury* (1995) 9 Cal. 4th 824, 830, fn. 1; *People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3; see also *People v. Turner* (1990) 50 Cal.3d 668, 708; *People v. Mattson* (1990) 50 Cal.3d 826, 849-850; *People v. Boyer* (1989) 48 Cal.3d 247, 270, fn. 13.)

In this case, respondent did not renew its objection either on the day that Dr. Leonard initially testified (18 RHRT 970-971), nor during the scheduling discussion on the prior court day (17 RT 961-963). Indeed, in her last closing argument, following Dr. Leonard's testimony, respondent's

counsel conceded that Dr. Leonard was entitled to offer his opinion and she was merely arguing the weight it should be given, conceding that it could come in:

> And our position is – and I would argue this, in a -- with a medical doctor, or with a legal -- an attorney who came in, I would make the same argument to them. Not necessarily that they can't provide their opinion, Your Honor, I think Dr. Leonard certainly can. Our position is that for these reasons, for the problems with this, for the kind of squishy nature of the factors that he uses, that it should not be relied upon in this case.
>
> And I apologize if I meant that he should not be considered. I think he certainly is free to offer his opinion just as any attorney is free to come in and say based on, you know, my practice as an attorney I would have done it differently, therefore he didn't follow appropriate standards. But then the opponent of that evidence is certainly free to argue, "Well, you know, but five other attorneys would do it differently." And that goes to the weight of it, Your Honor. And I think that is significant. And we would ask the Court to look at that when you're considering the weight of Dr. Leonard's testimony. (19 RHRT 1185.)

Accordingly, the argument was forfeited.

2. The Referee's Ruling That *Kelly* Did Not Apply to Dr. Leonard's Linguistic Analysis Was Correct

To begin with, *Kelly* itself recognized the trial court's discretion to determine whether to hear expert testimony: "The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*Kelly, supra,* 17 Cal. 3d at 39; *People v. McAlpin* (1991) 53

Cal. 3d 1289, 1299.) As petitioner will show, there is nothing approaching an "manifest abuse of discretion" here.

This Court has recognized the difference between expert testimony and the sort of "scientific" testimony that *Kelly* sought to guard against:

> It is important to distinguish in this regard between expert testimony and scientific evidence. When a witness gives his [or her] personal opinion on the stand -- even if he [or she] qualifies as an expert -- the jurors may temper their acceptance of [this] testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine; like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently 'scientific' mechanism, instrument or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative. [Citations.] For this reason, courts have invoked the *Kelly-Frye* rule primarily in cases involving novel devices or processes[.]

(*People v. McDonald* (1984) 37 Cal.3d 351, 372-373, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.)

As this Court has explained more than once, the underlying purpose of its holding in *Kelly* was to prevent lay juries from being overly bedazzled by new machines, devices, or techniques (none of which the use of linguistics is). (See, *e.g., People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1157 ["...absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*"]; *Kelly, supra,* at pp. 30-32 ["misleading aura of certainty"].)

Dr. Leonard has not done anything in his report that anyone could not do, once the underlying methodology is explained. He has counted words, found certain features which vary between the known documents and the questioned documents, and applied entirely transparent analyses to them. His expertise was in knowing what to look for. His *methods* are entirely transparent. Neither the Referee nor this Court nor, for these purposes, a trial jury, had to take his word for it. The results of his analyses speak for themselves. Indeed, this is precisely the point made by the *Clifford c*ourt quoted by respondent and discussed in the previous sub-section. (Resp. Supp. Brief at 6, quoting *United States v. Clifford, supra*, 543 F.Supp at 90.) As explained by this court in *People v. Jackson* (2016) 1 Cal.5th 269, *Kelly* is intended to "'forestall the jury's uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to unusually difficult for laypersons to evaluate.'" (*Id.* at p. 317, quoting *People v. Venegas* (1998) 18 Cal.4th 47, 80.) In *Jackson,* dog-scent trailing evidence was found not so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. (*Ibid.*) So, too, in this case. The entirely transparent methods of syntactical and word-use comparisons used by Dr. Leonard would be easily understood, and their weight easily evaluated, by a lay jury.

Respondent's own argument shows the inapplicability of *Kelly*. In arguing that Dr. Leonard's method would not be admissible under *Frye v. U.S.* (D.C. Cir. 1923) 293 F. 1013, 1014, respondent speaks of Dr. Leonard's failure to calculate an error rate, and quotes his testimony that he had "no idea to a scientific certainty, or any other kind of certainty, whether the defendant wrote the kites or not." (18 RHRT 1080; RSB at p. 8.) Respondent thus wants it both ways: it does not qualify under *Kelly* as a science, yet must be rejected as flawed science. Reliability concerns in this context go to the weight, not the admissibility of Dr. Leonard's measures. Indeed, if Dr. Leonard had submitted but one of the 7 measures for which he tested (after exclusion of the first - see PRREB at page 60, footnote 15) the reliability concerns would have risen in importance. It is notable, however, that *all* of the measures he testified to pointed to the same conclusion.

In addition, respondent's contention that Dr. Leonard's methods would not survive a *Frye* examination were rejected by the Illinois Court of Appeal in *People v. Coleman* (Ill.App. 2014) 24 N.E.3rd 373. There, the trial admitted Dr. Leonard's testimony for the state regarding similarities between questioned documents and known documents, using methods quite similar to those used here, including contractions ("I'm" instead of "I

am", fused spellings ("any time" fused into "anytime"), and apostrophe reversal (wont' and doesnt'). (*Id.* at 396.) The appellate court upheld the trial court's finding that *Frye* did not apply to bar Dr. Leonard's testimony, holding that such linguistic methods were neither new nor novel, nor even scientific because they were "derived solely from his or her observations and experiences."[3] (*Id.* at 400, citing *United States v. Starzecpyzel* (S.D.N.Y.1995) 880 F.Supp. 1027, 1041 [forensic document examination expertise constituted "technical, or other specialized knowledge," not "scientific knowledge," even though chemistry, physics, and mathematics clearly were used in the work of forensic document examiners].)

Moreover, the nature of the conclusion is crucial: *Kelly* is concerned with *definitive* results from the challenged science. Here, Dr. Leonard's work was not only not definitive, it was not introduced to decide the question. Rather, it was introduced to provide necessary corroboration to the recantations of the inmate snitch witnesses, Rufus Willis and Bobby Evans. The fact that the referee found Dr. Leonard credible is what provided that corroboration.

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[3]Lest there be any confusion about the *Coleman* court's finding that Dr. Leonard's methods were found to be not "new," it should be noted both that *Coleman* was a 1995 case, and, more important, like the cases cited hereinabove on pages 2 and 3, relied on similarities to include, rather than differences to exclude, the defendant as the author.

Viewed another way, one of the bases for *Kelly* analysis is whether correct scientific procedures have been used by the expert in reaching his opinion. (*Kelly*, at 30.) There is nothing in Dr. Leonard's analysis that is subject to such a test. He counted words. He compared syntactical tendencies. There is no machine to be calibrated, or DNA samples to be properly or improperly stored – there is nothing, in short, upon which to decide whether correct scientific procedures were applied. Rather, as an expert – such as a physician giving medical testimony, or an arson investigator reaching an opinion about the cause of a fire – he is rendering an opinion based upon the data he found *within the documents themselves.*

As noted, respondent's counsel admitted in her closing argument that Dr. Leonard was a qualified linguist (19 RHRT 117). She also conceded, in the argument quoted above at page 8, that his opinion could come in. That should settle the matter before this court.

3. Respondent's Materiality Argument Mimics the Referee's, and is Based Upon a Fundamental Misunderstanding of the Record at Trial and the Importance of Dr. Leonard's Findings

Respondent quotes the referee's findings that Dr. Leonard was immaterial, but in doing so, displays the same ignorance of the record below as did the referee.

According to the referee: "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." (Final Report, p. 15, quoted at RSB at p. 8.) This is simply wrong. The prosecutor, in his closing argument, referred to Bobby Evans' testimony that Masters told him that he voted for the order to go forward. (73 RT 16033; see also pp. 16039 [Masters as part of conspiracy]; 16046 ["Look to the letters themselves, written in the handwriting of Jarvis Masters" to show Overt Act Number 3]; *People v. Masters* (2015) 62 Cal.4th 1019, 1028 [Masters presented the plan to kill prison staff, and he and the other co-conspirators agreed on a plan].[4]

As noted in Petitioner's Supplemental Brief, at page 5, this court recognized in its opinion in *Masters* that at least one of the kites tended to implicate Mr. Masters. Indeed, the prosecutor argued to the jury that "the letters . . . these letters are central to our case. There is no denying that." (73 RT 16033.) However, if a jury were presented with Dr. Leonard's evidence that Masters was not the author of the kite, but rather simply the

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[4]It must be noted that, had the referee allowed final briefs at the end of the hearing, all of this could have been pointed out to her. That she refused to allow those briefs resulted in her, and respondent's counsel, coming to the erroneous conclusions they did.

scrivener acting under the orders of Willis, the kite would have lost its inculpatory force, and, indeed, shatter Willis's credibility.

Contrary the to idea that Dr. Leonard's findings were not material, the convincing evidence that Masters did not author the seemingly incriminating kites entirely undercuts the prosecution's case by "convincingly" supporting all of the other evidence introduced by petitioner that Willis was a chronic liar who lied also about Masters' involvement in the conspiracy. (Referee's Report, at 15 [Leonard "testified convincingly"].) Just as petitioner showed in his exceptions brief regarding false evidence, Dr. Leonard's new evidence is of a piece with the innocence of Jarvis Masters.

This included not only the substantial evidence – and referee's findings – that Willis and Evans were chronic liars. It included also the new evidence embodied in the formerly redacted portions of the Ballatore memorandum about the Richardson debriefing, in which he not only, at severe personal risk **[18 words redacted]**.

His failure to name Masters as a coconspirator, along with Masters' not having authored the kites, makes it significantly more likely than not that the outcome of the trial would have changed. (See PSB, at pgs. 8-10; Pen. Code §1473, subd. (b)(3)(A).)

If Masters did not author the kites, and if the jury knew of Willis's recantation to petitioner's investigators, and if Willis was thus shown to be the liar the referee found him to be, and if Richardson's list of coconspirators, almost identical to the prosecutions, did not name him as part of the conspiracy, then his writing down of the words Willis told him to write in the kites implicates him only as an accessory after the fact, and then *only* if he was not under compulsion to do so.

Dr. Leonard's testimony was therefore admissible and material.

4. Dr. Leonard's Testimony was Presented in a Timely Manner Because There Was No Forum in Which to Present it Earlier

Respondent sets forth a detailed chronology regarding the presentation of Dr. Leonard's findings and yet does not explain how it might have been presented sooner. By respondent's own argument, Dr. Leonard was not retained until November, 2010, or later (RSB at 10), and was presented along with his testimony in the 2011-2012 reference hearing. As a matter of law, Dr. Leonard's report and testimony were presented in a timely manner. Regarding Dr. Shuy's earlier report, respondent has similarly failed to explain in what forum, in a death penalty case, it might have been usefully presented. There was no prejudice to respondent in its not being included as an exhibit to the original petition; the underlying

claim was amply supported without it, and counsel had the right to seek further confirmation of Dr. Shuy's findings before presenting them to the court.

There are no cases defining substantial delay in the specific context of section 1473. More broadly, is has long been required that all habeas corpus petitions be timely filed without substantial delay: "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim. A petitioner must allege, with specificity, facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time." (*In re Robbins* (1998) 18 Cal.4th 770, 780.)

That the petition was itself timely is shown by the fact that this court issued its Order to Show Cause. Regarding the new evidence standards enacted in 2016 and incorporated in section 1473, the former statute did not include new evidence among the grounds for prosecuting a writ of habeas corpus. (2014 Cal Stats. ch. 623 (2014).) Accordingly, petitioner cannot be charged with meeting the requirements of an after-enacted statute, and petitioner's supplemental brief raising the new evidence standards was

presented to this court within a reasonable time after the 2016 revisions of the statute went into effect.

The evidence itself, as was stated in the prior briefing, was presented at the first opportunity – the 2011-2012 evidentiary hearing – in the context of his false evidence claim, which carried no such temporal requirement.

II. THERE IS A REASONABLE PROBABILITY THAT HAD THE JURY KNOWN ABOUT THE NEW EVIDENCE AND FALSE EVIDENCE THEY WOULD HAVE ENTERTAINED A REASONABLE DOUBT ABOUT JARVIS MASTERS' GUILT

Respondent argues that both "new evidence" and "false evidence" are subject to a similar standard of review, i.e., a "reasonable probability" that the evidence affected the outcome. (RSB at page 13, sentences 2, 4, 5, 6.) Irrespective of whether the "reasonable probability" standard attached to false evidence is the same as the "more likely than not" new-evidence standard, the result in this case is the same. Thus the ultimate question for the Court turns on what the jury would have done had they known about the false evidence and the new evidence, i.e., whether there is a reasonable probability, or more likely than not, that had they known about the new evidence, and the false evidence, they would have entertained a reasonable doubt about Jarvis Masters' guilt. Whichever the lens through which petitioner's post-conviction evidence is viewed, the result at trial would have been different. Indeed, it is precisely the new evidence which puts the lie to the false evidence presented at the trial.

Respondent appears to suggest that *In re Roberts* (2003) 29 Cal.4th 726, modifies this standard with a special *per se* rule that a jury's verdict should not be disturbed based on a disavowed recantation. (RSB at page

13, citing *Roberts* at 743.) *Roberts* does no such thing. The overriding standard remains the same. The result in *Roberts* is based on the facts of that case, as it should be. Yet, the facts in this case are entirely different. Thus, in this case, there is far more than a reasonable probability that had the jury known about all of the new evidence, and all of the false evidence, and all of the Bobby Evans evidence that was withheld by the State, a jury would have entertained a reasonable doubt about Jarvis Masters' guilt.

The *Roberts* facts are not particularly relevant to the analysis of the facts in this case. In that case, three eyewitnesses had testified that they saw Roberts commit the murder: Hayes, Cade, and Long. (*Id.* at 732.) Long recanted but later recanted his recantation. (*Id.* at 735.) Witness Yacontis, whose testimony was less significant, because he did not witness the murder, also recanted. (Id. at 733, 736.) Yacontis' recantation, however, was refuted by prison records. (*Id.* at 743.) Thus, the core of the State's case against Roberts remained substantially intact: Cade reaffirmed his eyewitness testimony. (*Id.* at 738.) Long, after recanting his recantation, invoked his privilege against self-incrimination and did not testify at the reference hearing. (*Ibid.*) Hayes, allegedly deceased, did not testify at the reference hearing. (*Id.*, at 740.) Thus, his prior testimony remained intact. (*Ibid.*)

In this case, by contrast, the false evidence, the new evidence, and the undisputed *Brady* violation eviscerate the core of the prosecution's case. As petitioner has argued in his supplemental brief, the State's case rested primarily on three pillars:

1. The Rufus Willis testimony;
2. The Bobby Evans corroborative evidence upon which the jury heavily relied because (a) the court declared Evans to be an expert; and (b) the jury's guilty verdict was returned shortly after they heard a read-back of the Evans testimony; and
3. The two kites in Masters' handwriting, which the District Attorney described as the "choke chain" around Jarvis Masters neck, and this Court referred to as helping to establish the harmlessness of three asserted appellate errors.

(PSB at 13-14; *People v. Masters* (2016) 62 Cal.4th 1019, 1048, 1053, 1063-1064.)

The entirety of the new evidence and false evidence, *including respondent counsel's June 30, 2010 phone conversation with Willis (see below),* clearly removes Rufus Willis from the case. Thus, in the referee's opinion, the entirety of this evidence establishes that Willis is a chronic liar. (Referee's Report at 6, 8, 9, 10) In the referee's opinion, nothing he ever

said was worthy of belief. (Referee's Report at 6, 8-10) It must therefore be presumed that a jury, confronted with this evidence would reach the same conclusion.

Unlike what happened in *Roberts*, Willis, after he disavowed certain portions of his 2001 declaration, did not adhere to his 1989 testimony. Significantly, he refused to say whether he told the District Attorney the truth, or whether someone told him what to say. (PEB at 125.). No jury would ever believe such a witness. Willis also provided stunning details of the threats and promises that were made by the District Attorney to obtain his cooperation. (*Id.*, at 123-126, 137, 141-142) What is perhaps most remarkable about his June 30, 2010 conversation with respondent's counsel is that it conflicts with much of what he has said before to the State, or in court. (*Id.* at 127-132.) (For the convenience of the Court, a copy of the just-cited pages, contrasting what Willis told respondent's counsel on June 30, 2010, with what he said at other times to the state or in court, are attached hereto as Appendix A.) Simply stated, Willis has forever destroyed his usefulness as a witness in this case.

Given Willis' history as a "revolving door," completely incredible witness, no one – not the District Attorney, and not the defense – would ever call Willis as a witness in this case, given what is now known. Yet the

fact remains that his February 23, 2001 declaration recanting his trial testimony is corroborated by overwhelming evidence in the record. (See, e.g., Chart at PEB, pages 108-119.) There is also now a large store of compelling habeas evidence that Rufus Willis gave false evidence in 1989. (See PEB at pages 64-89.) Finally, Willis description of Masters at the preliminary hearing, which didn't describe Masters at all, closely matched Harold Richardson, who has admitted his guilt in the Ballatore memo, and provided remarkably accurate details about the crime. (PEB at 65-71, 97-98) The weight of the evidence now clearly points to the conclusion that the State has had the wrong man on death row since 1990.

The new evidence, the false evidence, and the *Brady* violation also totally and completely remove Bobby Evans from the case. In the referee's opinion, Bobby Evans lied at the trial, and nothing he said was worthy of belief. (Referee's Report at 8.)

Finally, as already noted, the two kites which were the State's principal evidence against Jarvis Masters, were most likely not authored by Jarvis Masters, as the prosecution had claimed. (PEB 37-30, 42-43.)

Thus, viewed cumulatively, all three pillars of the prosecution's case have fallen and cannot be raised again. There is therefore more than a reasonable probability that, had the jury known about the new evidence and

the falsity of the prosecution's evidence at trial, and all of the Bobby Evans evidence withheld by the State, they would have entertained a reasonable doubt about Jarvis Masters' guilt. Simply stated, there is nothing left of the prosecution's case.

CONCLUSION

This round of supplemental briefing was sought by petitioner to insure that the Court had before it the view of the evidence that was provided by the Legislature in revising the new evidence standards as they relate to the evidence adduced on habeas corpus. This does not replace, but supplements and corroborates the substantial evidence provided that Jarvis Masters' conviction was based upon false evidence. That this could be considered merely a different view of the same evidence does not minimize its importance in showing, yet again, that the conviction should be, at long last, reversed.

DATED: August 22, 2018 (Orig. dated May 7, 2018)

Respectfully submitted,

RICHARD I. TARGOW
JOSEPH BAXTER
Attorneys for Jarvis Masters

CERTIFICATE OF WORD COUNT

I, Richard I. Targow, attorney for petitioner herein, hereby certify that the foregoing brief, while not appearing to come under the provisions of California Rule of Court 8.630(b), consists of 5332 words.

RICHARD I. TARGOW

APPENDIX A

TABLES FROM PETITIONER'S EXCEPTIONS BRIEF AT PAGES 127-132

1. How many BGF yard meetings were there concerning the hit on Sgt. Burchfield?

(a) The Willis June 30, 2010 version: six to seven. (Resp. Ex. II at 9:23-10:23)

(b) Other Willis versions:

1	2	3	4	5
June 20, 1985 version (Numark memo, Pet. Ex. 57)	8 PHRT 8493 (1511)	8 PHRT 8493 (1511)	27 PHRT 11360-11361 (4296-4297) 52 RT 12759	12 PHRT 9258 (2259)

"At first, I only remembered one meeting, right before, maybe the day before Burchfield was killed. When I talked to Mr. Gasser [the DA investigator] he told me that there isn't any way all of this was planned at one meeting." (Pet. Ex. 22 at ¶ 9)

2. Who picked Andre Johnson for the move?

(a) The Willis June 30, 2010 version: Jarvis Masters.

(b) Other Willis versions:

Willis picked Johnson	Woodard picked Johnson	Redmond picked Johnson	Redmond never chose anyone	Doesn't know
52 RT 12741, 12744	8 PHRT 8488 (1506) 8 PHRT 8489-8490 (1507-1508) 27 PHRT 11362 (4298) (5th Meeting) 27 PHRT 11380, 11407-11408 28 PHRT 11433-11434 (4365-4366) 52 RT 12750 June 20, 1985 version (Numark memo, Pet. Ex. 57)	8 PHRT 8505-8506 (at first meeting)	27 PHRT 11380	27 PHRT 11353 (4289)

3. Did Willis oppose the selection of Andre Johnson?

(a) The Willis June 30, 2010 version:

He opposed the selection of Andre Johnson. (Resp. Ex. II at 18:12-13; 19:14-15)

(b) Other Willis versions:

- He recommended Andre Johnson. (52 RT 12741, 12744)
- He agreed to the plan. (9 PHRT 8671-8672 (1684-1685))

4. Did anyone oppose the plan?

(a) The Willis June 30, 2010 version:

Willis opposed the plan, and no one else opposed it. (Resp. Ex. II 18:14; 19:23)

(b) Other Willis versions:

- Rhinehart opposed the plan. (June 20, 1985 Numark memo, Pet. Ex. 57)
- Rhinehart opposed the move. (1 PHRT 7012, 7014 (64, 67))
- Willis agreed to the plan. (9 PHRT 8671-8672 (1684-1685))
- Willis recommended Andre Johnson. (52 RT 12741, 12744)
- Masters opposed the plan. (Pet. Ex. 22 at ¶ 18)

According to Harold Richardson's 1986 reporting, and Rufus Willis' June 20, 1985 statements, the plan to kill Sgt. Burchfield came from BGF Captain Willie Redmond. (Pet. Ex. 54; Pet. Ex. 57)

5. Was Redmond present in C-Section at the time of the Burchfield murder?

(a) The Willis June 30, 2010 version:

Redmond was there at the time of the hit, and even after the hit. (Resp. Ex. II at 20:7-15)

(b) Other Willis versions:

- Redmond left the section. (28 PHRT 11493-11496 (4425-28))
- Redmond left the section after the second of at least four meetings, before the plan to target Burchfield was agreed upon. (52 RT 12747, 12759-12760)
- Richardson went on a visit and saw Redmond in the visiting area, and received the instructions from Redmond. (27 PHRT 11376 (4312); Pet. Ex. 57)

6. When and how did Redmond target Burchfield for the hit?

(a) The Willis June 30, 2010 version:

Burchfield was picked at the second of five to six meetings. (Resp. Ex II 10, 11)

(b) Other Willis versions:

- The plan to kill Burchfield came from Redmond, which was communicated to Richardson and by Richardson to Woodard, and by kite from Woodard to Willis (June 20, 1985 Numark memo, Pet. Ex. 57)
- The instructions came by letter from North Block. (Resp. Ex. II at 7:26-28)

7. Did a letter from Redmond come via Masters?

(a) The Willis June 30, 2010 version:

Yes. (Resp. Ex. II at 7:27)

(b) Other Willis versions:

- The plan to kill Burchfield came from Redmond, which was communicated to Richardson, and by Richardson to Woodard, and by kite from Woodard to Willis. (June 20, 1985 Numark memo, Pet. Ex. 57)

8. Did Redmond ask for a vote on the plan to kill Burchfield?

(a) The Willis June 30, 2010 version:

Redmond "looked for a vote." (Resp. Ex. II at 18:12-14)

(b) Other Willis versions:

- There was no real vote. *Woodard* gave the orders at a June 7, 1985 yard meeting attended by Rhinehart, Masters, Woodard, and Willis, based on instructions received from Redmond one to two weeks earlier in the visiting area. (June 20, 1985 Numark memo, Pet. Ex. 57)
- Redmond had already left C-Section. (28 PHRT 11493-11496 (4425-28); 52 RT 12747, 12759-12761)

9. Did Jarvis Masters select the code word for alerting BGF members that Burchfield was on the second tier on the evening of the hit?

(a) The Willis June 30, 2010 version:

He thinks Jarvis Masters picked the code word which was "Solid Gold." (Resp. Ex. II at 15:18-20)

(b) Other Willis versions:

- He does not think a code word was discussed.
- He does not recall "Solid Gold." (12 PHRT 9276-9277 (2277:2- 2278:21))

4. The Willis Declaration Is Capable of Being Believed

By any measure, Willis' February 23, 2001 declaration is capable of being believed. It is far more capable of being believed than either his 1989 testimony or his June 30, 2010 version of the facts.

Willis' June 30, 2010 statements to the Attorney General are contrary to both his 1989 testimony and his testimony at the preliminary hearing, and many statements are contrary to his very first version of the facts. Willis also refused to answer the most important questions that were asked him: whether he told the truth and whether he was told what to say. (Resp. Ex. 11 at 27:19-23, 28:14-24, 36:6-10) Willis, moreover, was clearly looking for favors, as he always has when he communicates with the government. (Resp. Ex. II at p. 41; 14 RHRT 780-782)

9. Did Jarvis Masters select the code word for alerting BGF members that Burchfield was on the second tier on the evening of the hit?

(a) The Willis June 30, 2010 version:

He thinks Jarvis Masters picked the code word which was "Solid Gold." (Resp. Ex. II at 15:18-20)

(b) Other Willis versions:

- He does not think a code word was discussed.
- He does not recall "Solid Gold." (12 PHRT 9276-9277 (2277:2- 2278:21))

DECLARATION OF SERVICE BY MAIL

Re: In re Jarvis J. Masters on HC No. S130495

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached **PETITIONER'S [REDACTED] SUPPLEMENTAL REPLY BRIEF REGARDING THE APPLICATION OF THE REVISED NEW EVIDENCE STANDARDS UNDER PENAL CODE SECTION 1473, SUBDIVISIONS (b)(3)(A) AND (B)** on each of the following:

Alice B. Lustre, Dep. Atty. Gen. (by Electronic Service)
San Francisco, CA 94102

Scott Kauffman, Staff Atty. (By Electronic Service)
c/o Docketing Clerk
California Appellate Project
San Francisco, California 94105

Joseph Baxter (By Electronic Service)
Santa Rosa, CA 95403

Jarvis J. Masters, Petitioner

Each electronic delivery was served on August 22, 2018, via TrueFiling. Each mailed copy was placed in the U.S. mail on the same date or the next day.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 22nd day of August, 2018, at Sebastopol, California.

RICHARD I. TARGOW
Attorney at Law

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: **rtargow@sonic.net**

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

8/22/2018
Date

/s/Richard Targow

Signature

Targow, Richard (87045)

Last Name, First Name (PNum)

Richard I. Targow, Attorney at Law

Law Firm