No: S 130495

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 REPLY TO RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS

[REDACTED]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

No: S 130495 DEATH PENALTY

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* This redacted version of the brief was prepared for the use of the public, and filed in accordance with the California Supreme Court's November 28, 2012 order.

INTRODUCTION

Respondents brief (styled Respondent's Exceptions to Referee's Report and Brief on the Merits) does not take exception to any of the findings made by the referee, including the findings that Bobby Evans lied, that Evans and Willis are chronic and habitual liars who would say or do anything to gain release from prison, and the finding that Dr. Leonard testified convincingly that Masters was most likely not the author of the two kites attributed to him at the 1989 trial. Respondent, nonetheless, claims error solely based upon the trial court's *in limine* denial of their motion for a *Kelly* hearing. (REB at 57,82)

In this brief, petitioner will review and reply to some of respondent's statements, and mis-statements, in support of the referee's conclusions, but devote much of this brief to respondent's lengthy *Kelly* arguments. Petitioner will demonstrate that respondent's claim of error must be rejected in its entirety for each of the following reasons, as well as for additional reasons which will be set forth at pages 51-147, *infra*.

1. Respondent's failure to renew their objection to Dr. Leonard's testimony when he was called at the evidentiary hearing waives their objection;

2. Respondent has not satisfied their burden of establishing that the referee's denial of their *in limine* motion was a manifest abuse of discretion;

3. *People v. Kelly* does not apply to Dr. Leonard's testimony;

4. Respondent has not met its burden of establishing prejudice;

5. Respondent's challenges to the referee's *in limine* motion are not based upon the record of that motion;

6. Respondent's claims are also based upon a distortion of the record.

FACTUAL ERRORS AND OMISSIONS

Respondent's Exceptions Brief contains a number of factual errors and critical omissions. While some of the errors and/or omissions are noted within the context of the arguments, the following factual errors and/or omissions are specifically noted below:

1. **Respondent's Exception Brief ("REB") pages 2-3**:

> During petitioner's trial, Bobby Evans provided testimony regarding the general structure and functioning of the Black Guerilla Family (BGF) as well as statements regarding admissions made to him by petitioner and his co-defendants – Woodard and Johnson. Specifically as to petitioner, Evans stated that they spoke at the Adjustment Center in August 1985,

> that petitioner stated a vote had been taken on the plan to kill Sgt. Burchfield, and that he, Masters, had voted in favor of the hit.
>
> (Respondent's Exceptions Brief ["REB" [1]], at 2-3)

Respondent's overview of Bobby Evans' trial testimony fails to note that Bobby Evans was certified as an expert by the trial judge, thereby greatly enhancing his credibility. (56 RT 13711) His testimony regarding the structure and functioning of the Black Guerilla Family was far more than "general." This testimony spanned many pages of the trial record and included a detailed discussion of the function of the Black Guerilla Family, and its violent activities.

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[1] Citations to the record will follow the usual format, using the following abbreviations:

1. "PEB": refers to Petitioner's Exceptions Brief at cited page(s).
2. "REB": refers to Respondent's Exceptions Brief at cited page(s).
3. "RHRT": refers to the Reference Hearing Reporter's Transcript.
4. "Ex. __": refers to trial exhibits. The trial exhibits identified also include a reference to the party who offered the exhibit.
5. "Pet. Ex." refers to Petitioner's Reference Hearing exhibits.
6. "Resp. Ex." refers to Respondent's Reference Hearing Exhibits.
7. "CT": refers to the Clerk's Transcript in the related appeal.
8. "RT": refers to the Reporter's Transcript in the related appeal.
9. A dated transcript (e.g., "1-10-88 RT") refers to a separately bound reporter's transcript in the related appeal, unless otherwise noted.
10. "AOB": refers to Appellant's Opening Brief in the related appeal.
11. "Petition": refers to the original Petition for Writ of Habeas Corpus filed herein.
12. "Evans' Deposition" refers to the May 14, 2010 in-court deposition of Bobby Evans. A copy of the transcript was admitted as Pet. Ex. 58.

Evans testified that Masters appeared before the BGF Super Commission and admitted his guilt, "around September," 1985, not August 1985. (58 RT 13724-13725)

Evans, moreover, did not simply testify that Masters told him that he voted in favor of the hit. Masters, he testified, was "a part of the Commission in Carson section at the time. And he sat on the commission and voted toward killing the Officer." (58 RT 13726) Given the fact that, according to Evans', the BGF was constantly involved in stabbings and other criminal activities, both inside and outside the prison, if Masters was a member of the BGF Commission, it meant that he, like Evans, had a propensity for committing violence and crime inside the prison. (58 RT 13693-13699) This would have made Willis' testimony against Masters all the more believable.

2. **REB, page 3, line 8**: Within the context of respondent's discussion of Evans' Reference Hearing testimony, respondent states:

> "He confirmed that Woodard mentioned Masters' name to Evans and indicated that Masters had some involvement in the murder, but that he didn't know how to make the weapon. (Evans Depo., p. 109.) As the referee noted, Evans later submitted a correction to his deposition denying that Woodard said Masters had some involvement, and asserting that Woodard said only that Masters was supposed to make the weapon but didn't know how."

This is a distortion of the record. According to Evans, Woodard simply told him that "Masters was supposed to sharpen [the weapon], but he didn't know how to sharpen it." This is the extent of his involvement per Woodard, per Evans:

> "Q. And when you were asked earlier about – from the other copy of the transcript that was used, Masters was supposed to sharpen it, but he didn't know how to sharpen it right, you said – you recalled that was correct, that Woodard said that to you?
> "A. I believe Woodard did say that to me.
> Q. So, in 1985, Woodard told you that Masters had some involvement?
> A. He said he had some, but he said he didn't know how to make the weapon. That's what he said.
> Q. I understand. But he said that Masters had some involvement?
> MR. BAXTER: That mischaracterizes the testimony.
> JUDGE DURYEE: It's overruled.
> MS. LUSTRE: Q. Woodard mentioned Masters [*sic*] name to you, correct, in 1985?" (REB page 5, lines 6-7)

Evans clarified his testimony with the following statement:

> "Woodard didn't say Masters had some involvement. He said he was supposed to make the weapon, but didn't know how. In other words, he was supposed to be involved. See page 126." (REB page 3, lines 9-12)

Thus, at page 126, Evans' testimony is a follows:

> "MS. LUSTRE: Q. Okay. Mr. Evans, I promise we are almost done, at least with me.
> I just want to again try to clarify the dates here. You spoke with Mr. Woodard and Mr. Johnson sometime between August in 1985 and the end of 1985; correct?
> A. Correct.

Q. That's when they told you that Mr. Woodard said 'We planned this. Mr. Masters tried to sharpen the blade, but was a failure at it.'

MR. BAXTER: Excuse me. That is mischaracterizing his statement. He's supposed to sharpen the blade, is what the text says. Was supposed to sharpen, but he didn't know how.

MS. LUSTRE: Didn't know how. My apologies. So he didn't know how, so he was unable to?

THE WITNESS: Correct.

MS. LUSTRE: Q. So he was supposed to be involved in it, but wasn't able to do what they wanted him to?

A. Correct."

Simply stated, Evans testified that Woodard told him that Masters was supposed to be involved, but was not involved.

3. **REB, page 6, lines 16-20**: Regarding Robert Conner's testimony, respondent states that Conner testified that "he knew James Moore," and that he was "also familiar with James Hahn." Conner testified, however, that he more than simply knew James Moore; he was Moore's supervisor. (3 RHRT 163) He was also more than simply "familiar" with James Hahn; he had contact with James Hahn almost every day. (*Id.* at 164)

4. **REB, page 9, lines 25-26**: Respondent notes that "Hahn said that he would describe Evans as a professional liar." James Hahn, however, was a member of the investigation and prosecution team. (PEB at 169-174) As such, Hahn had a responsibility to advise the District Attorney that Bobby Evans was "a

professional liar," and the District Attorney had an obligation to advise the defense and the jury.

5. **REB, page 11, line 2**: Respondent anonymously refers to Hahn's supervisor. Hahn's supervisor, it should be noted, was Phil Bruccoleri, the SSU officer who supplied the SFPD with information regarding Bobby Evans in conjunction with their James Beasley, Sr murder investigation. (James Hahn's June 22, 1989 report at Pet. Ex. 59; **[REDACTED CITATION]**.) This makes even more likely Hahn's actual knowledge of Evans' connection with the Beasley murder investigation. (See PEB at 163-167)

6. **REB, page 13, lines 13-15.** After discussing the aftermath of Willis's refusal to testify, and his subsequent attempt to take the stand and the referee's offer to allow the parties to call him, respondent states that "Petitioner declined the court's offer, choosing to rely on declarations and statements by investigators to support his claim that Willis had recanted his trial testimony. (10 RT 520)"

This is incorrect. Both sides declined the court's offer. (10 RHRT 519) Petitioner's counsel, moreover, advised the court why it was no longer possible to call Willis: The day before, after Willis had asserted his right to remain silent and left the stand, petitioner's counsel had introduced several exhibits impeaching him,

which were shown to Willis's counsel. Having shown petitioner's impeachment evidence to Willis's counsel (9 RHRT 502), **and reasonably assuming that it would have been discussed with Willis, petitioner's counsel was unwilling to proceed with a witness who might already have fashioned his answers to meet the impeachment evidence.** (10 RHRT 519-520.)

7. **REB, page 15, lines 9-11**: After discussing the February 2001 declarations signed by Rufus Willis, in which he recanted his 1989 trial testimony, respondent states:

> "Willis subsequently wrote a letter to prison authorities recanting the statements in the declaration and stating that Masters's defense team had pressured him to sign the declaration. (RE FF)" (REB at 15)

The above statement is incorrect; but more importantly, Willis' letter was clearly a lie. [2]

To begin with, the letter in question, a February 5, 2002 letter to the California Department of Corrections, did not recant Willis' declaration. Willis' letter does not say that his declaration was false. Instead, he stated that "Mr. Masters, is now trying to pressure me through his attorneys and investigators to change my testimony now that he knows Im [*sic*] in Utah." While Willis clearly suggests that he

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[2] The first and only time that Willis recanted statements in his February 2001 declaration was on June 30, 2010, when he spoke by telephone with respondent's counsel. (See PEB at 124-132)

signed some papers agreeing to change his testimony under pressure, he does not state that his declaration was false. (Resp. Ex. FF)

Respondent also fails to provide this Court with the true history of this letter. At the time that he met with petitioner's investigators in February 2001, Willis was housed in the general population of Draper State Prison in Utah. (Pet. Exs. 61, 65) Due to his lower level of custody, he was allowed to program by taking college and trade courses. (Pet. Ex. 65)

On June 12, 2001, Willis was taken out of programming as a result of the fact that information had been placed in his institutional file that he had been engaging in drug dealing. (Pet. Exs. 61-65) On July 3, 2001, Willis wrote a letter of complaint denying the drug dealing allegations to the California Department of Corrections, but without any success. (Pet. Exs. 61, 65)

To emphasize his point, Willis told the California Department of Corrections that if he really had been found drug dealing, he would have been placed in maximum confinement. (Pet. Ex. 61) Two months later, however, on September 7, 2001, Willis was found in possession of a controlled substance, and shortly thereafter he was moved to a medical facility. (Pet. Exs. 64, 65) As soon as he got out of the medical facility, he was placed in maximum confinement, in a

lock-down facility. (Pet. Ex. 65) Within a matter of months, Willis was again found in possession of a controlled substance. (Pet. Ex. 64)

It was at this point – after he had been labeled a drug dealer and a drug user, after he had been placed in maximum security housing, and after he had lost his programming – that Willis, in January 2002, sent a letter to the Attorney General of the State of Utah. Willis wrote that he no longer wanted to be incarcerated in Utah, but he did not want to approach Utah authorities regarding a transfer. A Utah Assistant Attorney General wrote back advising Willis that he needed to contact California authorities. (Pet. Ex. 62) This prompted Willis to write his January 30, 2002 letter to the California Department of Corrections in which he invented the claim that he was being pressured by Masters' investigators. (Resp. Ex. FF) Obviously, Willis' letter did not mention that his last contact with the investigators was almost a year earlier (February 2001), and that he himself initiated contact with petitioner's trial attorney. (Pet. Ex. 15) Without conducting an investigation, California authorities accepted Willis' claim that he needed to be moved because he was being pressured by defense investigators, and approved his transfer out of Utah. (Pet. Ex. 64)

8. **REB, page 18, lines 23-25**: Respondent states that Woodard testified that Masters was the "Usalama-Chief of Security" before he was demoted, citing 4 RHRT 243. While Woodard said that Masters was "Usalama security" before he was demoted, it should be noted that a "security" is a foot soldier. (52 RT 12676:24-27) Thus, the uncontradicted evidence at the evidentiary hearing was that anyone could be a "security" and that a "security" would not be a member of a commission. (5 RHRT 315:4-17; 7 RHRT 371:10-372:4) Harold Richardson, by contrast was a BGF Lieutenant, making him a person of substantial authority in the BGF hierarchy. (52 RT 12676:12-27; 1CT 237-243)

9. **REB, page 22, lines 14-15**: Welvie Johnson, who was not present in Carson section at the time of the Burchfield hit, said that he received information that someone said that the weapon had been sent up to Masters. This, however, was Willis' testimony at the trial. The fact that Welvie Johnson heard this hearsay – which may have come from reports about Willis' testimony – does not support its truth.

10. **REB, page 23, last line, to page 24, line 1**: Respondent states: "The K documents consisted of official prison forms and personal letters." The K documents, however, did not consist of any official prison forms. The K documents included text

authored by Jarvis Masters which was taken from portions of official prison forms that he filled out. For the most part, his text expresses some type of dissatisfaction with a prison action or makes a request. The bulk of the 7,119 words in the K corpus, however, consist of personal letters. (Pet. Ex. 72)

11. **REB, page 27, lines 2-5**:

> "As with all of Dr. Leonard's findings, he analyzed the documents collectively, as if he had one Q document and one K document rather than 16 individual documents of varying lengths and purposes."

Dr. Leonard did not analyze the documents "as if he had one Q document and one K document." He analyzed the Q documents as a corpus containing the two documents which the prosecution attributed to Jarvis Masters. He analyzed the 14 K documents as a corpus of 14 individual documents known to be authored by Jarvis Masters. This was done in accordance with the best practices of forensic linguistics. (See pages 132-134, *infra*, for a more complete discussion of this subject.)

12. **REB, page 27, lines 11-13**: "When asked why his [Dr. Leonard's] report did not address documents individually, he stated that it was simply '[b]ecause we were given to believe that all of the documents were authored by Masters.'" Respondent, however,

takes Dr. Leonard's remarks out of context and omits his next words: "Now, of course, I broke it all down, but we found nothing contrary to our overall finding." (18 RHRT 1098) Thus, Dr. Leonard's report details the differing contents of the individual documents. (Pet. Ex. 72 at 5-6, 9-13) In his testimony and in his report, moreover, Dr. Leonard specifically noted variations within the K documents. (See *infra* at pp. 132-133) Noting that most of the K documents were letters, he asked himself whether this was having an effect on his results. (18 RHRT 998) As a control, Dr. Leonard therefore compared the frequencies of Masters' use of "I" in personal letters to three large databases of personal letters written by other individuals, in order to confirm that Masters' writings were uniquely characterized by a high instance of the use of "I." (18 RHRT 998-999)

13. **REB, page 28, lines 6-8**:

> "Dr. Leonard also relied on the contemporaneous American English corpus, although it is not broken down into African-American vernacular, nor does it include gang language."

Dr. Leonard testified that one of the databases that he used was the American English Corpus. While Dr. Leonard testified that it is not *broken down* into African-American vernacular or gang language

vernacular, he did not suggest that the corpus did not *include* African-American vernacular or gang language. (18 RHRT 1100-1101)

14. **REB, page 28, lines 11-13**: Dr. Leonard "did not seek out BGF writings such as *Soledad Brother*. . . ." Dr. Leonard stated that he used the three books that he found in the Project Gutenberg corpus simply as a double check, since the Corpus of Contemporary American English and the British National Corpus already supported his findings. (18 RHRT 1100) Respondent did not offer any evidence at the Reference Hearing to support its *speculation* that Dr. Leonard's result might have been different had he used the writings of George Jackson as a double check. (See *infra*, at pp. 143-146)

15. **REB, page 29, footnote 20**:

> "[20] Respondent notes that a review of various Willis documents in the record shows that he virtually always uses the non-standard "Im," with the only alternative form being extremely limited usage of "I am." (See, e.g., PE 66; PE 7; RE T; RE U; RE V; RE W; RE Z; RE EE; RE Z.) As Dr. Leonard did not conduct an authorship analysis of any Willis documents in comparison with the Q documents, the failure of the Q's to include Willis's consistent non-standard usage, as it impacts on petitioner's theory that he was simply copying materials written by Willis, was not addressed by Leonard."

Significantly, this "review" of various Willis documents was not conducted in the trial court by either of respondent's counsel. Nor was this "review" conducted by an expert, since respondent did not

present expert testimony. Nor did respondent pose this question to Dr. Leonard. Thus, it is not known whether the Willis documents cited by respondent represent an appropriate corpus for linguistic purposes.

As for the Willis letters that are in respondent's "review," they span a far less relevant time period of 23 years. Thus, the Willis writings cited by respondent include writings as late as 2009. (Resp. Ex. T) This is to be contrasted with the K corpus of Masters' writings which only span a five-year period (1983-1987). (Pet. Ex. 72)

Respondent's list of Willis' letters is also both incomplete and incorrect. Thus, "PE 7" and "PE 66" are not Willis' letters, and "RE Z" is double cited. Respondent's list also does not include all of Willis' letters. For example, Petitioner's Exhibit 15, a Willis letter, includes two *I am*'s, and Petitioner's Exhibit 61, another Willis letter, includes two *I am*'s.

Aside from time and budget constraints, Dr. Leonard did not conduct an authorship analysis of Willis documents because the issue was whether Masters authored the Q documents, and not whether Willis authored the documents. Petitioner does not know who authored the Q documents. If Willis is to be believed, Q1 was copied from many reports that Willis had written and sent to Masters, and Q2 was copied from Woodard kites. (Pet. Ex. 22 ¶¶ 12, 15)

ARGUMENT AND DISCUSSION OF REFERENCE QUESTIONS

Question 1:	**Was false evidence regarding petitioner's role in the charged offenses admitted at the guilt phase of petitioner's trial? YES. If so, what was that evidence?**

Petitioner's Exceptions to the Referee's Report and Brief on the Merits sets forth our full discussion of this question at pages 52-89. The Court is therefore referred to those pages for a detailed response to most of respondent's arguments. Petitioner, nonetheless, addresses below some of the more significant oversights and omissions in Respondent's Exceptions Brief.

To begin with, respondent fails to address the obvious – that notwithstanding her erroneous general conclusions, the referee's specific findings require a "Yes" answer to question 1. The referee specifically found that Bobby Evans provided false evidence that Masters voted for the hit. The referee also found that Dr. Leonard testified convincingly that the two kites attributed to Jarvis Masters at the 1989 trial – the centerpiece of the State's case – were most likely authored by someone else. (Referee's Report at pp. 14-15; 73 RT 16033, 16070; 74 RT 16341) The referee also found that the two principal witnesses against Masters – Evans and Willis – were

"utterly lacking in credibility." (Referee's Report at p. 8) Thus, by the referee's specific findings, the case against Jarvis Masters was rotten at its core. The referee also found that Evans had more extensive contact with law enforcement than was disclosed at trial. (Referee's Report at p. 11)

It is also undisputed in the record that Bobby Evans' and James Hahn's trial testimony and discovery produced by the prosecution massively understated Evan's relationship as a snitch with law enforcement and, in particular, with CDC agent James Hahn. [2] The degree of understatement is made clear in simplified form in Chart 6 of Petitioner's Exceptions Brief. (PEB at p. 154) For the convenience of the Court, a copy of that chart is set forth on the following page.

Thus, by the referee's findings, and undisputed facts in the record, false evidence was used to convict Jarvis Masters.

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[2] Thus, respondent reports that Hahn testified that "he would occasionally give informants [like Evans] a few dollars, usually enough to buy a burger." (REB 9) This is clearly disingenuous, since it is undisputed in the record that Hahn set Evans up with BNE and ATF work, which paid Evans tens of thousands of dollars. *While Hahn could not pay Evans out of SSU funds, he created a livelihood for him, and this made Evans heavily dependent on Hahn.*

WHAT THE JURY WERE TOLD	THE UNCONTESTED FACTS
1. Prior to coming forward, the relationship between Bobby Evans and James Hahn was almost entirely adversarial. Hahn had kicked his mother's door down in 1986 with 14 other officers, and identified him in 1987, at the Oakland Police Department, after he had been arrested. He then violated Evans and sent him back to prison. (58 RT 13800-13801; 59 RT 13972-13973)	1(a). Evans' working relationship with Hahn began after Hahn kicked his mother's door down. (Evans Deposition Pet. Ex. 58) at p. 51) 1(b). Evans became an informant to keep himself from getting arrested. (*People v. Bailey* at p. 14, Pet. Ex. 66)
2. Evans did not provide any information on either of these occasions. (58 RT 13801, 13837-13838)	2. From that day forward, up until the time of his May 12, 1989 arrest, Hahn and/or his partner James Moore had anywhere from 30-50 contacts with Evans and were running him as a snitch. (3 RHRT 165, 190, 193; Evans Deposition at pp. 54-56)
3. The only time he had worked with Hahn was in May, 1988 when he gave Hahn information on a dirty cop. (58 RT 13832, 13834-13836, 13838; 59 RT 13985)	3. During this period, Evans was also working with "a lot of Oakland police officers," the California Bureau of Narcotics Enforcement (BNE), and the federal Bureau of Alcohol, Tobacco and Firearms (ATF). (8 RHRT 448-450, 457)
	4. Hahn set up the ATF work. Evans did "gun buys." Sometimes he got $1,000, and sometimes he got $300, depending on how many guns, or how much dope he would buy. (Evans Deposition at 457)

As for Rufus Willis, if all of the evidence that Rufus Willis lied in 1989 is weighed against the evidence that he told the truth, nearly all of the evidence would be on the side which says that he lied. We know that he gave false evidence regarding the kites, the centerpiece of the State's case. (73 RT 16033, 16070; 74 RT 16341) A witness wilfully false in one part of his testimony is not to be believed in other parts, and we know that Willis is a chronic liar. He has admitted that he lied, twice under oath, and to three investigators and three lawyers. We also know that Willis' trial testimony was a result of threats and false promises. And we know that the person he identified as Masters precisely matches Harold Richardson, who admitted his role and left Masters out of the entire operation.

And what is on the other scale? What evidence do we have that this chronic liar told the truth in 1989, after he had been cornered, both by his own lies and the lies of the State? Nothing.

Respondent's argument regarding Question 1 also fails to consider the bulk of the evidence. A few examples will suffice. Respondent almost entirely ignores the Harold Richardson evidence. Respondent also ignores the undisputed fact that Jarvis Masters does not fit Rufus Willis' physical description of the fourth

conspirator, but Harold Richardson precisely fits the description. And Harold Richardson, unlike Jarvis Masters, admits that he was a member of the conspiracy to hit Sgt. Burchfield.

Richardson, who stated that he knew "all the details about the Burchfield murder," identified ten C-Section BGF members as having been involved in the hit identifying the planners and sharpeners, and every individual who had a major or minor role. Significantly, Jarvis Masters is not included in this list of ten, not as a planner, not as a sharpener of the knife, and not even as one of the individuals with a minor role in the murder of Sergeant Burchfield. (1CT 237-243; August 22, 1986 Ballatore report and August 8, 1987 Richardson letter) (See pp. 13-15, 65-71 of Petitioner's Exceptions Brief for a complete discussion of this subject.)

The accuracy of the Richardson list is corroborated by the Marin County District Attorney's own list. The District Attorney twice identified for the jury the BGF members who were involved in the attack on Sgt. Burchfield. (40 RT 10831; 73 RT 16034) The District Attorney's list is nearly identical to Richardson's list. All ten of the individuals on the Richardson list are contained on the District Attorney's list. This by itself confirms the reliability of the Richardson list.

The only difference between the Richardson list and the District Attorney list, is that the District Attorney added the names of Michael Rhinehart and Jarvis Masters. Yet *only* Rhinehart and Masters share a remarkable distinguishing characteristic which sets them apart from everyone else. They are the only Carson-Section BGF members who opposed the hit. [3]

Respondent also entirely ignores the storehouse of evidence that the jury were misled regarding Bobby Evan's pre-existing and significant contacts with James Hahn, the Oakland Police, BNE, and ATF, as a government informant.

Instead of addressing the facts, respondent tells us that the "dynamics" in this case are "eerily reminiscent" of the facts in *In re Roberts* (2003) 29 Cal.4th 726. (REB at 43) Yet curiously, respondent fails to discuss the holding of *Roberts*. [4]

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[3] Respondent asks why is it that Masters suffered discipline as the result of his opposition to the hit, but Rhinehart suffered no discipline? (REB at 41-42) *The reason is that Rhinehart, as opposed to Masters, went along with the conspiracy and played a minor role in the conspiracy.* (5 RHRT 319; 6 RHRT 331)

[4] While the holding of *In re Roberts* is far from clear, since neither this Court nor any court can weigh the facts in cases that are not before it, the holding appears to be that as a matter of policy a recantation where there was no independent evidence corroborating the recantation should be viewed with suspicion and the conviction should not be overturned based upon the recantation. *In re Roberts* (2003) 29 Cal.4th 726, 742-743 In this case, by contrast, there is overwhelming evidence to corroborate the recantation. (See PEB 64-89)

Roberts does involve recantation by prison witnesses. Yet *Roberts* does not hold that this Court or any court should put its finger on the scale when determining whether recanted testimony is true or false. Obviously, that question needs to be decided in every case, by the evidence.

While *Roberts* states that recantation should be viewed with suspicion, the same, of course, can be said for snitch testimony. The same can also be said for accomplice testimony, and most obviously, the same can be said when a prisoner is promised his release if he comes forward with evidence.

The facts in *Roberts*, moreover, are markedly different than the facts in this case. The referee found in this case that Bobby Evans lied, that Evans and Willis are chronic liars, that the testimony of a forensic linguist that Jarvis Master most likely did not author the kites was convincing, and that the State failed to disclose Bobby Evan's true relationship with governmental agencies. In this case, moreover, if all the evidence that Rufus Willis lied in 1989 is weighed against the evidence that he told the truth, nearly all the evidence would be on the side which says that he lied.

Lastly, it should be noted that Respondent's Exceptions Brief falsely suggests that the Reference Hearing testimony, establishing

that Jarvis Masters did not appear before the BGF Commission in the Adjustment Center, was similar to evidence presented at the 1989 trial. Thus, respondent states:

> "In addition to the inmate testimony, petitioner offered the testimony of Graham McGruer who reviewed prison records and determined that Masters was not at the Adjustment Center in August when Bobby Evans stated their conversation took place. This evidence, although not in the same format, was presented at trial and argued to the jury as a reason to doubt Evans's testimony." (REB at 42)

This statement is disingenuous. The testimony and evidence regarding Evans that was presented at the Reference Hearing was not presented at the 1989 trial. Indeed, the defense did not present any testimony whatsoever on the subject of whether Jarvis Masters was housed in the Adjustment Center when he allegedly appeared before a BGF Super Commission. Instead, Masters' attorney made a few brief and ineffective remarks to the jury during his closing argument and referenced an exhibit that the jury may or may not have looked at, and is unlikely to have understood.

Thus, during his closing argument, Jarvis Masters' attorney only briefly, and ineffectively, challenged the prosecution's claim that Masters appeared before the BGF Super Commission in the Adjustment Center:

> "Finally, he talked about a conversation with Masters in August of '85. Well, there are some prison records that show that could not have happened. If you look at the prison logbook that's Exhibit 189, the logbook for the Adjustment Center, period October 29, '85 to December 8, '85, if you look at December 2nd, that when Masters was brought over to the Adjustment Center from Carson section. December second. Which means that he wasn't there in August when this conversation Bobby Evans claims hasn't even occurred. He wasn't even in the Adjustment Center, so that conversation could not have occurred." (74 RT 16205)

Masters' attorney, like respondent now, was confused about the date. Evans did not testify that the alleged conversation occurred in August 1985. He said it took place "around September". (58 RT 13724-13725)

Had the jury viewed Exhibit 189, it is extremely doubtful that they would have understood it. (For the convenience of this Court, a copy of the page of Exhibit 189 in question is provided as an attachment to this brief.) The applicable page shows that Jarvis Master went "from 3-C-27" to cell 67 on December 2, 1985. The

document does not explain what "3-C-27" is, nor does it explain where Jarvis Masters was housed in either August or September of 1985.

Evans, moreover, only said that the meeting took place "around September." *Given the passage of years, and the fact that the date was not important for him, the jury might have excused his being off a few months about an event four years earlier.*

A close review of the trial record also raises reasonable doubts as to whether the jury ever actually reviewed Exhibit 189. The trial was an extreme challenge for jury members, the judge, the attorneys, and the clerk. Not only were there at least 2,000 exhibits to look at, there were also two juries to look at the exhibits, and the exhibits needed to be moved between the two juries. If one jury was looking at an exhibit, the other jury could not have it. (77 RT 16757) [5]

Both the clerk and the judge were sometimes confused about the exhibits. For undisclosed reasons, the clerk did not give the jury Exhibit 189 when it was supposed to. When the error was discovered, the judge told the clerk to give it to the jury "if the other

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[5] Add to this the fact that there was repeated confusion over the two juries, and indications that exhibits requested by the Masters jury were being sent to the Johnson jury. (77 RT 16771:21-22, 16774:22, 16775:1)

jury isn't using it." (77 RT 16763-16764) After the court realized that a mistake had been made, on December 13,1989, the court told the Masters jury that they would have Exhibit 189 the following morning. (77 RT 16765)

The transcript of the proceedings on the following morning, Thursday, December 14, 1985, are extremely confusing. The transcript begins by stating that the proceedings were being held outside the presence of the Johnson jury and Johnson's attorney, but then the court states that it is dealing with a question in the Johnson case. (77 RT 16769) Nonetheless, it appears that a question at issue related to the Woodard and Masters jury. Apparently, the jury were concerned as to whether certain exhibits that they requested the day before were in evidence. (*Id.*) The court states "My answer is that the evidence was not admitted." (*Id.*)

After further discussion, the court discussed a note from the Masters and Woodard jury that the jury believed they never received a response to. (77 RT 16771) The court interpreted this to mean that maybe they did not receive exhibits that they requested. (77 RT 16771:18-20) Mr. Berberian, at that time, was either confused or believed that the court is confused, and asked "Have we switched juries, your honor?" (77 RT 16771:21-22)

Toward the end of the day, the Woodard and Masters jury advised the judge that "they're wondering why they didn't receive certain things" that they had requested. The judge explained that was because she sent it to the Johnson jury. (77 RT 16774:22-27) At this point, Mr. Berberian again expressed frustration with the court's apparent confusion, stating: "Your honor, I hate to keep butting in here, but are we switching juries?" (77 RT 16774:28-16775:1)

At the close of December 14, the judge instructed the Woodard and Masters jury that it would look into their requests for documents and deal with it the following day, their last day before the two-week Christmas-New Year recess. (77 RT 16780, 16793) The record, however, does not reveal whether the Masters jury ever reviewed Exhibit 189.

The trial record clearly supports the conclusion that the jury gave considerable weight to Evans' testimony against Masters. Thus, the jury, after nine days of deliberation, reached its guilt verdict shortly after a readback of Evans' testimony. (78 RT 16903; 79 RT 17093; 17 CT 5098; 18 CT 5103-5108, 5119, 5124) Indeed, on December 14, 1989, while the jury was deliberating, James Hahn said that Evans' testimony turned the tide in the case:

> "In November of 1989, EVANS testified for the prosecution. EVANS' testimony obviously caused damage to the defense and the trial appeared to have turned in favor of the prosecution. In fact, it may be the crucial factor in the outcome of the trial." (People's Exhibit 268)

The testimony and the evidence at the Reference Hearing, in contrast to the entirely ambiguous information offered to the jury, clearly and absolutely established that Jarvis Masters was not in the Adjustment Center in September of 1985, and that it was highly unlikely that he would have or could have appeared before the BGF Super Commission in December of 1985, or at any other time. Thus, Petitioner called CDCR and gang expert Graham McGruer, who testified that based upon San Quentin Adjustment Center records which he reviewed that Jarvis Masters was in Carson section of San Quentin Prison between September 1 and December 2, 1985, and only briefly appeared on the Adjustment Center yard in late December of 1985. (5 RHRT 281, 286-290; Pet. Ex. 16)

In reaching his conclusion, McGruer reviewed the available "CDC 114-As" which essentially tracked an inmates activity within a segregated unit. (5 RHRT 282) McGruer's results were reported in petitioner's Exhibit 16, a detailed matrix of available CDC records regarding Jarvis Masters and six individuals who were reportedly members of the BGF Super Commission and were present in the

Adjustment Center during this period of time: Larry Woodard, Welvie Johnson, Julius Chalk, Bobby Evans, Willie Redmond, and Kenny Carter. (Pet. Ex. 16) According to Mr. McGruer, and as shown in his chart, Jarvis Masters first appeared on the Adjustment Center yard on December 13, 1985, and only appeared on the Adjustment Center yard three more times: on December 17, 20, and 22, 1985. (5 RHRT 286-288; Pet. Ex. 16)

According to Evans' 1989 trial testimony, Jarvis Masters appeared before BGF Super Commission members Kenneth Carter, Willie Redmond, Julius Chalk, and Evans himself. (58 RT 13722:24, 13725:17-20)

Inasmuch as there are no records now available for Julius Chalk, or Kenneth Carter, Mr. McGruer could not ascertain whether these individuals went to a yard on the four dates that Masters went to the yard. While Evans went to the yard on December 13, 17, 20, and 22, Redmond only went to the yard on December 17, 20, and 22. Thus, December 17, 20 and 22 were the only possible dates that Masters could have conceivably been on the yard with Chalk, Carter, Redmond and Evans. (5 RHRT 287; Pet. Ex. 16)

The fact that these five individuals went to the yard on these three dates, however, did not mean that the five of them were ever

present on the yard together at the same time. As Mr. McGruer noted, there were four separate yards every day. (5 RHRT 288) Thus, on each of the three dates, assuming a random distribution,[6] there would only be one chance in four that Masters went to the same yard as Evans. And on each of the three dates, there would only be one chance in four that Masters went to the same yard as Redmond. While no records were available for Julius Chalk, or Kenny Carter, the same rules would apply.

It can be quickly appreciated that the chance that all five of them would be on the same yard on any one of these dates would be extremely remote, i.e., 1/4 X 1/4 X 1/4 X 1/4 = 1/256.[7]

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[6] The record does not indicate how the yard choice was made. While McGruer stated that gang members typically go to the yard at the same time, this would not determine which yard. (5 RHRT 293, 302) It is also reasonably possible that each floor of the Adjustment Center (which could be limited to a particular gang) went to a particular yard at one time. According to People's Exhibit 189, attached hereto as Appendix A, Chalk, Carter, Evans, and Redmond were not on Masters' floor in the Adjustment Center. Thus, if Masters went to a particular yard with his living group he would not have been able to meet with Chalk, Carter, Evans, or Redmond in the yard. *Instead of there being a highly remote chance of a meeting, there would be no chance of a meeting.*

[7] For example, the chance of throwing "snake eyes" (two ones) with one roll of two dice is 1/6 X 1/6 = 1/36. If one used two four-sided (pyramid-shaped) dice, the chance of throwing "snake eyes" would be 1/4 X 1/4 = 1/16.

In the instant case, there were three chances of the event occurring. Roughly speaking, this would increase the chance to about one

(continued...)

Real world factors made the likelihood of such a meeting even more improbable. According to McGruer, who is an expert in gang behavior, a hit on a prison guard by a gang member would have to be approved by the leadership of the organization. (5 RHRT 299) The record, however, suggests that the hit on Burchfield was unsanctioned. (E.g., 58 RT 13717 [BGF Main Central Committee did not know the hit was going to happen]; 58 RT 13723 [Woodard gave order for hit]; 7 RHRT 366 [hit not sanctioned]) According to McGruer, if the hit was unsanctioned, the BGF leadership would have acted immediately to gain control, in order to prove that they are in control of their own gang. (*Id.*) This would mean that the BGF leadership would need to conduct an investigation as soon as they possibly could. (*Id.* at 300) For this reason alone, the BGF leadership would not have waited until December 1985, six months after the attack, to conduct an investigation. (*Id.*)

In conducting this investigation, the leadership would only communicate with the major principals who ordered the hit. "They're going to want to talk to that person right away." Having done that,

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[7](...continued)
percent. See, e.g., http://www.bmlc.ca/Math12/Principles%20of%Math.%2012%20%20-%ProbabilityLasagne%201.PDF This, of course, assumes something we do not know, that Julius Chalk and Kenneth Carter went to the yard on each of these three days

they would not have had commission meetings with individuals of lesser authority. (*Id.* at 301) If there was any interest at all in finding out the understanding of all the participants, that would have been done right away, and they would not have waited months to do it. "They don't have months to wait to get the facts. They want the facts now." (*Id.* at 301)

Thus, had the jury heard all of the above evidence – which was not presented at the trial – they would have known to a certainty that Bobby Evans was a liar, as the referee found him to be.

For the foregoing reasons, and for the reasons set forth in Petitioner's Exceptions Brief, this Court should find that the evidence preponderates that false evidence regarding petitioner's role in the charged offenses was admitted at the guilt phase of petitioner's trial.

Question 2:	***Is there newly discovered, credible evidence indicative of petitioner's not having been a participant in the charged offenses? YES.***

While respondent correctly states the standard for "new evidence" going to actual innocence (REB 46), that is all that is correct in its brief.

First, respondent repeats, without noting the error, the referee's erroneous statement that Dr. Leonard's testimony is not "new" because petitioner could have introduced it at trial. (REB 47, Referee's Report 15, n. 9) As explained in Petitioner's Exceptions Brief, that restriction does not apply to habeas corpus proceedings. *In re Hall* (1981) 30 Cal.3d 408, 420 states that once petitioner has presented newly discovered evidence, he may thereafter present "any evidence not presented to the trial court and which is not merely cumulative . . . ." (PEB at 91) As also explained in petitioner's brief, the referee's statement quoted by respondent also mis-states the trial record. (PEB at 91, n. 63.)

Second, respondent also quotes another error regarding the trial record from the final report at page 14, footnote 8, to the effect that, if there was a backup plan to spear Sergeant Burchfield on tier four, Masters may indeed have sharpened *that* weapon. (REB 47)

The problem with this is that the prosecution's entire theory regarding Masters weapon-sharpening was not that he sharpened *a* weapon, but that he sharpened *the* weapon that killed the sergeant.

Third, in the same paragraph as the foregoing, respondent quotes from the referee's rejection of the inmate witnesses' testimony regarding the heightened security concerns of passing the weapon from tier to tier. That point is more than amply covered in petitioner's brief, regarding the evidence in the record that the conspirators would not have passed the weapon among tiers, and that the referee, in "not being convinced" on the question, applied the wrong standard. (PEB 101-1060)

Fourth, respondent fails to acknowledge or alert the Court to the error in the referee's statement that Dr. Leonard's testimony did not exonerate petitioner because "'he was not tried as the planner or leader of the conspiracy; he was tried as the knife-sharpener and messenger.'" (REB 47, quoting Referee's Report at 15) *It is beyond belief that respondent does not know the falsity of this statement, and does not know that Masters was tried as a planner and leader of the conspiracy.* (See PEB 92-93) Moreover, since the kites purportedly written by petitioner were written *after* the murder,

petitioner would be at most guilty as an accessory under Penal Code section 32. (PEB 93-94)

At a more fundamental level, the referee entirely misunderstood the importance of the kites to the prosecution of petitioner, and thus the importance of her finding that Dr. Leonard's testimony was convincing.

Finally, the section of respondent's brief purporting to show that the referee's findings were supported by the record (REB 48-50) is refuted as a whole by petitioner's discussion of question 2 in his brief, in which he shows (1) that the referee took an unjustifiably narrow view of the new evidence petitioner had introduced; and (2) that the evidence in fact was sufficient to meet the standard for new evidence of innocence. (REB 90-135).

More specifically, respondent makes the following false claims:

(1) That the mere fact that there was one Crip in cell 4 on tier two (in between the cells where petitioner's evidence show the shank was sharpened and Johnson's cell) belies the testimony of all of petitioner's witnesses about the security dangers of passing the shank between tiers 2 and 4. (REB 48) This is ludicrous. First, there was testimony at trial that the Crips and BGF were working

together against their common non-African-American enemies (see, e.g., 54 RT 13040; 58 RT 13723:24-27) and the fact that a shank would have to bypass one cell along the tier walkway is very different than having to move the shank across the walkway, and beyond it, up two tiers, across the upper walkway, and past several cells to reach Masters, and then again back across the upper walkway and beyond it, down two tiers, and back across the lower walkway, when it could have been snagged anywhere along the way. And, again, the assertion of a back-up plan, repeated by respondent (REB 48-49) has nothing to do with the prosecution's case below.

(2) While respondent's dismissal of Dr. Leonard's testimony (REB 49) is dealt with above and elsewhere in this brief, respondent further attempts to cast doubt on "Willis's copying theory" by asserting that it is in conflict with Woodard's testimony. (REB 49-50) Here, it seems, respondent is willing to accept Woodard's testimony. But the two are not in conflict, for the following reasons: First, as noted above, the copying took place *after* the

> murder, when it is likely that Woodard had been transferred to the Adjustment Center, leaving Willis as the highest ranking member in Carson section. Second, the idea the Masters was trying to get back into Woodard's good graces is Willis's theory, not petitioner's; Masters, nonetheless, was bound to follow orders from either Woodard or Willis, especially in the post-murder period of high tension with the prison authorities. Third, why would Woodard, even if Masters was on discipline, object to his taking responsibility for the actions of higher-ups and distract an investigator's attention from them? And finally, Masters was no longer under orders not to participate in a conspiracy, since the conspiracy was already complete.

As set forth extensively in petitioner's brief, the referee not only erred with regard to the two matters she included as "new evidence," she ignored other new evidence and its corroboration in the record below. Contrary to respondent's claim, there was sufficient new evidence to meet the standard for that evidence on habeas corpus.

Question 3:	***What, if any, promises or threats were made to guilt phase prosecution witness Rufus Willis by District Attorney Investigator Charles Numark or Deputy District Attorneys Edward Berberian or Paula Kamena? Was Willis's trial testimony affected by any such promises or threats, (YES) and, if so, how?***

Respondent makes no claims with regard to Question 3, other than to quote the referee's conclusions and state that they are amply supported in the record. (REB 50-51) The entirety of petitioner's response can be found in Petitioner's Exceptions Brief, which sets forth not only the actual facts involved, but the referee's error in interpreting the question. (PEB 136-147)

Question 4:	***Were there promises, threats or facts concerning guilt phase prosecution witness Bobby Evans's relationship with law enforcement agencies of which Deputy District Attorneys Berberian and Kamena were, or should have been, aware, but that were not disclosed to the defense? YES. If so, what are those promises, threats or facts?***

Respondent makes five arguments regarding Question 4:

1. James Hahn did not work in Marin. (REB 51)
2. James Hahn did not disclose the extent of his relationship to the District Attorney. (*Id.*)
3. The referee correctly concluded that the additional contact between Hahn and Evans was not substantially material. (REB 52)
4. The jury was told that Evans had served as a police informant. (*Id.*)
5. The jury heard that Evans had committed 13 to 15 shootings. (*Id.*)

These points will be considered in order.

A. HAHN AND CDC WERE PART OF THE INVESTIGATION AND PROSECUTION TEAM

While the record is silent as to the physical address of Hahn's desk and files, he testified that he was an employee of "the Special Services Unit of San Quentin," which is in Marin County. (8 RHRT 416:21-24) Welvie Johnson's testimony that Hahn's office was in Marin, and Bobby Evans' testimony that Hahn "worked in Marin County" was also undisputed. (Evans Deposition at 55:14-15; 7 RHRT 347) Hahn's partner, James Moore, also testified that Hahn's office was in Marin. (3 RHRT 200)

Mr. Berberian, the District Attorney who prosecuted Masters, also testified that Hahn's office was located in Marin County, but not at the prison itself. (3 RHRT 155; 8 RHRT 423) The record, indeed, suggests that Hahn's office and the District Attorney's office were within walking distance of each other. (8 RHRT 442:20-22) The physical location of Mr. Hahn's office, however, is utterly irrelevant to this proceeding since Hahn, as a matter of fact and as a matter of law, was an investigative officer in this case, and Hahn was a member of the investigation and prosecution team. [8] Hahn, in

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[8] These facts are set forth in further detail at pages 167-174 of Petitioner's Exceptions Brief.

addition, was an agent of CDC, who investigated and prosecuted this case.

B. THE UNDISCLOSED INFORMATION AND ADDITIONAL CONTACT REGARDING EVANS WAS MASSIVE, AND SUBSTANTIALLY MATERIAL UNDER *BRADY* [9]

"Additional contact" between Hahn and Evans was vast. It did not include just Hahn. Hahn was Bobby Evans' handler. As the result of his assistance, Bobby Evans was a professional informant who worked for the Oakland Police Department, the California Bureau of Narcotics Enforcement (BNE), and the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). The jury learned of none of this.

The jury were led to believe that prior to coming forward, the relationship between Bobby Evans and James Hahn was almost entirely adversarial. According to Evans' trial testimony, Hahn had kicked down his mother's door in 1986 with 14 other officers, and identified Evans in 1987 at the Oakland Police Department, after he had been arrested. He then violated Evans and sent him back to prison. (58 RT 13800-13801; 59 RT 13972-13973) According to Evans' trial testimony, he did not provide any information on either of

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[9] This argument is fully set forth at pages 54-61, 150-167, and 176-178 of Petitioner's Exceptions Brief.

these occasions. (58 RT 13801, 13837-13838) According to Evans, the only time he had worked with Hahn was in May 1988, when he gave Hahn information on a dirty cop. (58 RT 13832, 13834-13836, 13838; 59 RT 13985)

The real facts are now uncontested. Evans' working relationship with Hahn *began* when Hahn kicked down his mother's door. (Evans' deposition, Pet. Ex. 58 at p. 51) Evans became an informant to keep himself from getting arrested. (*People v. Bailey* at p. 14, Pet. Ex. 66)

From that day in December 1986, when Hahn kicked down the door of Evans' mother's house, up until the time of his May 12, 1989 arrest, Hahn and/or his partner James Moore had anywhere from 30 to 50 contacts with Evans and were regularly running him as a snitch. (3 RHRT 165, 190, 193, Evans deposition at pp. 54-56) James Hahn, however, was also a doorway to a lot of lucrative work, much of which Hahn himself set up. Thus, during this period, Evans was also working with "a lot of Oakland police officers," the California Bureau of Narcotics Enforcement (BNE), and the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). (8 RHRT 448-450, 457) Evans did "gun buys" or "dope buys" for ATF. Sometimes he got $1,000 and sometimes he got $300, depending upon how many

guns or how much dope he would buy. (Evans deposition, Pet. Ex. 58 at 57) According to Evans, he was also paid $500 a week by BNE. (Evans deposition, Pet. Ex 58 at 58-59; Pet. Ex. 68 at 1)

C. THE JURY DID NOT KNOW THAT EVANS WAS A WELL PAID PROFESSIONAL INFORMANT

Respondent attempts to minimize the fact that the jury were left in the dark about Bobby Evans by contending that "the jury heard that Evans had served as a police informant." (REB at 52) The jury, however, only heard that Evans had worked with Hahn on one occasion in 1988, when he gave Hahn information on a dirty cop. (58 RT 13832, 13834, 13836, 13838; 59 RT 13985) The jury did not learn that Evans was a professional informant and that Hahn was his handler. The jury did not learn that Hahn and his partner James Moore had anywhere from 30 to 50 contacts with Evans and were running him as a snitch. (3 RHRT 165, 190, 193; Evans deposition at pp. 54-56) The jury did not learn that Evans was also working with "a lot of Oakland police officers," BNE, and ATF. (8 RHRT 448, 450, 547) The jury did not learn that Evans was paid $500 a week for his BNE work and $300 to $1,000 for each of the 50 to 60 "gun buys" or "dope buys" that he did for ATF. (Evans deposition, Pet. Ex. 58 at 58)

D. THE FACT THAT THE PENALTY-PHASE JURY HEARD THAT EVANS ADMITTED OTHER SHOOTINGS MISSES THE POINT

Respondent also attempts to minimize the undisclosed evidence regarding Evans by suggesting that the jury learned that Evans "had committed numerous offences, including 13 to 15 shootings . . . for which he did not expect to be prosecuted by either federal or State authorities." (REB 52) Respondent is confused. When Bobby Evans was a guilt phase witness, and when he was asked about shootings that he had performed as a BGF enforcer before he reformed himself and left the BGF, Evans had a severe case of amnesia. He could not recall the details of any shooting or stabbing, or who were the victims, or what kind of weapons were used. (59 RT 13908-13910)

As a result of *penalty* phase discovery, however, the defense learned that Bobby Evans became a professional hit man for James Beasley, Jr., and committed a number of shootings. As a result, the details of these shootings were disclosed to the penalty phase jury, but not the guilt-phase jury. (89 RT 20576-20582) These penalty phase disclosures, however, are irrelevant since the issue before this

Court is whether petitioner's guilt phase rights – not his penalty phase rights – were violated by *Brady* violations. [10]

Petitioner was convicted shortly after a read-back of Bobby Evans' guilt phase testimony. Had the guilt phase jury known the true facts concerning Bobby Evans' relationship to James Hahn and the governmental agencies that supported Bobby Evans as an informant, as well as Hahn's opinion that Evans was a "professional liar," (8 RHRT 432) Bobby Evans' testimony and possibly the entire prosecution case, would have been thoroughly discredited.

The fact that Evans had a history of violence, moreover, misses the point. Evans' history of violence prior to dropping out of the BGF simply burnishes his credentials as a reformed BGF member, who is now an expert. [11] The *Brady* issue, in any case, is not about Evans' history of violence. It is about the fact that the jury did not learn that Evans was a well-paid, long-time professional informant when he came forward, and that James Hahn was his handler.

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10 Question 4, by its terms, is about "guilt phase prosecution witness" Bobby Evans.

11 Like a heroin addict who becomes a drug counselor, someone who is reformed is deemed both knowledgeable and trusted. Had the jury known that Evans became a professional hit man after he dropped out of the BGF, and had they known that he was a paid "professional liar," as Hahn put it, the prosecution's case would have been destroyed.

Question 6:	***What, if any, promises or threats were made to Bobby Evans by District Attorney Investigator Numark, Department of Corrections Investigator James Hahn, or Deputy District Attorneys Berberian and Kamena? Was Evans's trial testimony affected by any such promises or threats, and, if so, how?***

Respondent argues that this question is **only** about promises and threats allegedly made by James Hahn in conjunction with the murder of James Beasley, Sr. To that end, respondent argues that Evans' story that Hahn coerced him was unbelievable, since Evans, during his deposition, denied any involvement in the murder, and James Hahn did not have any role in the Beasley murder investigation.

The Beasley, Sr. murder evidence is extremely troubling. Bobby Evans was the prime suspect in the brutal murder of James Beasley, Sr. on the day he came forward to testify against Jarvis Masters. Sgt. Conner testified that James Hahn knew that Evans was a suspect. (3 RHRT 170-171, 181-182) Inasmuch as it was Hahn's role to keep close track of all things concerning Evans, it would be inconceivable that Hahn would not know about the police investigation. (8 RHRT 459) Indeed, Officer Conner's testimony that he knew about the investigation, that he was in almost daily

contact with Hahn, and that he told Hahn about it is undisputed in the record. (3 RHRT 164, 170-171, 181-182) (See PEB pp. 164-165)

While there is no direct evidence that Hahn promised that the Beasley murder investigation would go away, the undisputed fact is that it unexplainedly did go away when Bobby Evans came forward.[12] Hahn's involvement in this process certainly represents one of the most plausible explanations. [13]

Respondent's analysis of Question 6, however, is wrong. *The James Beasley murder represents only a very small portion of petitioner's evidence in conjunction with Question 6.*

Even if it be assumed that Bobby Evans did not know about the Beasley murder investigation, the undisputed fact remains that Bobby Evans was a professional informant between 1986 and 1989,

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12 By May 10, 1989, everything pointed to Bobby Evans as the murderer. (**[REDACTED CITATION]**) Evans came forward shortly thereafter. There is no further record of any investigation of Bobby Evans. (PEB 158-163, 180)

13 While Bobby Evans denied that he knew about the investigation, his testimony need not be accepted at face value. *The issue of what Bobby Evans knew, in any case, would have been a matter for the jury to decide.* Given the weight of the evidence collected by the San Francisco Police Department, Evans would have wanted the murder investigation to go away, and would have been inclined to cooperate in any way he possibly could, to curry favor, to make it go away. Evans, moreover, testified that he was threatened with prosecution for murder if he did not testify. (Evans Deposition at 71-72, 111-112)

and he continually received benefits, either money or freedom from prosecution, or sentence reductions, or some other benefit when he assisted the State. It is also undisputed that Bobby Evans lied at the trial. Other things being equal, Bobby Evans, a professional snitch, who always looked to his handlers for some kind of deal, would not have lied against someone he had never met and did know unless he expected something in exchange.

Keeping Evans "out on the streets longer" was the bedrock premise of the working relationship between Bobby Evans and James Hahn. That is the reason that Evans began working as a snitch for Hahn after Hahn broke down his mother's door in 1986. (Pet. Ex. 66, 68)

While Evans' credibility when he testified both in 1989 and 2010 are certainly at issue, he had no reason or motive to lie when he spoke to his attorney John Costain. (Sealed RT of January 5, 1990 testimony of John Costain at pp. 2-4) He also had no reason or motive to lie in the 1996 Yolo County preliminary hearing proceedings in *People v. Williams.* (Pet. Ex. 67) He also had no reason or motive to lie in the June 10, 1998 Superior Court proceedings in *People v. Bailey.* (Pet. Ex. 66) And he had no

reason or motive to lie when he was interviewed by his correctional counselor in 2002. (Pet. Ex. 68)

It is also uncontested that Hahn came through for Evans. Evans, a career criminal, was facing up to 18 years in State Prison for armed robbery when he placed the telephone call to James Hahn. (Evans Deposition at 62:6-10) *Through Hahn's intercession, Evans did less than seven months, about one-fortieth of what he could have received on the armed robbery charges.* (78 RT 16880, 16891, 16945-16948, 16957; 79 RT 27024) This is in addition to any benefits he may have received on potential murder, shooting, kidnaping, and RICO charges. (Evans Deposition at 73-74; Pet. Exs. 66, 67, 68)

Even if it be assumed that there were no explicit promises or threats made to Bobby Evans, either in conjunction with the forty-fold reduction of his prison term, or in conjunction with manifold other potential charges, the fact remains that the longstanding relationship between Evans and Hahn created an expectation in Evans' mind that benefits were being provided for his testimony.

Thus, the evidence preponderates that either an explicit promise was made to Bobby Evans – as Bobby Evans testified in 1996, 1998, and 2010, and as he told his Correctional Counselor in

2002 – or an implied promise was created based upon a longstanding – secret – working relationship, and this promise, or these promises, influenced his decision to testify falsely against a man he had never met.

Was the Referee's Denial of Respondent's *in Limine* Motion for a *Kelly* Hearing a Manifest Abuse of Discretion (NO), Did Respondent Waive Their Right to Appeal that Decision (YES), Has Respondent Proved Prejudice (NO), and Are Respondent's Arguments Relevant (NO)?

A. INTRODUCTION

Respondent does not take exception to any of the findings made by the referee, including the findings that Bobby Evans lied, that Evans and Willis are chronic and habitual liars who would say or do anything to gain release from prison, and the finding that Dr. Leonard testified convincingly that Masters was most likely not the author of the two kites attributed to him at the 1989 trial. Respondent, nonetheless, claims error solely based upon the trial court's *in limine* denial of their motion for a *Kelly* hearing. (REB at 57,82)

As we will demonstrate below, respondent's *in limine* motion for a *Kelly* hearing was fatally flawed since respondent's motion did not offer any argument or evidence to support their contention that Dr. Leonard's testimony or the processes he employed were "new scientific processes." Respondent also offered no legal/historical support for their motion, relying solely upon an unpublished San

Diego Superior Court ruling on a motion, and a New Jersey United States District Court decision which did not even involve *Kelly*. Neither decision, moreover, was on point. In addition, respondent's motion was based upon a profound misunderstanding of Dr. Leonard's testimony.

Having lost their *in limine* motion, respondent made no objection to Dr. Leonard's testimony at the Reference Hearing – either before, during, or after Dr. Leonard testified. Respondent instead advised the referee that the court could consider Dr. Leonard's testimony in reaching her decision. (19 RHRT 1185)

Respondent's claim of error must be rejected in its entirety for each of the following reasons, as well as for additional reasons which will be set forth below:

1. Respondent's failure to renew its objection to Dr. Leonard's testimony when he was called at the evidentiary hearing waives their objection;
2. Respondent has not satisfied its burden of establishing that the referee's denial of their *in limine* motion was a manifest abuse of discretion;
3. *People v. Kelly* does not apply to Dr. Leonard's testimony;

4. Respondent has not met its burden of establishing prejudice;

5. Respondent's challenges to the referee's *in limine* motion are not based upon the record of that motion, and are instead based upon a gross distortion of the evidentiary hearing record.

B. PROCEDURAL BACKGROUND

On February 18, 2011, respondent filed a seven-page *in limine* motion to preclude Dr. Leonard's testimony under *People v. Kelly* (1976) 17 Cal.3d 24. While the legal and factual basis for the motion was unclear, the gravamen of respondent's argument appeared to be that there was no general scientific consensus that a linguist can identify a *particular* individual using authorship identification. Thus, respondent cited and relied upon two cases which appeared to hold that the use of forensic linguistic testimony to identify a particular author of a document is scientifically questionable:

1. *People v. Michael Flinner*, a San Diego Superior Court decision involving a prosecution linguist who *linked* certain threatening letters to the defendant.

2. *United States v. Van Wyck* (D.C.N.J. 2000) 83 F. Supp. 515, 523, which concluded that an FBI agent-linguist could not, under *Daubert*, identify the particular author of certain unknown writings.

Respondent's motion, nonetheless, ignored both the history of linguistics and the historical use of linguistic evidence in the American courts.

Significantly, respondent's motion did not contest Dr. Leonard's credentials as a forensic linguist. [14] The motion also offered no support for its contention that the linguistic processes employed by Dr. Leonard were new scientific processes.

Respondent's motion cited and attached four scholarly articles:

1. *Linguistics in the Courtroom*, by Roger Shuy. (Pages 3-13)
2. *Empirical evaluations of language-based author identification techniques*, by Carole Chaski. (Pages 1-65)

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[14] "In this case, respondent does not contest the second prong of *Kelly*, that Dr. Leonard has the relevant credentials in the field." (Respondent's Motion to Preclude the Testimony of Dr. Robert Leonard Pursuant to *People v. Kelly* (1976) 17 Cal.3d 24, filed on February 18, 2011, at p. 2.)

3. *"Junk" Science, Pre-Science, and Developing Science*, by Carole Chaski. (Pages 97-149)

4. *The State of Author Attribution Studies: Some Problems and Solutions*, by Joseph Rudman. (Pages 351-365)

Respondent, however, did not explain how these articles were related in any way to Dr. Leonard's testimony.

On March 21, 2011, the referee denied respondent's motion.

C. THE TESTIMONY OF DR. LEONARD

On March 28, 2011, petitioner called Dr. Robert A. Leonard, Ph.D., a forensic linguist. Dr. Leonard is a professor of linguistics at Hofstra University, the chairman of their Department of Linguistics and their graduate program in forensic linguistics, and the Director of the Institute for Forensic Linguistics, Threat Assessment, and Strategic Analysis. Dr. Leonard, an expert in social linguistics, semantic theory, and lexicography, specializes in the application of the science of linguistics to issues of the law. (18 RHRT 971-973; Pet. Ex. 72 at p. 3)

Dr. Leonard regularly works as a forensic linguist for law enforcement agencies. He has trained FBI agents and international agents in forensic linguistic techniques at the FBI Academy at

Quantico, Virginia. He has also been hired by the FBI to analyze and improve their forensic linguistic database. Dr. Leonard is also regularly consulted by law enforcement agencies. (*Id.* at 975-976)

Dr. Leonard has regularly testified, and his testimony has been accepted in nine states and/or federal court districts. (*Id.* at 975) He is a member of the Linguistic Society of America, Columbia School of Linguistics Society, and the International Association of Forensic Linguistics, among other groups. (*Id.*)

According to Dr. Leonard, many linguistic practitioners have been applying linguistics to legal data for a long time. (*Id.* at 973) Linguists publish over 15 professional journals, and forensic linguists are now also publishing their own journals. Dr. Leonard started the first graduate program in forensic linguistics in the United States. (*Id.*) Other graduate programs in forensic linguistics also exist in Europe. (*Id.*) The science of linguistics is funded by the national Science Foundation. (*Id.* at 982)

One of Dr. Leonard's fields is authorship analysis. Dr. Leonard gave the example of a case that he had with the FBI where the question was whether three letters that dealt with bombing were written by the same person. Dr. Leonard looked at the problem with

an eye to saying whether the language patterns in these three documents were consistent with one another:

> "That was their question. So I looked at it with an eye to say whether the language patterns in these three documents were consistent with one another. And interestingly, one particular feature was of special note. Each of these documents was making fun of the police for not having caught the person who was writing them and for chiding them for their ignorance of how bombs were made. And in each of these three there was, next to the name of the type of bomb, an asterisk. And at the bottom of the page there was an asterisk with a footnote that explained the construction of the bomb. Mind you, in each of these three letters the bombs were different, the explanations were different, but his single linguistic feature of having an asterisk next to the bomb name and then the description with an asterisk at the bottom of the page, it would be hard to find a hypothesis under which you could explain that these were three random letters from three random individuals. So that alone tilted towards the hypotheses of common authorship." (*Id.* at 980)

To drive home the significance of the novelty of the event, and the need for "bottom up (*a posteriori*) analysis," Dr. Leonard pointed out that if a letter had been published in a newspaper in its entirely, that could change the analysis since that would heighten the possibility that one of the authors was a copycat. (*Id.* at 980-981) In that event, one would look for indications that the copycat performed his work "more slavishly" than the other letters. (*Id.* at 981)

Dr. Leonard pointed out that his method of analysis in that case went beyond looking at just the asterisks. He noted that all three letters were the same type of letter which had the same pragmatic intent of making fun of and belittling the police. They were written in English, and they had similarities, and there were no glaring differences or signposts that would link the other way. (*Id.* at 982)

In this case, Dr. Leonard was asked to examine two Q documents and a set of K documents and test two competing hypotheses. "The prosecution hypothesis, which is that the person who wrote the K documents wrote the Q documents. So that is common authorship. Or a competing hypotheses, which is that the nonrandom distribution of the data is better explained by a hypothesis of dissimilar authorship, of separate authorship, of the K and the Q documents." (*Id.* at 984)

The Q documents studied by Dr. Leonard were the two kites which the prosecution attributed to Jarvis Masters. (Trial exhibits 150-C and 159-C) The K documents were 14 documents authored by Jarvis Masters during the period within a few years before and after the writing of the Q documents. (Pet. Ex. 72)

Dr. Leonard testified that the first thing that he does with bodies of data like this is "turn the data into cleaner data, which means we strip out things that are not authored by the subject." (*Id.* at 985)

> "So for example, if it were an e-mail we would take out the e-mail heading and we do a computational analysis to get a ballpark of what's happening with the Q documents versus the K documents. So we'll look at something like average words per sentence, and other computational methodology that we use to mine for details. Meanwhile, we will also read through all of the documents in great detail looking for discernible patterns that will or will not match to expected patterns in the other documents. (*Id.* at 985-986)

In most cases, the goal of a forensic linguist in an authorship case is to "reduce the suspect pool." (*Id.* at 989) Dr. Leonard gave an analogy from outside of linguistics. If the police have reason to believe that a suspect is red haired, that would reduce the suspect pool. But if they knew that the person was also very short or very tall, that would further reduce the suspect pool. Where the police also knew that the person had curly hair, while that by itself would not be sufficient because many people have curly hair, but it would further reduce the suspect pool." (*Id.* at 989)

Dr. Leonard's authorship analysis in this case follows a similar approach. Based upon the available data, a number of methods

were used to identify differences between Q and K documents. While no single method was conclusive, the fact that all of the methods pointed in the direction of separate authorship was deemed significant.

Dr. Leonard testified that the first linguistic measure that he relied upon were the "Words per Sentence Ratios" in the two corpora. [15] This measure provided a snapshot of what is going on in the two different corpora which allowed him to look at the two corpora in more detail. (*Id.* at 992-993) The Q documents had much shorter sentences than the K documents and that was consistently so. Thus, the sentences in the Q documents were on the average 15 words per sentence while the sentences in the K documents were on the average 23 words per sentence. [16]

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15 Dr. Leonard's report also preliminarily relied upon what he referred to as the "type/token ratios" of the two bodies of documents. After drafting his report, however, Dr. Leonard reached the conclusion that the substantially different sizes of the two corpora made the type/token ratios less relevant. Thus, in reaching his conclusions at the Reference Hearing, Dr. Leonard did not rely upon the differing type/token ratios. (18 RHRT 990-992)

16 According to Dr. Leonard's report, the Q documents had 14.02 words per sentence, while the K documents had 23.49 words per sentence. (Pet. Ex. 72 at p. 7) Since some of the words in the Q documents were difficult to read, Dr. Leonard described the Q documents as 15 words per sentence. (18 RHRT 993-994)

Dr. Leonard also noted the different sentence structures in the two corpora. "For example, the K documents have far more sentences, far more, that have four or more grammatical clauses in them. . . . Very complicated sentences, with four or more clauses, are far more common in K than Q. This is also one reason why the sentences are longer. The number of sentences in K that have prepositional phrases are far greater than – than in the Q." (*Id.* at 993)

Dr. Leonard stated that this information pointed out different patterns in the two data sets:

> "So we see that 15 and 23 is a good difference which suggests that is a – support for the hypothesis of separate authorship. But moreover, it points the way to looking at qualitative differences. As I say, the four or more clauses and the prepositional phrases which can be a pattern that's discernible in one body and is not in the other. And then one must ask if both bodies of data were written by the same person why does that person abandon longer sentences, abandon four-plus clauses, abandon prepositional phrases, when he or she writes the other Q documents?" (*Id.* at 994)

Dr. Leonard also employed a "Word Frequency Analysis." "Word frequency allows us to compare the frequency of words in any particular document with a large database" of what is more common in the English language. (*Id.* at 994) In the databases that have been constructed to analyze English "the" is almost always the most

common word in a text, and "I" is much lower. The Q documents follow the common English baseline. The K documents, by contrast, are quite at odds with the databases of English in that "the" is the third most common, and "I" is the most common. (*Id.* at 994-995):

> "So that is not only a difference between K and Q, but it is a difference that is not something that we find elsewhere in the general population." (*Id.* at 995)

Dr. Leonard noted that "'the' is virtually always the most frequently used word, occurring at approximately five or six percent of the total word count. (*Id.* at 996) It is the most common word in the corpus called the British National Corpus, the BNC, the corpus of contemporary American English (the COCA), and also the CTARC, the Communicated Threat Assessment Reference Corpus, which Dr. Leonard uses in his work for the FBI. (*Id.*) Dr. Leonard noted that the Q documents are completely consistent with the three databases he regularly uses. In the Q, "the" occurred approximately five percent of the time. (*Id.* at 996)

Next Dr. Leonard used a linguistic measure known a "Key Words." While this measure is somewhat similar to word frequency analysis, it is also different in many cases. As Dr. Leonard noted in his report at page 6:

> "*Key* words are those words whose frequency is unusually high (significantly so: $p < .05$) in one set of documents – the Qs – in comparison to another set of documents – the Ks. For example, if "the" occurred 5% of the time in the Qs and 4% of the time in the Ks, it would not turn out to be "key" even though it was the most frequent word." (Pet. Ex. 72) (Emphasis in original)

Key words are identified by software which compare the word list of the text in question with the word list based on a larger reference corpus. Dr. Leonard noted that keyword statistical analysis is useful in all sorts of applications. For example, if you are "in counterintelligence and intelligence it's a very useful measure because it can tell you whether all of a sudden there is a statistically significant spike in certain words that you have asked to look for." (*Id.* at 997)

As it turned out, according to the keyword computational program, "the" was the keyword in the Q documents, whereas "I" was the keyword in the K documents. After seeing these results, Dr. Leonard asked himself whether the fact that the K documents were mostly letters was having an effect on the number of "I" in the K. (*Id.* at 998) *While the Q documents are also letters*, Dr. Leonard, nonetheless, wanted to see whether "I" occurs a greater percentage of the time in recognized letter databases.

To this end, Dr. Leonard went to Project Gutenberg, a recognized database which contains thousands of books that are out of copyright, and are therefore subject to linguistic corpus analysis. (*Id.* at 998) Dr. Leonard therefore found three groups of letters in this database: *Letters of a Soldier*, *Diary of a Nursing Sister on the Western Front*, and *A Hilltop on the Marne*. Each was listed on the category of personal narrative, as most of the K letters are. (*Id.* at 998) This sub-corpus of 115,000 words indicated that "the" was still number one at six percent. "Of" was second, just as in the K and Q, and then "I" was down in fifth place. (*Id.* at 999)

Dr. Leonard therefore concluded that the number of "I"s in the K documents was not a reflex of it being letters, but a marker, a pattern that was "identifiable with the body of data." (*Id.* at 999) "[I]t is suggested as evidence of an "uncommon language pattern." (Pet. Ex. 72 at p. 8)

The next linguistic analytic method that Dr. Leonard used involved what he referred to as an analysis of the distribution of modals, including specifically the "deontic must" Dr. Leonard explained that the word "must" can either have a *deontic* meaning or an *epistemic* meaning. Deontic "must" expresses obligation, such as "Johnny, you must do your homework." Epistemic "must," by

contrast, expresses probability, such as "who's that at the door? Oh, it must be Joe." (*Id.* at 1000) Dr. Leonard noted that the relative frequency of the deontic "must" in the Q is 1.24 per 1,000 words, but in the K he found twice that, approximately 2.39 per thousand. (*Id.* at 1002) "So again we have a pattern of difference between the K and the Q." (*Id.* at 1001)

The next method that Dr. Leonard used involved an analysis of the idiosyncratic nonstandard contraction "*I'am*". Dr. Leonard testified that K, but not Q, shows, and indeed favors, the nonstandard contraction "*I'am*". While there are none in the Q, the K corpus contains 36. (Pet. Ex. 72 at p. 10)

Dr. Leonard noted that "It is very uncommon to see the nonstandard usage 'I'am. . . . [I]t's like having red curly hair and being very, very tall . . . . because this is extremely uncommon" (*Id.* at 1002-1003) So in other words, since it is used so frequently in the K documents, if you were supporting the common authors' theory, you would want to see that in the Qs. (*Id.* at 1003-1004)

The next method of analysis that Dr. Leonard employed involved an evaluation of the distribution of the indefinite articles, "a" and "an." Dr. Leonard noted that the author of Q never uses anything other than *a*; he never uses *an*, either appropriately or

inappropriately, despite opportunities to do so. (Pet. Ex. 72 at p. 12; 18 RHRT 1009, 1110) K, however, "shows *an* as well as *a*, and the writer of K more often than not chooses the variety appropriate for the written language." (Pet. Ex. 72 at p. 12) This is evidence of a different grammar. (18 RHRT 1006)

The final language features studied by Dr. Leonard was the distribution of the alteration "and/or". While many people use the alteration "and/or", its use in the K documents was "idiosyncratic in that it is almost semantically gratuitous . . . and not limited in range by appropriateness. The use of the phrase seems only for effect, it does not depend on content, and it can be inserted as a form of Officialese." (Pet. Ex. 72 at p. 13) Dr. Leonard noted that there were five of these idiosyncratic uses in the K, but none in the Q. (18 RHRT 1014)

On cross-examination, Dr. Leonard emphasized that his approach does not involve what is sometimes known as "author identification," i.e., using linguistics to identify a *particular* author. His work, instead, involves what he refers to as "authorship analysis," *which involves only limiting the suspect pool.* (18 RHRT 1030-1031, 1038)

Dr. Leonard never uses just one measure if he can avoid it. As he put it, "curly hair by itself doesn't really cut down the suspect pool too much." (*Id.* at 1044) Dr. Leonard gave an example from a famous case:

> "In this case the authorities came to Professor Shuy with a pencil-scrawled, on a brown piece of paper, ransom note. And it said, if you ever want to see your precious little girl again leave $50,000 – let's see if I have it in here. Yes. 'If you ever want to see your precious little girl again? Put $10,000 cash in a diaper bag. Put it in the green trash kan [*sic*] on the devil strip at corner 18th and Carlson. Don't bring anybody along. No kops [*sic*]. come alone. I'll be watching you all the time. Anyone with you, deal is off and dautter [*sic*] is dead.'
>
> Now, the first thing that anyone notices when they look at the actual note is that a lot of words are misspelled. Cops is spelled k-o-p-s. Daughter is spelled d-a-u-t-t-e-r. But precious is spelled correctly. The flow of ideas, the sentence structure, the punctuation, is extremely standard and a mark of a well-educated person.
>
> So Dr. Shuy said to himself, why would someone who has in his grammar the ability to write well-punctuated, et cetera, et cetera, note misspell cops and daughter." (*Id.* at 1031-1032)

Dr. Shuy decided that perhaps it was disinformation. Dr. Leonard noted that this is something we face all the time in things like ransom notes, or threatening letters, people put disinformation in there hoping to mislead our ability to narrow down the suspect pool.

> "So in narrowing down the suspect pool he said to the authorities, do you have a well-educated man on your list? And they said, 'What do you mean well-educated?

> Look at kops [*sic*] and kan [*sic*].' And he said, "Yes, but the idea is why would you misspell those things? Perhaps because you're well-known in your community as a well-educated person.' And he also said to them, 'Who lives in Akron, Ohio." And they were at little bit taken aback at this. They said, "How do you know he lives in Akron, Ohio? He's a well-educated man from Akron, Ohio, and you tell us this in 10 minutes.' The answer was because the green trash can on the devil strip at corner of 18th and Carlson. Devil strip means the strip of grass between the sidewalk and the street, but only in Akron, Ohio. [17] (*Id.* at 1033)

Dr. Leonard said that this example shows several important things. While much of what a forensic linguist does is "very non-statistical," but it "brings to bear all of our linguistic science." A forensic linguist, for example, uses dialectology, the knowledge of how language varies geographically. This is "good science" without statistics. (*Id.* at 1033-1034) This is also "bottom up analysis," as opposed to coming into an author analysis with *a priori* notions about what must happen. "[W]hen you have these a priori, decided before

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[17] Dr. Leonard mentioned that once he gave the plenary talk to the Ohio State Attorneys' Conference on Law Enforcement before 1,000 law enforcement officials, and he gave this example. And a District Attorney was standing behind two police officers, one from Akron and one from nearby Columbus. The District Attorney told him later that the police officer from Akron turned to the officer from Columbus and said, "But that's what everybody calls it, right?" The officer from Columbus answered, "Called what? What's a devil strip?" (*Id.* at 1033)

the analysis, you run into a lot of problems" and it becomes unscientific. (*Id.* at 1034)

This is not to say that statistics may not be helpful. Yet statistical tests are not a "be all and end all. It's simply a way of allowing us to process of lot of data quickly so that we can then analyze it more directly." (*Id.* at 1043)

Asked about whether or not he had done any testing on how reliable any given factor is, Dr. Leonard answered that error rate is typically "something that you get in top-down kind of sciences where you have these *a priori* notions that are applied in every case." (*Id.* at 1048-1049) And he gave the example of testing for chlorine in a pool as *a priori* analysis. You can test a thousand samples of a reagent and get an error rate. (*Id.* at 979) "Whereas every instance of analysis of language is bottom up, it's a comparative science. It's a science from the field, from the real world." (*Id.* at 1049)

Asked about why his report does not discuss the differences between the Q documents, Dr. Leonard noted that he "counted them every way they could possibly be counted" and broke it all down. Nonetheless, he also treated the Q documents as a group because, "We understood that that was the prosecution's hypothesis that Masters wrote both Q1 and Q2." (*Id.* at 1094-1095, 1098)

On April 8, 2011, Dr. Leonard testified on re-direct. During his direct testimony, Dr. Leonard had pointed out a number of significant differences between the Q documents and the K documents and concluded that these differences point to different authorship. On cross-examination, however, he was asked about a number of *similarities* shared by the Q and K documents and whether these similarities point to joint authorship. The similarities were noted in a number of respondent's exhibits. [18] On re-direct, Dr. Leonard demonstrated that these similarities were not linguistically significant in this case because they were shared by many of the BGF members at San Quentin at the time.

To explain his point, Dr. Leonard identified petitioner's Exhibit no. 73, entitled "Documents taken from discovery and trial exhibits showing common features of BGF writings." (19 RHRT 1159) The exhibit includes writings by Rufus Willis, Andre Johnson, Lawrence Woodard, Michael Rhinehart, letters with smiley faces by known and unknown authors (other than Jarvis Masters), documents with " 'ed"

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[18] Resp. Exs. WW (use of "/"), ZZ (use of "no" and "know"), AAA (use of numbers inside parentheses), BBB (use of parentheses for words and plurals), CCC (unusual use of quotation marks), DDD (the use of smiley faces), FFF (the use of "ed"), HHH (the use of apostrophe "nt" contractions).

authored by individuals other than Jarvis Masters, and BGF operational documents by unknown authors. (Pet. Ex. 73)

Dr. Leonard testified that this compilation supports the conclusion that the similarities in this case between the Q documents and K documents were endemic to the BGF culture at San Quentin during the period in question. (19 RHRT 1156-1158, 1161-1162) Dr. Leonard described the culture as a "very, very rarefied socio-linguistic situation of being in cell blocks in San Quentin and being part of the same gang structure. The authors of the same age and the same ethnic group share the native dialect of English, have similar education levels, and are members of a small group within which there is a constant communication regarding their survival, physical and mutual protection, and the ideology and philosophy of the world. All of these things – which are described as "accommodation" by linguistic science – "make us expect extreme regimentation and similarity." (*Id.* at 1157)

In addition, the "rules of standard orthography were not fully inculcated in the authors by the time they entered San Quentin. . . . There were, thus, no fully formed rules that had to be abandoned for the rules to be replaced by the writing conventions that were the norm in the BGF, as opposed to . . . a hypothetical highly-educated

writer who would already have had the rules of writing English fully formed and fixed in his behavior pattern. (*Id.*) In addition, because the authors spent a lot of time copying kites, and disciplined members were made to copy out constitutions and propaganda, the similarities in BGF writings were remarkable." (*Id.* at 1158) This is why the differences between the Q and the K documents, rather than their similarities, are so important. [19]

Respondent conceded in her closing argument that Dr. Leonard was a qualified linguist. (19 RHRT 117) She also conceded that his testimony was no different than a doctor testifying in a medical malpractice case, or an attorney testifying in a legal malpractice case, and that his opinion was admissible. (19 RHRT 1180-1181, 1184-1185)

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[19] By way of example, Dr. Leonard was asked about the use of " 'ed" which is found in both the Q and K documents. Referring to pages 60, 61, 64, and 65, Dr. Leonard noted that " 'ed" was used by other BGF members during this period of time at San Quentin. (19 RHRT 1161, 1162, 1166; Pet Ex. 74) Dr. Leonard noted that M. Patricia Fisher, a document examiner, examined the handwriting of those documents and certified that Jarvis Masters did not write those documents. (*Id.* at 1116) In Dr. Leonard's opinion this idiosyncratic feature, as well as other unusual features shared by the Q documents, K documents, and the BG documents at large, are idiosyncratic to the San Quentin BGF itself during this period. (*Id.* at 1162)

D. ARGUMENT

Respondent does not take exception to the referee's finding that Dr. Leonard testified convincingly that Jarvis Masters was most likely not the author of the two kites attributed to him at the 1989 trial. Respondent instead claims error solely based upon the trial court's denial of respondent's *in limine* motion for a *Kelly* hearing. (REB at 57, *et seq.*) For each of the reasons set forth below, respondent's argument must be rejected.

1. Respondent's Failure to Renew its Objection to Dr. Leonard's Testimony When it Was Introduced at the Reference Hearing, and Their Admission That His Testimony Was Admissible, Waives Their Objection

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.

> "Generally when an in limine ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal."
>
> *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.) *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.

In this case, respondent did not renew its objection either on the day that Dr. Leonard initially testified (18 RT 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 that she was merely arguing the weight it should be given. (19 RHRT 1185, quoted *infra* at p. 91)

2. Respondent Has Not Established That the Referee's Denial of Their *in Limine* Motion Was a Manifest Abuse of Discretion

Inasmuch as a *Kelly* hearing may require extensive, expensive, and time-consuming expert testimony, and expert declarations, and extensive expert research of a large body of scientific knowledge, such a hearing should not be ordered unless the moving party has satisfied its preliminary burden of proving that such a hearing is required. Thus, the moving party must prove to the satisfaction of the court that a *Kelly* hearing is legally required to evaluate the admissibility of certain expert evidence, on the ground that the evidence "is based, in whole or in part, on a technique, process, or theory which is new to science and, even more so, the law." *People v. Leahy* (1994) 8 Cal.4th 587, 605.

Kelly itself recognized that the trial court is vested with considerable discretion in determining 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. See also, California Evidence Code section 353 ("miscarriage of justice" test) As petitioner will show, there is nothing approaching a "manifest abuse of discretion" in this case, and no "miscarriage of justice." The referee's decision, moreover, was legally sound.

To begin with, respondent's motion was patently deficient. The motion offered no support for its contention that the linguistic processes employed by Dr. Leonard were new scientific processes. Indeed, the specific linguistic processes employed by Dr. Leonard in reaching his conclusions were not even discussed by respondent.

As best as can be determined, respondent's motion was targeted at something that Dr. Leonard does not even practice: the use of forensic linguistics to precisely identify the author of a questioned document. Thus, the motion was founded upon only two cases. A San Diego Superior Court case which involved a

prosecution linguist who "linked" certain threatening letters to the defendant. (February 18, 2011 motion at p. 5) And an United States District Court decision wherein the court concluded that an FBI agent-linguist should not be permitted to identify the author of certain unknown writings. *United States v. Van Wyck* (D.C.N.J. 2000) 83 F. Supp. 515, 523. The latter decision, moreover, was under the federal *Daubert* test, and not under *Kelly/Frye*.

Respondent's motion, moreover, entirely ignored the principal question at issue in their motion: the history of the jurisprudential use of linguistic evidence and analysis. Had respondent briefed this issue, and actually evaluated Dr. Leonard's methods and processes, it would have been obvious to respondent that *Kelly* did not apply. [20]

Long before linguistics became a well-known science, American courts relied on linguistic evidence to evaluate authorship. Indeed, the line of authority supporting the use of linguistic evidence to identify the author of a written document extends well over 100 years.

In *State v. Kent* (1909) 83 Vt. 28 the issue is whether an inscription carved on doors near the area of the murder site were

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[20] Thus, respondent later conceded the admissibility of Dr. Leonard's testimony. (19 RHRT 1185)

carved by respondent. Similarities between known writings by Kent and the questioned inscriptions were found. The questioned inscription included the date "July. 22. 1908". In the same way, a memorandum book, unquestionably authored by Kent contained 47 consecutive dated entries, "and in almost every instance, the name of the day is separated from the figures by a period." *Id.* at 32.

The Supreme Court of Vermont held that legal reliance upon such evidence "is well recognized and may be relied upon to establish authorship:

> "If a writer invariably makes the same mistake, or always adopts the same of two or more legitimate methods which present substantial differences, his practice therein is a circumstance which makes his genuine writings available to establish the authenticity of a disputed one."
>
> *Id.* at 32.

The Vermont Supreme Court also noted that the conclusiveness of such evidence or the number of instances is not the issue:

> "[T]he number of letters or the quantity of writing which the witness may have received is entirely immaterial as far as the admissibility of the evidence is concerned. . . . So when the genuineness of a writing is to be determined by the jury from a comparison with exhibited and conceded standards, the basis of comparison may be slight and yet be adequate in law. We are satisfied that the acknowledged writings of the respondent offered a basis of comparison with the disputed inscriptions which made the latter relevant to inquiry, and it is certain that we have no rule that required the

> exclusion of relevant evidence for lack of weight. The evidence was admissible. Its weight was for the jury; and it is to be presumed that the jury were aided in their consideration of it by suitable instructions."
>
> *Id.* at 34-35.

In *Josephs, Executor v. Briant* (1914) 115 Ark. 538, 172 S.W. 1002, the authorship of certain letters allegedly written by the deceased, A. W. Shirley, was at issue. The Supreme Court of Arkansas rejected the claim that it was error to permit witnesses to testify as to Mr. Shirley's methods of constructing his sentences:

> "The witnesses testified that they were familiar with Mr. Shirley's method of writing and constructing his sentences, and the testimony was admissible as tending to prove that the letters examined by the witnesses were written by Shirley."
>
> *Josephs, supra*, 172 S.W. at 1005.

In *Fleming's Estate* (1919) 265 Pa. 339, 109 A. 265, the Supreme Court of Pennsylvania upheld a challenge to a will. The court's decision was based in part on the fact that the will contained misspelled words, yet the decedent was a good English scholar and an excellent speller. *Fleming, supra*, 109 A. at 266.

Murphy v. Murphy (1920) 144 Ark. 429, 222 S.W. 721 also involved a disputed will. The contestant in that case claimed forgery based on expert witnesses who drew attention to spelling and other handwriting characteristics of the deceased. Among other matters,

the Supreme Court of Arkansas noted the usefulness of expert witnesses in such cases:

> "[Expert witness's] experience and studies have so qualified them, that from the comparison of the disputed writing with other writings admitted to be genuine they can detect peculiarities in the writing which might escape the observation of those less experienced."
> *Murphy, supra,* 222 S.W. at 723-724.

In re Creger's Estate (1929) 135 Okla. 77, 274 P. 30 also involved a will contest. Among other matters, the Supreme Court of Oklahoma relied upon the fact that one of the words in the will was misspelled, a fault that was also found in one of the letters by the proponents of the will. The decedent in his writings, however, correctly spelled the word. 274 P. at 34-35. In *The Estate of Ridley* (1934) 273 N.Y.S 48, the New York court rejected two questioned certificates because the forgeries were clumsy and contained errors in spelling and grammar, which were unlike the writings of a highly educated gentleman. *Id.* at 51.

State v. Hauptmann (1935) 115 N. J. L. 412, 180 A. 809, involved the ransom note in the Lindbergh kidnaping case. Experts compared the ransom note to additional notes from the kidnaper as well as known writings of the accused. The criteria used for

comparison included peculiarities of expression and spelling common to all the writings.

Thus, during the cross-examination of the defendant, the prosecutor showed the defendant a ledger taken from his apartment. Pointing to a page in the ledger, the prosecutor asked the defendant (Hauptmann), "Will you please look at this one word?" The word was "boat," spelled in Hauptmann's ledger "B-O-A-D," just as on the ransom note.[21] Other samples of linguistic style shared by the questioned documents and Hauptmann's writing included the peculiar spelling of the word "New York" with a hyphen between "New" and "York;" the shaping and writing of English letters with strong German influences so that the English letters resembled their German equivalent; and, the dropping of the letter "h" from the first name "Richard." [22]

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21 www.jurist.law.pitt.edu/trials26.htm

22 www.law.umkc.edu/faculty/projects/ftrials/Hauptmann/tyrelltest.htm (With respect to characteristic of dropping the letter "h" in other words authored by the writer of the questioned document and found in Hauptmann's known writings, the expert commented: "But in this case it appears to be a habit of this writer to do that peculiar thing, and these h's are slighted in the ransom notes in numerous places and also in the writing from dictation, which, in my opinion indicate that it is an unconscious habit of this writer to do this peculiar thing."

In re Bundy's Estate (1936) 153 Ore. 234, 56 P.2d 313, also involved a contested will. Expert witnesses testified based on their analysis of the will in comparison to eight documents prepared by the alleged forger. Experts compared the documents and found the following similarities: Margin size, unusual use of the colon as a punctuation mark, and irregularity in spacing. In rejecting the decision below, the court noted that in comparing known and questioned documents courts take into account the logical effect of the multiplicity of markers:

> "As a number of circumstances from which a given conclusion is generally drawn by the process of deduction multiply, the propriety of drawing the conclusion becomes more logical. In other words, as the circumstances multiply they dispel competing possibilities."
>
> *In re Bundy's Estate, supra*, 56 P.2d at 317.

This precisely matches Dr. Leonard's testimony. As Dr. Leonard put it, "curly hair by itself doesn't really cut down the suspect pool." (18 RHRT 1044) An investigator would also want to know, at a minimum, the height of the person, and the color of the hair. (*Id.* at 989) That is why Dr. Leonard relied upon seven linguistic markers – including some highly idiosyncratic markers, such as "I'am" – in reaching his conclusion.

In *Succession of Prejean* (1954) 224 La. 921, 71 S.E. 2d 328, the linguistic issue was whether the testatrix was too illiterate to use the language with which the codicil was written. The court concluded that while the language may not have been the decedent's own language, it was the language of the notary who was present with her. In *Hughes v. United States* (10 Cir.) 320 F.2d 459, cert. den. 375 U.S. 966, 11L Ed. 2d 415, 84 S. Ct. 483, a lewd letter allegedly written by Hughes were compared to known documents written by him to show a tendency to misspell certain words.

In *Cutler Estate* (1964) 33 Pa. D. & C2d 682, a contested will was compared to another later-discovered will. A number of linguistic features were evaluated, including phraseology ("to whom concerned" vs. "to whom it maybe concerned"), the use of hyphens, the use of capitalization, and the consistency of the grammatical and typewritten errors.

United States v. Pheaster (9 Cir. 1976) 544 F.2d 353, cert. den. 429 U.S. 1099, 51 Legal Ed. 2d 546, 97 S.Ct. 1118, involved a ransom note. To connect the ransom note with Pheaster, the police dictated certain statements of Pheaster for him to transcribe to determine whether he would commit the same unusual spelling

mistakes found in the ransom note. A government expert was also retained to compare handwriting. The court noted:

> "Like spelling, penmanship is acquired by learning. The manner of spelling a word is no less an 'identifying characteristic' than the manner of crossing a 't' or looping an 'o'. All may tend to identify defendant as the author of a writing without involving the content or message of what is written."
>
> *Id.* at 372.

In *Estate of Ciaffaoni* (1982) 498 Pa. 267, 446 A.2d. 225, appellants sought to establish that elements of style common to 40 probated wills of other decedents – which had been drafted by the purported scrivener of the decedent's will – were absent from the decedent's will. The trial court had excluded the 40 probated wills of the other decedents. The Supreme Court of Pennsylvania reversed, holding that "The exclusion of these comparison wills resulted in the disallowance of expert testimony which would have explained the significance of the stylistic deviations." *Estate of Ciaffaoni, supra*, 446 A.2d. at 226.

In *Crittel v. Bingo* (Alaska, 2001) 36 P.3d 634, the Supreme Court of Alaska reviewed a will contest. The trial court specifically noted that the testimony of the linguists was helpful and accepted "as more convincing and believable the testimony of Professor McMenamin." (*Id.* at 651.) Linguistic markers included the fact that

certain letters generally lacked the use of articles and the proper use of the verb "to be." (*Id.*) The content of the letters was also inconsistent with the kind of language that the decedent has used in unknown documents. (*Id.*)

Legal treatises also recognize the use of linguistic evidence. Wigmore states that traits such as spelling and the grammatical use of words have been freely used to determine authorship. 2 *Wigmore on Evidence* 3d ed. §388 at p. 413. Thus, even *American Jurisprudence Proof of Facts* provides: "An especially fruitful field of investigation in identifying the typist is the personal, literary, or *stylistic irregularities or characteristics* found in the document." 20 *Am. Jur. Proof of Facts* §20, at 286-287 (Emphasis added).

In summary, the technique of identifying a writer by the internal patterns of the writing – through spelling errors, methods of punctuation, methods of capitalizing, grammar, vocabulary, peculiarities of expression, phraseology, and other stylistic markers – has been long used by American courts. Linguists have been used to aid the court, just as experts have been used to evaluate handwriting. As with handwriting analysis, the force of this evidence increases, as a matter of logic, as the circumstances supporting one hypothesis rather than another multiply.

Thus, respondent's motion for an expensive, time-consuming, and burdensome *Kelly* hearing was thoroughly deficient in all respects:

1. Respondent's motion did not address the specific linguistic processes employed by Dr. Leonard in reaching his conclusions.
2. Respondent's motion did not identify any new scientific processes
3. The motion was targeted at something that Dr. Leonard does not even practice: the use of linguistics to identify a particular author.
4. Respondent's discussion of linguistics and the law entirely ignored 100 years of American jurisprudence and solely focused upon an unpublished Superior Court decision and federal district court decision, neither of which were on point.

By any measure, the referee's denial of respondent's motion was not a "manifest abuse of discretion." *People v. Kelly, supra*, 17 Cal.3d at 39.

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

There was nothing approaching a "manifest abuse of discretion" for yet another reason: The referee's ruling that *Kelly* did not apply was absolutely correct, as a matter of law.

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.

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).

> Because the inventions and discoveries which could be considered "scientific" have become virtually limitless in the near-70 years since *Frye* was decided, application of its principle has often been determined by reference to its narrow "common sense" purpose, i.e., to protect the jury from techniques which, though "new," novel, or "'experimental,'" convey a "'misleading aura of certainty.'"
>
> *Kelly*, supra, at pp. 30-32, citation omitted; see also *People v. McDonald*, supra, 37 Cal. 3d at pp. 372-373.
>
> This approach has produced two discernible themes. First, *Kelly/Frye* only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law. . . .
>
> The second theme in cases applying *Kelly/Frye* is that the unproven technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury. The most obvious examples are machines or procedures which analyze physical data. Lay minds might easily, but erroneously, assume that such procedures are objective and infallible. (Citations.)
>
> *Kelly/Frye* also has been applied to less tangible new procedures which carry an equally undeserved aura of certainty. In *People v. Shirley* [(1982) 31 Cal.3d 18], at page 66, we applied the *Kelly/Frye* rule to, and barred admission of, "post-hypnotic" testimony of a rape complainant. . . .
>
> However, *absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to Kelly/Frye.*
>
> *People v. Stoll* (1989) 49 Cal. 3d 1136, 1155-1157 (emph. added); accord, *People v. McDonald, supra*, 37

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

Thus, the common features of evidence that *Kelly* applies to are that they involve (1) juries, which may have their common sense and critical faculties overcome by (2) new scientific machines or techniques, which (3) purport to provide definitive answers to determinative questions. *None of these factors are present in this case.* The referee's critical faculties were not likely to be overcome by a report and testimony not involving the sort of new scientific machine or technique which did not, in any case, purport to identify the author of the Q documents.

Kelly only applies to "new processes." *People v. Stoll, supra*, 49 Cal.3d at 1155-1157; *People v. Cowan* (2010) 50 Cal.4th 401, 470; *People v. Leahy* (1994) 8 Cal.4th 587, 605. Yet Dr. Leonard did not perform any "new processes." He counted words. He calculated word frequencies. He found certain word and grammatical features – "I'am," "and/or," "a" and "an," the "deontic must," "the" and "I" – and counted and compared their presence in the Known and Questioned documents. He did things more quickly because he used a computer. His expertise was in knowing what to look for, and in knowing how to use sources of knowledge. His *methods* are entirely

transparent. The results of his analyses speak for themselves. Anyone can run his calculations and replicate his results. There is nothing here upon which a *Kelly* analysis could operate. The words of *Stoll* quoted above are worth repeating here: "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye*." (49 Cal. 3d at 1157)

Another flaw in respondent's argument is that it attacks evidence that was never introduced. It answers the wrong question. The gravamen of their argument is that there is no general scientific consensus that you can identify a particular individual using authorship identification. While acknowledging that this is not what Dr. Leonard undertook to do, respondent counters this by the conclusory statement that the areas of concern regarding specific identification "are similar to the reliability concerns noted by other linguists and apply whether identifying a specific person or simply narrowing a suspect pool." (REB at 66) However, 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 *supra,* fn. 14 at p. 60) the reliability concerns would have risen in

importance. It is notable, however, that *all* of the measures he used pointed to the same conclusion.

It should be noted that the seeds of respondent's error are contained in their argument. Thus, respondent makes much of a purported lack of a rate of error, but the absence of such an error rate is further indication that this is not the sort of "scientific technique or process" that is a proper subject for *Kelly* analysis.

Viewed another way, one of the bases for *Kelly* analysis is whether correct "scientific procedures" have been used by the expert in reaching his or her opinion. (*Kelly*, at 30.) There is nothing in Dr. Leonard's analysis that is subject to such a test, except for the fact that he counted words, calculated word frequencies, compared syntactical tendencies, and noted grammatical idiosyncracies. There was no machine to be calibrated, or DNA samples to be properly or improperly stored – there was nothing, in short, upon which to question whether new and 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 rendered an opinion based upon the data presented to him. Indeed, respondent's counsel admitted in

her closing argument that Dr. Leonard was a qualified linguist (19 RHRT 117). She also conceded that his opinion 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.)

In this instance, respondent was correct: Questions about flaws in Dr. Leonard's opinions, if any, go to the weight, not the admissibility of the evidence. Unfortunately for respondent, the referee found Dr. Leonard credible, and there is no basis on which this Court might find otherwise. Such a basis is certainly not found in respondent's Exceptions Brief. Even if that brief convinces this Court that there is no general consensus in the relevant scientific community that stylistic linguistics can prove the identity of a

particular author, *that is not what Dr. Leonard set out to or purported to do.* He did *not* state that petitioner was or was not the author of the questioned kites; he instead stated that the data is best explained by the hypothesis that petitioner was not the author, and fully explained the reasons for his conclusions. (18 RHRT 1030-1031, 1038, 1070-1071; Pet. Ex. 72 at p. 13) This classic expert opinion was found credible by the referee, and there is nothing in respondent's brief to indicate otherwise.

4. Respondent Has Not Proven Prejudice

One of the bedrock principles of appellate law and procedure is that a party who is contesting an action of a lower court needs to prove prejudice. This "prejudicial error" rule derives from both the California Constitution and California statutory law. Thus, California Constitution, Article VI, section 13, requires proof that an error resulted in a "miscarriage of justice." Code of Civil Procedure § 475 provides that appellate courts must disregard any error, or improper ruling "which does not affect the parties' substantial rights." Finally, Evidence Code § 353 provides that a "finding shall not be set aside . . . by reason of the erroneous admission of evidence

unless: . . . . (b) the error or errors complained of resulted in a miscarriage of justice."

Prejudice is never presumed. *California Code of Civil Procedure* § 475. Rather, a party asserting error has a burden of affirmatively demonstrating prejudicial error. See, e.g., *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069.

The *Kelly/Frye* rule, like many rules of evidence, was designed to guard against placing improper matters before a jury. *People v. McDonald, supra,* 37 Cal.3d 372-373; *People v. Stoll, supra*, 49 Cal.3d 1155-1157. But when "the trial is before a judge sitting without a jury, the judge is presumably capable . . . of remaining uninfluenced by unduly prejudicial matter." Witkin, *California Procedure* 5th ed., "Appeal" § 422. Thus, a claim of prejudice from error will be tested more strictly in this case, and a heightened showing of prejudice is required. See, e.g., *Estate of Boole* (1929) 98 Cal.App. 714, 721; *Bixby v. Bixby* (1953) 120 Cal.App.2d 495, 499.

These venerable rules of appellate law apply with special force in this case. Respondent is, in essence, attempting an end-run around the referee's ruling, to avoid the consequences of their failure to present an opposing expert at the hearing. While respondent is

perfectly entitled to comment on the weight of Dr. Leonard's findings to counter the referee's findings that he was credible, petitioner ought not be required to meet the proponent's burden in *Kelly* hearings solely through the agency of this brief. Moreover, it is worth noting that respondent is attempting in this argument to be its own opposition "expert," raising questions about the validity of Dr. Leonard's findings which go to its weight, without the referee having had the benefit of such an expert (if any there were) nor this court having the benefit of Dr. Leonard's live testimony to counter it. To that extent, it is improper. [23]

This case is both similar to, and different from, *People v. Shirley* (1982) 31 Cal.3d 18. In that case, like this, the evidence at issue was not a machine-based scientific technique. And in that case, as in this one, the trial court did not hold a hearing to test the reliability of the proffered evidence. Despite the lack of hearing, the *Shirley* court undertook to review the literature and determined that there was substantial controversy in the relevant scientific community, thus deciding on appeal the *Kelly* issue without benefit of a hearing in the

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[23] Insofar as respondent is arguing as its own opposition expert, this flies in the face of *Kelly's* injunction that a witness furnishing testimony on the reliability of the method must be properly qualified as an expert to give an opinion on the subject. *Kelly*, *supra*, 17 Cal.3d at 30.

court below. 31 Cal.3d at 56. In the instant case, for this Court to decide both that *Kelly* applies and that, without the benefit of a hearing, petitioner had not met its burden, would be inherently unfair, because petitioner was never asked below to make that showing. "It is the proponent of such testimony, of course, who has the burden of making the necessary showing of compliance with *Frye* , i.e., of demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community. (*Kelly*, at pp. 36-40.)" *Shirley, supra,* at 31 Cal. 3d at 54. [24] Moreover, most of the cases that *Shirley* cites for the proposition that "scientists have long been permitted to speak to the courts through their published writings" did so only *after* evidence was adduced below on the subject. *Huntingdon v. Crowley* (1966) 64 Cal.2d 647, 653; *People v. Law* (1974) 40 Cal.App.3d 69, 77-82; *United States Addison* (D.C. Cir. 1974) 498 F.2d 741, 744; see also *People v. Morganti* (1996) 43 Cal. App. 4th 643, 663, 665; *People v. Barney* (1992) 8 Cal. App. 4th 798, 804, 814-816.

Other decisions, following *Shirley*, have opted not to decide the question in the absence of a hearing below. In *People v. Leahy*

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[24] The proponent's burden does not apply in this case since respondent did not satisfy their burden of establishing that the processes used by Dr. Leonard (counting words, etc.) are new scientific processes.

(1994) 8 Cal.4th 587, 610, the case was remanded for the limited purpose of a *Kelly/Frye* hearing. In *People v. Brown* (1985) 40 Cal.3d 512, there is no mention of a *Kelly* hearing in the court below, and the ruling went against the proponent of the electrophoretic blood-typing procedures used. This Court declined, however, to settle the question of the validity of the technique used without the benefit of a hearing below; rather, "We simply conclude that the answer must abide an adequate future trial record made with the help of live witnesses qualified in the applicable scientific disciplines." *Id.* at 534-535 (admission of evidence was error, but harmless)

In the instant case, had a *Kelly* hearing been held, petitioner would have had the benefit of its experts available to counter the arguments of respondent or respondent's experts. Not being afforded that opportunity offends petitioner's due process right to a full and fair hearing.

Respondent's claim of error must therefore be rejected.

5. The *Kelly* Exclusion of Dr. Leonard's Testimony Would Violate Petitioner's Due Process Right to a Fair Hearing

There was no manifest abuse of discretion for yet another reason: The *Kelly* exclusion of Dr. Leonard's testimony would adversely affect petitioner's due process right to a fair hearing, since

the parties' rights under *Kelly* must be balanced against petitioner's due process rights. Allowing the referee to weigh Dr. Leonard's testimony is the best way to achieve that balance.

In *Rock v. Arkansas* (1987) 483 U.S. 44, the court ruled that the state could not enforce a *per se* rule which prevented a defendant from testifying to her hypnotically-recovered memories of the incident which led to the murder charges against her. Although grounded in her Sixth Amendment rights, the Court's opinion referenced a broader set of constitutional rights underpinning her right to present evidence in her own behalf:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (Emphasis added.) *In re Oliver*, 333 U.S. 257, 273 (1948). See also *Ferguson v. Georgia*, 365 U.S., at 602 (Clark, J., concurring) (Fourteenth Amendment secures "right of a criminal defendant to choose between silence and testifying in his own behalf").
>
> The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 17-19 (1967). Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982), is a right

> to testify himself, should he decide it is in his favor to do so.
>
> *Rock v. Arkansas*, *supra,* 483 U.S. at 51-52.

If the Fourteenth Amendment grounds the right to testify on the right to call witnesses, then the converse must also be true – that the right to testify includes the right to call witnesses, including expert witnesses, whose testimony is "material and favorable to the defense." *Id.*

While it is true that, unlike *Rock*, petitioner here is not a criminal defendant in this setting, "the writ of habeas corpus was not created for the purpose of defeating or embarrassing justice, but to promote it[,] especially when the challenged confinement is pursuant to a judgment of death." *In re Sanders* (1999) 21 Cal.4th 697, 816 (conc. opn. of Mosk, J.; internal quotation marks omitted); *see also, Harris v. Nel*son (1969) 394 U.S. 286, 291-292 "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus . . . ."].

In this case, in which the application of *Kelly* is questionable – and, as we have shown above, actually inappropriate – these constitutional principles gain currency because of the very setting in which they are proposed to be applied. Given that there is no jury,

no new devices or processes, an entirely transparent study leading to an expert opinion that does not purport to be dispositive, and the fact that the exclusion of Dr. Leonard's testimony adversely offset petitioner's right to a due process hearing, *Kelly* simply does not apply.

6. Respondent's Argument Regarding the Denial of the *Kelly* Hearing, at Pages 59-70 of Their Brief, Is Thoroughly Lacking in Merit

As petitioner has noted repeatedly, respondent does not take issue with the referee's finding that Dr. Leonard testified convincingly that the two kites attributed to Masters at the 1989 trial were most likely not authored by Jarvis Masters. Respondent instead challenges the referee's denial of their February 18, 2011 *in limine* motion to preclude Dr. Leonard's testimony. (REB at 57, 82) Petitioner has already demonstrated that respondent waived its claim of error by not objecting to Dr. Leonard's testimony, that respondent's motion was fatally flawed, that there was no abuse of discretion, that there was no entitlement to a *Kelly* hearing, that there was no prejudice, and that respondent itself acknowledged that Dr. Leonard's testimony was admissible.

Respondent's Exceptions Brief, nonetheless, treats this proceeding as a *Kelly* hearing. Thus, pages 59 through 70 of their

brief is devoted to the question of whether there is a general consensus within the scientific community or the courts regarding the use of forensic linguistics in author identification. Unless and until this Court is ready to convert this proceeding into a *Kelly* hearing, and issue an order granting petitioner the right to submit declarations, and scholarly articles, in lieu of calling expert witnesses who could explain the meaning of the scholarly articles, respondent's question is absolutely irrelevant.

Admittedly, respondent's discussion at pages 59 through 70 might be somewhat relevant if respondent were taking exception to the referee's finding regarding Dr. Leonard's testimony. Thus, respondent argues that Dr. Leonard's testimony should be accorded little weight. (See, e.g., REB at 81) But given the fact that respondent does not take exception to the referee's finding that Dr. Leonard testified convincingly that the two kites were most likely not authored by Jarvis Masters, respondent's arguments regarding the weight to be accorded Dr. Leonard's testimony are not even before this Court.

Respondent's arguments, moreover, are objectionable since they go far afield of the record,[25] which means that petitioner also sometimes needs to go outside the record to respond. Thus, for example, the following expert articles and books cited by respondent in their brief are outside of the record properly before this Court since they were not brought to the attention of the referee prior to the date of her ruling denying respondent's request for a *Kelly* hearing:

1. Chaski, *Linguistics as a Forensic Science: the Case for Author Identification*, Language in the Real World (Behrens & Parker, edits. 2010). (REB at 61-62)
2. Crystal, Reviews, *Language,* Vol. 71, No. 2 (1995). (REB at 62-63)
3. Coulthard, *Author Identification, Idiolect and Linguistic Uniqueness,* http://.www1.aston.ac.uk/lss/staff/coulthardm/. (REB at 64, and attached as Attachment A to respondent's brief)
4. Coulthard, *. . . and then . . . Language Description and Author Attribution,*http*://.www1.aston.ac.uk/lss/staff/*

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[25] To deal with these concerns, the Court may issue an Order to Show Cause as to why the Court pages 59-70 of Respondent's Exceptions Brief should not be stricken.

coulthardm/. (REB 64, and attached as Attachment B to respondent's brief)

5. Grant [name of article not provided]. (REB at 64)

6. Olsson, *Word Crime*. (REB at 64)

7. Shuy, *Language Log.* (REB 64-66)

For the reasons noted below, respondent's scientific articles, moreover, are also beside the point, and the Chaski article is even scientifically questionable. While respondent's reliance upon them is strenuously objected to, petitioner will discuss these articles, but only because respondent discusses them.

Respondent's argument

Respondent's discussion at pages 59-70 is offered to prove the following conclusion at page 70:

> "In light of the above articles, and given Dr. Leonard's stated lack of familiarity with the research and writing that has been done in the field to test for reliability, there certainly appears to be no general consensus as to the reliability and acceptance of this method, at least in this context." (REB at 67)

As petitioner will demonstrate below, pages 59-70 of Respondent's Exceptions Brief do not support their irrelevant argument, and are a gross distortion of the record.

Carole Chaski

The above noted article by Carole Chaski ("Linguistics as a Forensic Science . . .") is a case in point. The referee considered two *other* articles by Carole Chaski, (*Empirical evaluations of language-based author identification techniques*, and an unnamed article which bears the page heading *"Junk" Science, Pre-Science, and Developing Science,* [26] attached to respondent's February 18, 2011 motion to preclude), yet concluded that they did not support respondent's motion. (March 21, 2011 Order denying *in limine* motion to preclude)

Respondent's thesis is that Chaski establishes that a dispute exists within the linguistic community over the proper use of stylistic markers to determine authorship (REB at 60, 61), and that this in turn establishes that Dr. Leonard's testimony is so far outside the consensus of linguistics that his testimony should be excluded under *People v. Kelly*. (REB at 6) Respondent, however, entirely misreads Chaski.

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[26] While the second paper is allegedly titled as "Linguistic Authentication and Reliability," the article attached to respondent's motion only includes the header "'Junk' Science, Pre-Science, and Developing Science." Thus for purposes of this brief this paper by Chaski will be referred to as "'Junk' Science."

Contrary to what is suggested by respondent's argument, Chaski is a proponent of the use of linguistics to identify the author of a questioned document. (18 RHRT 1038, 1046; Chaski, *Empirical evalua*tions . . . . at 5, 7, 10, 41, attached to respondent's *in limine* motion) Chaski, moreover, favors the use of computational and statistical analysis. She also favors linguistic tests and tools that are capable of producing differential numerical results as a means of differentiating writings. (Chaski, *Empirical evaluations . . . .*)

Given the fact that Chaski recommends that at least two different methods be used, it can be inferred that Chaski also favors employing more than one method of analysis to evaluate authorship. (Chaski, *"Junk" Science*, at 130, attached to respondent's motion; Chaski, *Empirical evaluations* at 7, attached to respondent's motion.) In this case, of course, Dr. Leonard used seven different methods in his analysis.

Chaski's main point appears to be that syntactic analysis is more reliable in identifying the author of a questioned document than an approach which she describes as "Forensic Stylistics." (Chaski, *Empirical evaluations* at 7, 40-41; Chaski, *"Junk" Science*, at 131.) The precise techniques employed by Dr. Leonard in his linguistic analysis, however, are not criticized by Chaski.

Dr. Leonard employed eight well-recognized linguistic tools in conducting his analysis – the first of which he withdrew at the hearing. At the hearing he relied upon the following linguistic tools:

1. WORDS PER SENTENCE RATIOS
2. WORD FREQUENCIES
3. KEY WORDS
4. DISTRIBUTION OF MODALS; DEONTIC *MUST*
5. THE IDIOSYNCRATIC NONSTANDARD CONTRACTION *I'AM*
6. DISTRIBUTION OF THE INDEFINITE ARTICLE *A/AN*
7. DISTRIBUTION OF THE ALTERNATION *AND/OR*

(*Supra* at pp. 59-66)

The first three of these methods are what is known as "corpus-based linguistic analyses." This is to say that two *corpora* are examined and computations are made of the numbers of certain incidents within the documents to determine whether two *corpora* are linguistically similar or linguistically different. Chaski herself employs this method. (Chaski, *Empirical evaluations* at 43)

Chaski's articles, however, do not evaluate the reliability of word per sentence ratios, the first method employed by Dr. Leonard. While one method studied by Chaski involving "readability measures" purportedly takes sentence length into account, there is no indication that the method studied by Chaski was in any way similar to the method employed by Dr. Leonard. (*Id.* at 22) Thus, Chaski's articles can hardly be viewed as critical of Dr. Leonard's evaluation of the words per sentence ratios of the "Q" and "K" documents.

Chaski's articles also do not evaluate the usefulness of studying word frequencies, the second method employed by Dr. Leonard. Nor does Chaski's report evaluate the usefulness of studying key words, the third method employed by Dr. Leonard. Thus, Chaski's articles cannot be offered as an authority on a subject which Chaski does not discuss.

As above noted, the fourth method of analysis employed by Dr. Leonard, which involves an evaluation of the distribution of modals, and the deontic *must*, involves syntactic analysis. Inasmuch as Chaski strongly supports this method of analysis (*Id.* at 2, 7), Chaski directly supports this portion of Dr. Leonard's analysis.

The fifth method of analysis, which involves a comparison of the use of the idiosyncratic non-standard contraction *I'am*, involved

the study of punctuation convention. Inasmuch as Chaski supports the use of punctuation analysis in identifying authorship, Chaski clearly supports this aspect of Dr. Leonard's analysis. (Chaski, "*Junk" Science* at 131.)

The sixth method employed by Dr. Leonard studies the distribution of the definite article *a* and *an*. This method of analysis is typically referred to as phonological analysis. [27] Chaski does not evaluate the usefulness of phonological analysis. Thus, Chaski can hardly be relied upon to support respondent's position.

It should also be noted that Chaski's articles do include an evaluation of grammatical error analysis and grammatical accidence analysis, but neither of her methods were in any way similar to Dr. Leonard's study of the distribution of the indefinite articles *a* and *an*. (Chaski, *Empirical evaluations* at 35-36) In addition, the success or failure of Chaski's grammatical error and grammatical accidence methods in differentiating the writers in her experimental task really

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[27] Phonology focuses on sounds and the system of sounds. http://www.linguistics.ucla.edu/people/schuh/lx120a/pdf_files/01_phonology.pdf

do not bear any relationship to the success of Dr. Leonard's phonological method in comparing the "Q" and "K" documents. [28]

The seventh method of analysis, which involved the distribution of the alternation *and/or,* falls into the category of analysis sometimes referred to as "pragmatics." [29] Chaski does not study this method of analysis. Thus, Chaski's study does not support respondent's argument on this subject. And to the extent Chaski touches upon Dr. Leonard's methods, Chaski supports all of them.

Based upon a reading of the two Chaski articles presented to the referee, it reasonably appears that Chaski accepts the following basic principles:

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[28] Apparently, Chaski's grammatical error testing methods were far too blunt a sword to discriminate between the four women in her study. In the same way, Chaski's grammatical accidence study was too blunt a sword under the circumstances of her case. This could be the result of her techniques, or possibly the result of the fact that her analysts were unqualified. The fact that Chaski's methods, however, were not successful under the circumstances of her case hardly suggests that Dr. Leonard's methods – which were able to successfully differentiate the "Q" and the "K" documents – were not reliable.

[29] See, e.g., http://www.sil.org/linguistics/GlossaryOfLinguisticTerms/WhatIsPragmatics.htm

1. Linguistics can be used to identify the author of a questioned document (18 RHRT 1046; Chaski, *Empirical evaluations* at 5, 43);
2. To evaluate authorship, the linguist looks for language variations that allow the linguist to differentiate, if at all possible, the known and questioned documents;
3. The linguist employs multiple methods (Chaski, *Empirical evaluations* at 7; Chaski, '*Junk' Science* at 130.);
4. As the circumstances multiply, they dispel competing possibilities.

Dr. Leonard's study follows all of these principles. The one significant difference between Chaski and Dr. Leonard is that Dr. Leonard does not claim that his methods identify the author of a questioned document. Dr. Leonard, instead, simply claims that his methods are capable of narrowing the suspect pool. (18 RHRT 1030-1031, 1038, 1053) Chaski, on the other hand, appears to be of the view that a linguist may be capable of successfully identifying the author of a questioned document. (18 RHRT 1046) Dr. Leonard, in other words, views his role more conservatively than Chaski.

It, nonetheless, appears that Carole Chaski's methods are scientifically questionable. There are three huge problems with her scientific method:

1. For the most part, Chaski's study is based upon a tiny group of writers; a comparison of the writings of only four women. (Chaski, *Empirical evaluations* at 2, 41-44.) Had a *Kelly* hearing been ordered, petitioner's experts would have testified that as a result of this baseline, Chaski's results are scientifically invalid. [30]

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[30] Tim Grant, Director of the Centre for Forensic Linguistics at Aston University in Birmingham, England, as well as other linguists, were highly critical of Chaski's study:

> "Authorship attribution is a classification problem and the question often asked is 'What stylistic features can discriminate between these texts by different authors?' Given a degree of methodological rigour, answering this question is a relatively easy task.
>
> . . . . The difficulty is that a typical answer, such as "features X and Y correctly classify the texts but feature Z does not', often produces a temptation to generalize in at least two ways. The first leap of generalization is to assert that features X and Y discriminate between any texts by authors A and B, the second, larger leap is to suggest that X and Y are 'good' markers of authorship and that Z is not. These generalizations may be acceptable but only through a separate explanation of the reliability and validity of the stylistic features involved in the markers. Demonstrating this reliability and validity may not be an easy task, as part of asserting reliability and validity must involve well-founded sampling, and this in itself is problematic. These concepts of reliability, validity and

(continued...)

2. Chaski's study is based upon document evaluations by unknown analysts with unknown qualifications, using tests that she herself selected. One can only speculate what the results would be if the analyses were performed by highly qualified forensic linguists.

3. Generally, linguistic evaluation of authorship is based on a study of linguistic variation. The linguistic evaluator looks to the variations in the known writings and compares this to the variations in the questioned documents. This method is considered

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[30](...continued)

sampling and how they may be applied in authorship attribution are at the heart of the methodological problems in many studies (including Chaski's)."

. . . .

. . . . [I]f we are attempting to demonstrate the reliability of a particular authorship method, it might be better to sample narrowly, demonstrating success in the more difficult problem, rather than attempting to find typical texts that are more representative of a wider linguistic community. This seems to be the approach that Chaski takes. The difficulty with this approach is that it undermines the possibility of generalization and thus conclusions cannot be drawn about the general usefulness of the reliability of markers studied in this way."

Grant, T,. and Baker, K. *Identifying reliable, valid markers of authorship: a response to Chaski*, Forensic Linguistics 8(1): pp. 66-79 (2001)

empirical because it is based upon the data. This is also called "bottom up analysis." (18 RHRT 1034, 1037-1038, 1069) Chaski, by contrast, employs what is known as "top down analysis." She approaches her analysis with a set of pre-conceived notions which are built into her computer program, which she will not share with others. She starts with a preconceived notion – based on the four writers in her study – of what she is looking for. (Chaski, *Empirical evaluations* at 1) And, as above noted, her baseline is highly questionable since it consists of only four people, and the qualifications of her analysts are unknown. (Chaski, *Empirical evaluations* at 2, 4, 6, 8, 41-44.)

Dr. Leonard testified that he was very familiar with Chaski's work, that he had read her study many years ago, and that he was critical of her methods and her conclusions. (18 RHRT 1038-1041, 1044, 1046-1047) In his opinion, her study was based on a "rather small sample." [31] (18 RHRT 1040) Unlike most linguistic analysis, which is based upon a "collocation of factors," she only tested one

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[31] See n. 29, *supra.*

factor at a time. (18 RHRT 1040, 1044) As Dr. Leonard put it, "As I have said, many, many times on this stand, we never use, if we can avoid it, just one measure. What we are looking for is patterns." (18 RHRT 1044)

Chaski's methods, moreover, unlike the methods of most forensic linguists, are not "transparent." (18 RHRT 1046-1047) She uses a patented algorithm, which Dr. Leonard described as a "black box." So her results cannot be replicated. (*Id.*)

Joseph Redmond/Joseph Rudman

At the evidentiary hearing respondent's counsel asked Dr. Leonard if he was "familiar with Joseph Redmond as a linguist?" Dr. Leonard asked for "more information" and asked whether she was referring to "Joseph G. Redmond." (18 RHRT 1052) Respondent's counsel, however, could not provide Redmond's middle initial. (*Id.*)

Respondent's counsel then asked Dr. Leonard whether he was familiar with a paper by Joseph Redmond of "Carnegie Mellon" in which he stated there was no consensus as to accepted techniques for authorship attribution. (18 RHRT 10525-1053) Ms. Lustre did not provide Dr. Leonard with the name or date of the article, or the identify of the publication. (*Id.*) Dr. Leonard said he

could not comment on a paper that he had not seen, out of context, "and . . . I don't know who wrote it." (*Id.* at 1053)

Respondent's counsel made no attempt to clarify her question, and did not share a copy of the article with Dr. Leonard. (*Id.* at 1052-1053) Respondent now advises us that the article was written by "Joseph Rudman" (not "Joseph Redmond," or even "Joseph G. Redmond," whom Dr. Leonard appeared to recognize). (REB at 62) Yet respondent has the temerity to claim that Dr. Leonard was "uncertain as to the identity of Dr. Rudman," and that he was not "familiar with Dr. Rudman's paper." (*Id.*)

An internet search of the Carnegie Mellon University website reveals that Mr. Rudman is not a professor at the University, that the University does not have a Linguistics Department, and that at some time in the past Mr. Rudman served as a golf coach and was associated with the Physics Department as a project administrator. [32] As for Mr. Rudman's 1998 paper, it was not published in a linguistic journal, and the journal in question currently operates under a different name.

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[32] See, e.g., http://www.cmu.edu/hr/directory/orgcharts-profs.html; ml.hss.cmu.edu/ml/undergrad-majmin,html

David Crystal

Respondent cites David Crystal for his review of *Forensic Stylistics*, a book by Gerald R. McMenamin. Respondent notes that Crystal offers the following criticism of McMenamin's work:

> "Without any arguments in support of the chosen methodology, one is left wondering why certain criteria have been used and not others, and what some of the criteria could possibly mean." (REB at 62)

Yet, to paraphrase Crystal, "one is left wondering" what possible relevance does David Crystal's musings about a book by Gerald McMenamin have with this proceeding?

John Olsson

Respondent tells us that Dr. Olsson is the author of the book, *Word Crime*, a "popular book" about authorship analysis. Respondent simply notes that Dr. Leonard has not read this book. [33] Again, we are "left wondering" why we are being told about this book, or what relevance it has to this proceeding?

If the suggestion is that Dr. Leonard, who established the first graduate program in forensic linguistics in the United States and

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[33] Petitioner's counsel read this book since it was cited. In counsel's opinion, Dr. Olsson clearly supports the reliability of authorship analysis performed by qualified experts.

teaches and assists the FBI (18 RHRT 971-973, 975-976; Pet. Ex. 72 at p. 3), needs to read a British book for the masses about authorship analysis, before his testimony can be taken seriously, such an argument insults the intelligence of this Court.

Respondent's snide suggestion, moreover, is founded upon yet another distortion of the record. Dr. Leonard stated that he was familiar with John Olsson, and that he has read Olsson's textbook. (*Id.* at 1058)

Malcolm Coulthard

Respondent cites two articles by Malcolm Coulthard and attaches them to her Exceptions Brief as Attachments A and B. Significantly, respondent did not bring these articles to the attention of the referee, either in her motion, or at the evidentiary hearing.

Respondent, nonetheless, cites two sentences – 38 words – from these 38 pages of text:

1. "No one has even begun to speculate how much and what kind of data would be needed to uniquely characterize an idiolect."
2. The "Holy grail [*sic*] of authorship studies is to find valid and reliable markers which consistently distinguish authors." (REB at 64)

Respondent then makes a one-sentence argument about these 38 words:

> "Dr. Leonard was unfamiliar with these statements and could not say what Coulthard had in mind." (REB at 64)

Respondent's argument is perverse. On the one hand, respondent has attached two challenging scientific articles to their brief without explaining their significance, and without the benefit of expert analysis. *Yet, Dr. Leonard, the only expert in this case, was not shown either of the articles at the Reference Hearing.*

As for the first quote, Dr. Leonard was asked whether he agreed with the statement, and Dr. Leonard stated that he knew Coulthard, but did not know whether Mr. Coulthard,

> "was talking about the difficulty of the concept idiolect as a theoretical category, as a descriptive category, or what? I mean, with all due respect, it's very difficult to field these out-of-context statements and then ask if I agree with them when I have no idea what's behind their motivation." (18 RHRT 1060-1061)

When respondent's question did not get the desired answer, respondent's counsel, again without providing Dr. Leonard with the article in question, asked about Mr. Coulthard's comment about the search for the Holy Grail in authorship analysis, to which Dr. Leonard answered, "Did they find the Holy Grail?" (18 RHRT 1061) Dr. Leonard then chided respondent's counsel, for asking questions

without providing the relevant context. Dr. Leonard asked respondent's counsel to respectfully recognize that given, "the limitations of our interaction here . . . it's almost impossible for me to opine on these" without seeing the articles. (*Id.*)

Had respondent's counsel given Dr. Leonard the opportunity to read the two articles, or even given him the opportunity to read the two statements in their proper context, she would have undoubtedly learned that Mr. Coulthard actually supports Dr. Leonard's approach to authorship analysis. Thus, like Dr. Leonard, Mr. Coulthard recognizes the difficulties of identifying an author's "idiolect," and that is why Coulthard compared it to the search for the Holy Grail. Yet this is precisely why Dr. Leonard abandoned this futile search, and concluded that idiolect was an unnecessary concept. (18 RHRT 1066) This so-called "dispute," if anything, serves to highlight Dr. Leonard's credentials as a hard-nosed forensic linguist who is only concerned with results.

"Idiolect" is defined as a person's "individual dialect." (*Id.*) As Dr. Leonard put it, all linguistic textbooks talk about it, and it is obvious we all have our own habits of speech, and many linguists have battled over the concept. But in Dr. Leonard's opinion, it is also an unnecessary concept because it is "not required for the analysis

of the data." (*Id.* at 1067) Thus, in the case of the bomb letters, where the author of the note placed an asterisk next to the name of the type of the bomb, and at the bottom of the note there was an asterisk with a footnote that explained the construction of the bomb, (*Id.* at 980) one does not need the concept of "idiolect" to form the opinion that the three notes were written by the same person. The data itself drives the conclusion.

Coulthard's two articles also clearly support the effectiveness of skilled linguistic methods of authorship analysis. Thus, Mr. Coulthard's article . . . *and then . . . Language Description and Author Attribution* (Attachment B to REB) lists cases in which authorship analysis was successfully used to solve crimes. Mr. Coulthard begins with the Unabomber case, explaining that, after the Washington Post published the Unabomber's 35,000-word manifesto, a man contacted the FBI believing that the document was written by his brother. Coulthard continues:

> The FBI traced and arrested the brother, who was living in a log cabin in Montana. They impounded a series of documents and performed a linguistic analysis – one of the documents was a 300-word newspaper article on the same topic as the manuscript, written a decade earlier. The FBI analysts claimed there were major linguistic similarities between the 35,000 and the 300 word documents: they noted that they shared a series of lexical and grammatical words and fixed phrases, which,

> they argued, provided linguistic evidence of common authorship.
>
> The defense contracted a distinguished linguist, who counter-argued that one could attach no significance to these shared items because anyone can use any word at any time and therefore shared vocabulary can have no diagnostic significance. She singled out twelve words and phrases for particular criticism, on the grounds that they were items likely to occur in any text that was arguing a case. . . .
>
> In response the FBI analysts searched the web, which in those days was only a fraction of its current size, but even so they discovered some 3 million documents which included one or more of the twelve items. However, when they narrowed the search to documents which included not one but all twelve of the items, they found a mere 69 and, on closer inspection, every single one of these proved to be a version of the 35,000 word manifesto. This was a massive rejection of the defense expert's view of text creation as purely free and open choice and a powerful illustration of the idiolectal habit of repeating co-selections."
>
> Coulthard, Malcolm, *Author Identification, Idiolect, and Linguistic Uniqueness*, pp. 2-3 (Emphasis in original) (REB Attachment B)

The second paper also presents a number of other cases in which expert authorship analysis methods were used. Coulthard's discussion of the Derek Bentley case, for example, demonstrates the effective use of corpus-based word-frequency analysis. (. . . *and then . . . Language Description and Author Attribution* at pp. 3-7, REB Attachment A) Thus, by any measure, Coulthard is clearly of

the view that authorship analysis methods are scientifically reliable. Thus, Coulthard states:

> "I would argue that the methods of author attribution discussed above do meet the four *Daubert* criteria."
>
> Coulthard, Malcolm, *Author Identification, Idiolect, and Linguistic Uniqueness*, p. 14 (REB Attachment A)

Tim Grant

Respondent refers to a study by Tim Grant, but does not provide a citation regarding the date, title, or name of the publication. [34] (REB 64) According to respondent, Grant concluded that, after testing over 170 stylistic markers, the vast majority were found "wanting." Dr. Leonard testified that he knew Tim Grant, and that he had been invited by Grant to do a presentation on authorship and demographic profiling at the Austin Centre for Forensic Linguistics, and Grant told him about something he was working on. (18 RHRT 1059-1060) Dr. Leonard, however, testified that he was not sufficiently familiar with the study to offer an opinion about

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[34] Instead of providing Dr. Leonard with a copy of the study, respondent's counsel asked, "Are you aware that [Grant] has written a paper called "Quantifying Evidence in Forensic Authorship Analysis," to which Dr. Leonard answered: "It's quite possible. One does not memorize the titles of papers you look at." (18 RHRT 1059)

Grant's *alleged* conclusion. [35] (18 RHRT 1063) Dr. Leonard therefore asked Ms. Lustre whether Grant tested the markers alone, or as part of a pattern," but Ms. Lustre did not answer his question, or provide him with a copy of the article. (18 RHRT 1063) [36]

Again, one is "left wondering", what possible relevance does any of this have to this proceeding?

Roger Shuy

Respondent also quotes some excerpts from "Language Log," a linguistic blog submitted by Dr. Roger Shuy, Dr. Leonard's now-retired partner. (REB 64-66) While these excerpts were utilized during Dr. Leonard's cross-examination, they were not part of the record of respondent's *Kelly* motion. Given the fact that respondent

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35 Grant expressed his criticisms of Carole Chaski's study in a 2001 article. Se n. 29, *supra.*

36 Dr. Leonard repeatedly testified that "we never use, if we can avoid it, just one measure. What we are looking for is patterns." (18 RHRT 1044)

This theme also runs through linguistic jurisprudence:

"As a number of circumstances from which a given conclusion is generally drawn by the process of deduction multiply, the propriety of drawing the conclusion becomes more logical. In other words, as the circumstances multiply they dispel competing possibilities."

In re Bundy's Estate (1936) 153 Ore, 56 P.2d 313, 317.

is not challenging the referee's finding about Dr. Leonard, one is again "left wondering" why these excerpts are being discussed.

As best as can be determined, the excerpts are being offered to again raise questions about the ability of a linguist to be able to find an "idiolect" that can be used to definitively identify one individual as the author of a questioned document. Dr. Leonard, however, testified that he agreed with Dr. Shuy, and that in his opinion, the concept of an idiolect was unnecessary for data-driven author-identification analysis. (18 RHRT 1067)

Conclusions

Having completed our tour of respondent's scientific articles, let us take another look at respondent's conclusion:

> "In light of the above articles, and given Dr. Leonard's stated lack of familiarity with the research and writing that has been done in the field to test for reliability, there certainly appears to be no general consensus as to the reliability and acceptance of this method, at least in this context." (REB at 67)

Respondent's conclusion grossly distorts the record, in the following ways:

1. Dr. Leonard had read Chaski's study, and was very familiar with her work, but was critical of her methods. Others have also criticized her study. Chaski, in any

case, is a proponent of authorship attribution, and believes that she can identify the author of a questioned work if she is provided enough information.

2. Dr. Leonard knew Malcolm Coulthard, but did not want to offer an opinion about Coulthard's statements out of context, and respondent's counsel elected not to provide the context, and withheld the articles from Dr. Leonard. Coulthard, in any case, supports forensic linguistic authorship analysis, and believes that expert author attribution methods satisfy *Daubert*.

3. Dr. Leonard is familiar with John Olsson, and has even read his textbook.

4. Dr. Leonard knows Tim Grant and has been invited by Mr. Grant to speak at one of his conferences. Asked to offer an opinion regarding an alleged study by Grant, without being given a copy of the study, or a citation regarding the name or date of the study, or the name of the publication, Dr. Leonard asked for further details, but Ms. Lustre did not answer his question. On this basis alone, Dr. Leonard said he could not offer an opinion.

5. Asked about statements by his partner, Dr. Roger Shuy, Dr. Leonard answered all of respondent's questions.

The only person that Dr. Leonard was not familiar with was Joseph Redmond, a person who does not even exist.

Thus, pages 59-70 of respondent's exceptions brief are not simply irrelevant. These pages are also a gross distortion of the record, and appear to be solely designed to muddy the waters of this proceeding.

7. Respondent's Argument Regarding the Denial of the *Kelly* Hearing, at Pages 70 Through 82 of Their Brief, Is Thoroughly Lacking in Merit

Pages 70 through 82 of respondent's exceptions brief, like pages 59 through 70, suffer from the same fundamental flaws. These pages also ignore the fact that respondent admitted that Dr. Leonard's testimony was admissible, and ignore the fact that their *in limine* motion was patently deficient because it offered no support for the contention that the linguistic processes employed by Dr. Leonard were new scientific processes. Pages 70 through 82 likewise offer nothing to support such a contention, and do not even make this contention. Instead of dealing with the relevant issue, pages 70 through 82, like pages 59 through 70, treat this proceeding as a *Kelly*

hearing and address issues such as the appropriateness of scientific methods employed by Dr. Leonard, based on the false premise that he was testifying about new scientific processes.

Given the fact that these pages of respondent's brief are irrelevant to the issues before this Court, petitioner strenuously objects to them and urges that they not be considered. Petitioner, however, will discuss these pages, but only because respondent has included them in their brief.

Respondent's argument

The simplest way to evaluate the random bundle of points made by respondent in pages 70 through 82 is to look at their concluding remark:

> "When the failure to include hypothesis C – Willis is the author – is added to the inability to quantify the level of confidence in the conclusion, and the various factors noted above that call into question the reliability of the analysis done, particularly when considering the literature in the field, respondent submits that Dr. Leonard's testimony cannot pass muster under the *Kelly* test. The referee erred in denying respondent's request for a hearing, and Dr. Leonard's testimony should be excluded." (REB at 82)

As noted above, respondent's argument has nothing to do with the question of whether Dr. Leonard employed a "new scientific process," the matter at issue in the February 18, 2011 motion. This

by itself proves how respondent's entire discussion is irrelevant to the issues before this Court.

Petitioner did not author the kites

As for respondent's so-called "hypothesis C – Willis is the author –" is concerned, this hypothesis is simply a subset of hypothesis B, that the Q documents and the K documents were written by different authors. If hypothesis C is correct, it proves hypothesis B, but the truth of hypothesis B does not depend upon proving that Willis is the author.

Respondent acknowledges that proving that Masters did not author the Q document "addresses petitioner's theory," but argues that petitioner's "actual claim, based upon the petition and Willis' declaration, is that Willis is the author of the Q documents and petitioner only copied them." (REB at 81) This, however, is not petitioner's "actual claim" and never has been. **Since petitioner did not author the documents, he has no way of knowing who authored the documents.**

Willis said in a declaration that Q1 was compiled "from many reports Willis had written and sent to him" and Q2 "was written in conjunction with a kite Woodard sent, and parts of it are copied from a kite Woodard sent." (Pet. Ex. 22 at ¶¶ 12, 15) Since the evidence

to prove these allegations was hidden in Willis' TV and later destroyed by the State, petitioner has no way to verify Willis' claims. Petitioner only knows that he did not author the kites.

Dr. Leonard aptly testified that he compared the hypothesis that Jarvis Masters authored the kites with the hypothesis that Jarvis Masters did not author the kites because the prosecution's case was founded upon that assumption. (18 RHRT 1095) That is also the issue before this Court: whether the State's case against Jarvis Masters was based upon false evidence. Whether Willis is the author of the Q documents, or whether Willis and Woodard share authorship, or whether a third individual was also an author, are interesting questions, but beside the point.

Forensic linguistics is founded upon logic

Respondent's second criticism of Dr. Leonard is that he was unable "to quantify" his conclusions. (REB at 82) Thus, respondent criticizes Dr. Leonard for failing to provide "an error rate for his analysis" and for failing "to quantify the confidence level of his own conclusion." (REB at 73, 74)

Dr. Leonard's testimony fully addressed these concerns. Forensic linguistic analysis, he stated, does not lend itself to error

rates. He gave the example of the "devil's strip" case. Without knowing a possible error rate, Dr. Shuy was able to conclude that the author of the ransom note lived in Akron, Ohio because "devil's strip means the strip of grass between the sidewalk and the street, but only in Akron, Ohio." (*Id.* at 1033) Dr. Shuy was also able to conclude that the author of the ransom note was well educated because it included obvious misspellings, suggesting that the author was engaging in "disinformation." According to Dr. Leonard, this is "very non-statistical," but it "brings to bear all our linguistic science." (*Id.* at 1033)

For the same reason, forensic linguists do not "quantify" the confidence level of their conclusions. This is simply not the way forensic science is practiced, and American decisional law is in accord with this. When the Supreme Court of Vermont, more than a hundred years ago, upheld the legal reliance upon evidence that Mr. Kent idiosyncratically inserted a period between the month, date and year in his writings and inscriptions ("July. 22. 1908"), the court found no need to identify its confidence level in its conclusion. *State v. Kent, supra,* 83 Vt. 28, 74 A. 389. In the same way, when an New Jersey court reviewed the ransom note in the Lindbergh kidnaping case, and noted that Hauptmann spelled the word "boat" as "B-O-A-

D," both in the ransom note and in his own writings, the court felt no need to put a numerical value on its confidence level. *State v. Hauptmann*, *supra,* discussed at pp. 79-80. The court's confidence in the conclusion, as drawn, was instead a matter of logic. In the same way, forensic linguists and courts take into account the logical effect of the fact that a multiplicity of markers point in the same direction:

> "As a number of circumstances from which a given conclusion is generally drawn by the process of deduction multiply, the propriety of drawing the conclusion becomes more logical. In other words, as the circumstances multiply they dispel competing possibilities."
>
> *In re Bundy's Estate* (1936) 153 Ore. 234, 56 P. 2d 313, 317.

"Reliability factors"

As for "the various factors noted above that call into question the reliability of the analysis done, particularly when considering the literature in the field," petitioner will next consider respondent's so-called "reliability factors." [37] By petitioner's count, respondent identifies seven factors which "call into question the reliability of the analysis done":

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[37] As for "the literature in the field," petitioner has fully considered this argument. (*Supra* at pp. 101-125)

1. Treating the two Q documents as one corpus, and treating the 14 K documents as one corpus, for purposes of analysis;
2. Not paying sufficient attention to stray marks;
3. Dr. Leonard's "and/or" analysis;
4. Dr. Leonard's analysis of the significance of the use of quotation marks around various words, parentheses around plurals, and the use of " 'ed;"
5. Dr. Leonard's reliance upon standard grammar for purpose of making sentence counts;
6. Dr. Leonard's failure to take into account the alleged contraband nature of the Q documents as compared to the K documents; and
7. Dr. Leonard's failure to use *Soledad Brother* or a similar work in forming his conclusions.

Petitioner will evaluate these alleged "reliability factors."

a. Combining documents

Dr. Leonard fully explained why he compared the two Q documents as a corpus with the 14 K documents as a corpus. A forensic linguist works with bodies of documents. That is what Chaski and Coulthard do in the articles cited by respondent. The larger the bodies of documents are, the easier it is to compare the patterns of the two bodies of documents.

In this case, Jarvis Masters was tried and convicted based on the hypothesis that the two Q documents were authored by him. That by itself established the size of the first corpus.

The 14 K documents, by contrast, were all known to have been written by Jarvis Masters during a period within a few years before and a few years after the writing of the two Q documents. (Pet. Ex. 72) That fact established the size of the second corpus.

Contrary to respondent's suggestion, Dr. Leonard closely examined the differences between individual documents. As Dr. Leonard testified, "Now, of course, I broke it all down, but we found nothing contrary to our overall finding." (18 RHRT 1098) Thus, Dr. Leonard's report details the different contents of the individual documents. (Pet. Ex. 72 at 5-6, 9, 13) Dr. Leonard also asked himself whether the fact that the K documents were mostly letters

was having an effect on the number of "I"s in the K. As a control, Dr. Leonard therefore compared the frequencies of Masters' use of "I" in personal letters to three large databases of personal letters written by other individuals, in order to confirm that Masters' writings were uniquely characterized by an extremely high instance of the use of "I," and an unusually low instance of the use of "the". (18 RHRT 998-999; Pet. Ex. 72 at 8)

Asked about whether the fact that certain of the K documents were appeals to prison authorities, while others were personal letters or letters to an investigator, and whether this needed to be taken into account, Dr. Leonard stated that there were only slight differences among the various K documents. (*Id.* at 1081-1082) This is because Masters did not have "the ability to vary all that much. So that even in his most formal register we get almost the same genre." (*Id.* at 1082) Whereas, someone who has been really trained yet kept his neighborhood roots, has a tremendous range of variation in his speech. (*Id.*) Thus, Masters' appeal to a prison board has many, many similar vernacular features to his other letters. All of them have a tremendous amount of misspellings and the same lexogrammatical features. (18 RHRT 1082)

Dr. Leonard also noted that the K documents and the Q documents are for the most part similar genre. They are written to someone else. They are not like musings or a diary. They are sharing personal information. They are often requesting a response. (*Id.* at 1082)

Thus, Dr. Leonard's corpus-based approach was *scientifically rigorous*.

b. The insignificance of stray marks

Respondent argues that Dr. Leonard's results may be based upon the fact that a mark on one of the pages, "was possibly a stray mark resulting from poor copy quality." (REB at 77) Respondent, however, was only able to point out one "possible misinterpretation," a known document authored by Masters, which contained what "could either be 'iam' or 'I'am' but was typed as 'Ia'm'." (REB at 77)

Respondent's argument proves absolutely nothing, since Dr. Leonard testified that he did not count this instance of a non-standard contraction as an "I'am" in his "I'am" study. (18 RHRT 1108) As a result, it did not affect his results. Had he counted it, it would have meant that the known writings of Jarvis Masters used this idiosyncratic non-standard contraction 37 times (rather than 36

times), while the Q documents never used it. In other words, it would have slightly strengthened Dr. Leonard's conclusions.

c. The gratuitous use of "and/or"

Respondent ridicules Dr. Leonard by repeatedly telling us that Dr. Leonard "testified that the use of 'and/or' was something that he had not seen before and that it was idiosyncratic." (See, e.g., REB at 71) Indeed, respondent invites the Court to view Dr. Leonard as an absurd and self-important man, suggesting that he claims it takes a linguist 30 years of experience "to be able to determine whether the use of something like a 'and/or' is unusual." (REB at 59)

Respondent, again, grossly distorts the record. Dr. Leonard was not referring to Masters' use of "and/or" in the ordinary way. He was referring to Masters' idiosyncratic use in the known Masters documents. As he put it, its use was "idiosyncratic" because it was "almost semantically gratuitous . . . and not limited in range by appropriateness. The use of the phrase seems only for effect, it does not depend on content, and it can inserted as a form of Officialese." (Pet. Ex. 72 at p. 13) By way of example, Masters wrote:

- "MY DEEPEST APPRECIATION IN YOUR ASSISTANCE AND/OR WORK AT THIS POINT IS WELL APPRECIATED."
- "YOU HAVE MY FULL SUPPORT TO WORK AND OBTAIN THE TYPE AND/OR KIND OF INFORMATION FROM THOSE INSTITUTIONS AND AGENCYS WE DISCUSSED AFEW [*sic*] TIMES ALREADY." (Pet. Ex. 72 at p. 13)

Dr. Leonard noted that there were five of these idiosyncratic uses in the K, but none in the Q. (18 RHRT 1014) [38]

d. Non-standard use of quotation marks and parentheses, and the use of "ed"

Respondent notes that when Dr. Leonard was asked about the fact that both the Q documents and the K documents include non-standard usages of quotation marks and parentheses for plural, Dr. Leonard testified that "they were in the realm of normal usage, or normal non-standard usage – and therefore not idiosyncratic." (18 RHRT 1124) Respondent then criticizes Dr. Leonard because "he failed to explain why this did not qualify as idiosyncratic." (REB at 71)

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[38] Since the K documents used "and/or" on five occasions, Dr. Leonard did not place great weight on this finding. It is only because respondent calumniates a professional individual with a distortion of the record that petitioner addresses this mattter in this section of the brief.

Again, respondent distorts the record. Respondent never asked Dr. Leonard why these usages did not qualify as idiosyncratic. (18 RHRT 1122-1123) Dr. Leonard, nonetheless, explained why these usages were normal non-standard usages, as opposed to idiosyncratic usages.

Simply stated, the explanation is this. Standard English usage accords with English grammatical standards. Much of our vernacular, or the vernacular of any particular group of people, however, is deemed *non-standard* because it does not conform to accepted grammatical rules. But this does not make it *idiosyncratic* when it does not point to a particular user. Thus, it is called *normal non-standard*.

Dr. Leonard explained this in the context of the normal non-standard usages of the BGF at San Quentin. Petitioner's Exhibit 73, "Documents taken from discovery and trial exhibits showing common features of BGF writings" demonstrated his point. Pages 28, 33, 35, 39, 46, 50, 51, 63, 64, and 65 of that exhibit demonstrate the normal non-standard usage of quotation marks by BGF members at San Quentin. (Pet. Ex. 74) Pages 3, 15, 21, 27, 30, 31, 33, 35, 46, 70, 71, 73 of that exhibit demonstrate the normal non-standard usage of parentheses for words in plural by BGF members at San Quentin.

(*Id.*) These usages, although very non-standard, were not deemed idiosyncratic of a particular person since they were used by a large group of people. (18 RHRT 1158, 1162) Like "devil's strip," they identified a group of people, but they did not identify a particular author.

Contrary to respondent's suggestion, Dr. Leonard also documented the fact that Masters' usage of "ed" endings was not idiosyncratic. Referring to pages 60, 61, 64, and 65 of petitioner's exhibit 73 and petitioner's exhibit 74, Dr. Leonard noted non-standard "ed" word endings were also used by other members of the BGF at San Quentin during the period in question. (18 RHRT 1161-1162)

Respondent did not call their own expert to challenge any of these conclusions.

e. Word counts

Respondent argues that Dr. Leonard's standards were not "transparent" because his count for the words in the Q documents differ from Dr. Shuy's count, and differed from counsel's word count

using the Microsoft Word program. [39] (REB at 75) Both of these issues, however, are outside of the record.

Dr. Shuy was not available to explain his word count, his data set was different, and his report and his email were not admitted into evidence. (18 RHRT 1017-1018, 1164-1165) Dr. Shuy, moreover, could not find any evidence of his work and only vaguely remembered it. [40] (18 RHRT 1016) Dr. Leonard, nonetheless, was allowed to speculate that Dr. Shuy may have been working with poor copies or illegible documents, and that he elected to count only the words that he could read. (18 RHRT 1092-1032)

As far as the difference between Dr. Leonard's word count and respondent counsel's count using Word Perfect, that issue was not raised below, and is therefore not properly the subject of briefing. Nonetheless, since respondent has raised an issue outside of the record, petitioner notes that Dr. Leonard's professional linguistic program (Wordsmith) counts certain contractions, numbers (e.g., 7

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[39] Respondent's argument is ironic, since respondent relies heavily on Carole Chaski. Chaski uses a patented algorithm in her analysis. As a result, her methods are a "black box," and cannot be replicated. (18 RHRT 1046-1047) Dr. Leonard's methods, by contrast, can be completely replicated.

[40] Inasmuch as Dr. Shuy had lost his records, it is unknown what Masters letters or Willis kites he is referring to in his report.

am), hyphenated words (e.g., C-notes), and certain other words as more than one word, while Microsoft Word only counts them as one word, and this completely explains their different word counts.

The issue, in any case, is irrelevant since Dr. Leonard counted both sets of documents using the same word counting program. [41]

f. Dr. Leonard's use of his own grammatical standards

By way of criticism, respondent argues that Dr. Leonard

> "provided no authority . . . to support the use of his own grammatical standards – those of a person holding a doctorate in linguistics – to determine the grammatical structure of documents written in the Black vernacular by an African-American member of a prison gang who lacks a college education." (REB at 76)

Respondent then argues that this "failure" would seem particularly significant since a grammatical benchmark needs to be used when comparing the sentences in the Q documents versus the sentences in Jarvis Masters' writings.

Again, respondent distorts the record. Ms. Lustre did not ask Dr. Leonard to provide her with "authority . . . to support the use of

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[41] Respondent also challenges Dr. Leonard's count of the "was/were" grammatical errors in the Q documents. (REB 32) Dr. Leonard, however, did not perform this count, and did not include it in his report. (Pet. Ex. at p. 72) The count was performed by a second linguist, Dr. Wald, and forwarded to Dr. Leonard in an email. (Resp. Ex. XX at pp. 3-4; 18 RHRT 1114-1115)

his own grammatical standards." Dr. Leonard, moreover, did not state that he used a set of personal grammatical standards. He said that he did it according to the standard rules of English grammar. (18 RHRT 1093) He also testified that he "followed the same metric throughout " his counting of the sentences in the Q and K documents. (18 RHRT 1094)

Respondent also did not call their own expert to challenge Dr. Leonard's use of standard English for counting the sentences in the Q and K documents. Nor do they suggest, or even speculate how the use of standard English rules to count sentences undermines Dr. Leonard's conclusions.

Respondent's argument is also foolish. To compare the sentence lengths in the two corpora, what is important is that one have a well-established benchmark, and that the same benchmark is used for both the Q and the K.

The rules of standard English provide that benchmark. A first hand comparison of the Q documents and the K documents demonstrates that Jarvis Masters' sentences are longer, and sometimes almost idiosyncratically longer than the Q documents. He frequently uses run on sentences. In the Q documents, by contrast, the sentences are frequently short and crisp. Thus, Dr.

Leonard concluded: "The Q has far fewer words per sentence than the K." (Pet. Ex. 72 at 7) Respondent does not challenge this conclusion.

g. Kites as contraband?

Respondent asked Dr. Leonard whether he was aware that the kites were contraband. Dr. Leonard answered that he "was told that Willis kept a large box of [kites] under his bed" which led Dr. Leonard to believe they were treated "like personal correspondence."

Respondent did not offer any evidence to dispute the fact that Willis kept a large box of kites under his bed and that he viewed them like personal correspondence. In fact, at the 1989 trial, Willis testified that he had 200 to 300 kites in his cell before the Burchfield killing. He said the collection of notes was more than three inches thick. (54 RT 13091) Willis' February 23, 2001 declaration also confirms this testimony:

> "Before I went to the police, I destroyed a lot of old kites in my cell, perhaps hundreds of them, many from Masters. They could have contained information that might have helped Masters' defense. I had reported on every meeting and action that took place prior to Burchfield's death. The destroyed kites would have shown the minor role played by Masters, and the fact that there were not kites about Masters sharpening weapons or ordering anyone else to do so." (Pet. Ex. 22 ¶ 17)

At the 1989 trial, Bobby Evans also testified that kites were not treated as contraband. According to Evans, the guards themselves frequently delivered the kites. (58 RT 13689) Indeed, Willis testified that an officer delivered his highly confidential letter to the Warden directly to Woodard, and then delivered Woodard's kite about the letter back to Willis. (52 RT 12776-12778)

Dr. Leonard also noted that the fact that an inmate might hide his letter when a guard passed by would not necessarily affect the linguistic analysis. As he put it, "I mean, I don't start speaking Chinese because I am in a hurry." (18 RHRT 1077-1078)

h. Dr. Leonard did not use *Soledad Brother* in forming his conclusions

Respondent criticizes Dr. Leonard for failing to use George Jackson's book *Soledad Brother*, or a corpus of BGF materials, for a database of African-American vernacular, in reaching his conclusions. (REB at 80-81) Respondent, however, did not call an expert to challenge the reliability of the databases used by Dr. Leonard, and did not offer any evidence to support the conclusion that the use of a database of African-American vernacular would change the result.

Dr. Leonard, nonetheless, did employ a BGF database of BGF vernacular. Petitioner's Exhibit 73, "Documents taken from discovery and trial exhibits showing common features of BGF writings" clearly establishes that the *similarities* between the Q documents and the K documents are endemic to the BGF documents that were part of the trial and discovery record in this case. Thus, what mattered to Dr. Leonard were the patterns of differences between the two kites and the known writings of Jarvis Masters. The differences existed despite the fact that the author of the Q documents and the author of the K documents both spoke the San Quentin BGF version of Black vernacular English. The seven differences between the two sets of documents, some of them highly idiosyncratic, clearly pointed to the conclusion that Jarvis Masters was not the author of the two kites.

Respondent's argument, however, is also directed to Dr. Leonard's use of well-recognized databases as benchmarks for conducting his "Word Frequency Analysis" and his "Keyword Analysis", thus, in all the recognized databases that have been constructed to analyze English, "the" is almost always the most common word in a text, and "I" occurs with much less frequency. The Q documents follow the common English baseline. The K documents, by contrast, are quite at odds with the databases of

English in that "the" is the third most common, while "I" is the most common. (*Id.* at 994-995):

> "So that is not only a difference between K and Q, but it is a difference that is not something that we find elsewhere in the general population." (*Id.* at 995)

Dr. Leonard noted that "'the' is virtually always the most frequent word used, occurring as approximately five or six percent of the total word count. (*Id.* at 995-996) It is the most common word in the corpus called the British National Corpus, the BNC, the corpus of contemporary American English (the COCA), and also the CTARC, the Communicated Threat Assessment Reference Corpus, which Dr. Leonard uses in his work for the FBI. (*Id.*)

Dr. Leonard noted that the Q documents are completely consistent with the three databases he regularly uses. In the Q, "the" occurred approximately five percent of the time. (*Id.* at 996) But to further confirm his results, to make sure that his results were not somehow influenced by the fact that letters were involved, Dr. Leonard did word counts of three books of letters found in an out-of-copyright database, and the results further verified his findings. (18 RHRT 1100) This sub-corpus of 115,000 words indicated that

"the" was still number one at six percent. "Of" was second, just as in the K and Q, and "I" was down in fifth place. (*Id.* at 999) [42]

Respondent now claims that Dr. Leonard should have done a triple check with *Soledad Brother*, [43] or another corpus of letters by an African-American. Dr. Leonard, however, pointed out that using the three novels "was just a double-check for us. Whereas COCA and the British National Corpus already supported our findings." (18 RHRT 1100)

Given that (1) respondent did not call an expert to challenge Dr. Leonard's findings, and (2) respondent did not introduce any evidence to support their speculation about word counts in their book of choice, this entire issue is irrelevant.

The same can be said for all of respondent's arguments at pages 70-82. All of these pages are totally lacking in merit and completely irrelevant to the issue of whether Dr. Leonard employed

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[42] Significantly, both the Q documents and most of the K documents were letters, and many of the K documents were appeals to prison authorities and letters to an investigator. Thus, one would not expect different percentages of the use of the word "the" in the Q and the K simply because they were mostly letters. The 115,000-word sub-corpus confirmed this.

[43] Given the fact that respondent did not introduce *Soledad Brother* as an exhibit at the evidentiary hearing, respondent's citation of a website where the book can be read online is absolutely inappropriate. (REB at 28)

new scientific processes. *People v. Cowan*, *supra*, 50 Cal.4th at 470; *People v. Stoll, supra*, 49 Cal.3d at 1157; *People v. Leahy, supra*, 8 Cal.4th at 605. They are also doubly irrelevant since respondent conceded the admissibility of Dr. Leonard's testimony. And they are now triply irrelevant since respondent does not take exception to the referee's finding in favor of Dr. Leonard's testimony.

CONCLUSIONS

Neither petitioner nor this Court can answer every question that can be posed in this case. Who actually authored the kites attributed to Jarvis Masters? Why did Willis physically describe Harold Richardson as the Fourth Co-Conspirator? How many times, and when, did Rufus Willis meet with Charles Numark to get written reports from Masters? Was there a back-up plan? Many of these questions will never be answered. Yet that is as it must be. As the Italian proverb goes, "A fool can ask more questions than seven wise men can answer."

Petitioner states the facts as they are. As might be expected after twenty-seven years, there are differences in memories about details. Yet many remarkable facts persists in this case, and respondent does nothing to disprove them.

Harold Richardson admitted his role in the murder of Sgt. Burchfield, left Jarvis Masters out of the conspiracy, and precisely fits Willis' description of the Fourth Co-Conspirator. Bobby Evans lied. The State utterly misled the jury about Bobby Evans. Rufus Willis is a chronic liar.

And if there is one central unchanged fact in this case in the quarter century it has been pending, it is the fact that promises and threats were made to Rufus Willis. The State has never disputed the fact that Willis was promised an early release for his testimony. Indeed, at the reference hearing, the State introduced Willis' June 30, 2010 statement that promises and threats were made by the Marin County District Attorney, Edward Berberian.

While witnesses may disagree over whether there was a back-up plan, or whether a certain person played a specific role, petitioner's witnesses and petitioner's evidence are remarkably consistent about facts that exculpate Jarvis Masters.

As for Rufus Willis, it took two visits by two investigators in 2001 to get a settled set of facts from him. Remarkably, nine years later, he went over every single line in his declaration and re-affirmed the truth of practically every word. This stands in huge contrast to every other version of Willis' story.

After all is said and done, the principal question for this Court is this: Does the evidence before this Court undermine one's confidence in the outcome? Reduced to its most basic level, the question is also this: How would the evidence in the record have affected the jury, had they heard it?

We know that the jury would have been instructed, as every California jury is instructed, that "A witness, who is wilfully false in one material part of his or her testimony, is to be distrusted in others." (CALJIC 2.21.2) Given the record before this Court, we know that the jury would not have believed either Willis or Evans. The jurors would have easily concluded, like the referee, that both men are chronic liars.

Bobby Evans alone would have destroyed the State's case. Had the jury learned that everything they were told about Bobby Evans was a gross lie, that his life, his occupation and his freedom depended on his putting people away for the government, and that on the day he came forward, and on the day he testified, he was the prime suspect in a murder investigation, and that after he came forward the investigation mysteriously ceased, the jury would have been enraged, and Jarvis Masters would be a free man today.

By any measure, a reasonable probability exists that false evidence and violations of petitioner's rights under California law and the United States Constitution may have affected the outcome of the 1989 trial. *In re Sassounian* (2003) 9 Cal.4th 535, 546. The writ of habeas corpus should therefore issue.

Dated: December 31, 2012 Respectfully submitted,

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PROOF OF SERVICE

I declare that:

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to the within action; my business address is 645 Fourth Street, Suite 205, Santa Rosa, California, 95404. On January 2, 2013, I served the within:

PETITIONER'S REPLY TO RESPONDENT'S EXCEPTIONS TO THE REFEREE'S REPORT AND BRIEF ON THE MERITS [REDACTED]

on the following party(ies):

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x **BY MAIL**: I placed each such sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Santa Rosa, California, following ordinary business practices. I am readily familiar with the practice of this office for the processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited with the United States Postal Service the same day as it is placed for processing.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 2, 2013, at Santa Rosa, California.

Ken Ward