No: S130495 **DEATH PENALTY**

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

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of

JARVIS J. MASTERS,

Petitioner,

on Petition for Writ of Habeas Corpus

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

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I. INTRODUCTION

At the time of the reference hearing and subsequent briefing in 2011-2013, new evidence, or newly discovered evidence, had to "cast fundamental doubt on the accuracy and reliability of the proceedings" such that, for the guilt phase, it "undermine[s] the entire prosecution case and point[s] unerringly to innocence or reduced culpability." (*In re Lawley* (2008) 42 Cal.4th 1231, 1239, quoting *In re Hall* (1981) 30 Cal.3d at p. 417.)

In the post-reference-hearing briefing herein, that standard formed a much higher bar than the standards for both false evidence and *Brady* material, which were, in essence, a reasonable probability of a different result. (See, e.g, *In re Sassounian* (1995) 9 Cal.4th

535, 546 (reasonable probability); *In re Roberts* (2003) 29 Cal.4th 726, 741-742 (defined as undermining confidence in the outcome).) Accordingly, Petitioner's Exceptions to the Referee's Report and Brief on the Merits [Redacted], filed January 3, 2013 ("PEB"), cast the arguments solely in terms of the false evidence and *Brady* materiality standards.

As of January 1, 2017, however, a revised new evidence standard went into effect. Penal Code, section 1473, subdivision (b) now reads:

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

While it is still arguable that the false evidence standard presents a lower standard of materiality, and thus prejudice, petitioner would be remiss in not providing the following analysis of what he perceives to have been the new evidence presented at his hearing.

In the arguments that follow, the evidence discussed will be viewed through the lens, first, of whether it qualifies as new evidence under subsection (b)(3)(B), and then against the standards of subsections (b)(3)(B).

II. THERE IS MORE THAN AMPLE NEW EVIDENCE THAT RUFUS WILLIS LIED REGARDING PETITIONER'S INVOLVEMENT IN THE CONSPIRACY SUCH THAT IT WOULD MORE LIKELY THAN NOT HAVE CHANGED THE OUTCOME OF THE TRIAL

A. THE FINDINGS OF DR. LEONARD REGARDING THE NON-AUTHORSHIP OF THE KITES ASCRIBED TO JARVIS MASTERS

Dr. Robert Leonard's report and testimony that Masters was not the author of the two seemingly incriminating kites, judged by the referee to be credible and uncontradicted, was new evidence which could not have been obtained by diligent counsel at the time of trial, and significantly undermines the state's case and Rufus Willis's testimony.

Pursuant to section 1473, subdivision (b)(3)(B), Dr. Leonard's testimony is "new evidence" because it (1) was discovered after trial, (2) could not have been discovered prior to trial by the exercise of due diligence, (3) is admissible, and (4) not merely cumulative, corroborative, collateral, or impeaching.

Dr. Leonard analyzed the two kites according to linguistic methods known as forensic linguistics and authorship analysis. This was "discovered after trial". It could not have by due diligence been discovered before trial, because authorship analysis was not widely used until the 1990's. That this is so is shown by respondent's own evidence, in two articles submitted with their Respondent's Exceptions to Referee's Report and Brief on the Merits ("REB"). Exhibit A accompanying that brief is an article by Malcolm Coulthard "Author Identification, Idiolect and Linguistic Uniqueness." (2004, linked at <http://www1.aston.ac.uk/lss/staff/coulthardm/> (last accessed Nov. 17, 2017).)

Coulthard does refer to one 35-year-old work which, he said, marked the birth of a new discipline. But, Coulthard explains, "Little more happened for a quarter of a century, with the notable exception of Roger Shuy in the United States," referencing Dr. Shuy's articles in 1993 and 1998. (*Id*., at pg. 1.) So, too, in Coulthard's second article, at page 2, which references articles written only as early as 1992. (See Exh. B in respondent's post-hearing brief, Coulthard, ". . . and then . . . Language Description and Author Attribution." (2006, linked at URL previously cited, at p. 2). The cited articles all were published after the trial herein.

Any attorney's due diligence leading up to the 1989 beginning of the trial herein cannot possibly be said to have included knowing of a linguistics discipline which had not become widely known even within linguistic circles until the 1990's.

Neither can the State rely on the referee's finding that this was not new evidence. The referee's report erroneously states that Dr. Leonard's testimony was not new evidence because, "At trial, petitioner denied authorship of the kites and a handwriting expert was offered. Had petitioner so chosen, he could have offered expert linguistic evidence at trial, but instead chose a different strategy." (Report of Referee # 13 Final ("Referee's Report"), at p. 15, fn. 9.) As just shown, they would have had no such choice. (See also PEB, at 91, fn 63.) The fact that the kites were in Masters' handwriting was irrelevant if, as Dr. Leonard showed, he was not the author of the words but merely the scribe. This is also consistent with Willis' explanations of how the kites came to be

written, under his orders and largely from the reports of others. (Ex. 1 to Petition for Writ of Habeas Corpus ("Willis Dec.") at 3-7.)

Finally, regarding the remaining requirements for new evidence under subsection (b)(3)(B), petitioner is aware of no grounds upon which it would not be admissible as expert testimony. And it is not merely cumulative, corroborative, collateral or impeaching; it directly contradicts Willis's testimony that Jarvis Masters was the author of those kites.

Regarding the four-part test of subsection (b)(3)(A): The referee found it was credible, finding that Dr. Leonard "testified convincingly, and no opposing expert was offered by respondent." (Report of Referee # 13 Final ("Report'), at 15.) It also was material, as it went directly to the Masters' non-authorship of the seemingly incriminating kites. It was presented without substantial delay, because, following trial and the discovery of its possible application herein by appellate counsel, the only logical setting for its presentation was the instant habeas corpus proceeding. And, most important, it would more likely than not have changed the outcome of the trial, as it directly contradicted damning and seemingly confessional evidence. This court, in the related appeal, several times referred to the "note written in Masters's handwriting," implicating him in the conspiracy, as additional grounds for finding the asserted error harmless, "even if" it were found to be error. (*People v. Masters* (2016) 62 Cal.4th 4019, 1048 (re: failure to allow for preliminary hearing lineup); 1053 (re: failure to grant witness immunity); 1063-1064 (re: admission of inflammatory evidence related to the BGF).)

This court's references to the most implicating kite underscores its importance in inculpating Masters. Accordingly, it is more likely than not that the result of the trial would have been different if the jury were presented with this uncontested evidence that not only was Willis's specific testimony regarding Masters's authorship of the notes false, but that, therefore, his entire testimony implicating Masters could not be trusted.

B. RUFUS WILLIS'S DECLARATION AND SUBSTANTIAL OTHER NEW EVIDENCE CONFIRMS THAT HE LIED ABOUT PETITIONER'S PARTICIPATION IN THE CONSPIRACY, AND THAT WILLIS IS A CHRONIC LIAR

Rufus Willis's 2001 declaration, establishing that he lied about Masters' involvement in the crime, was both new evidence and broadly supported by the other evidence introduced at the hearing. (See Willis Dec., at 3-7.) One example of that support, just discussed, was Dr. Leonard's findings that Masters did not author the two kites.

In that declaration, which itself qualifies as new evidence under section 1473, Willis stated that Masters, while he may have been present at the planning meetings (and Willis only remembered him at one of them), had no authority to contribute to them. (Willis Dec., at 3, ¶ 8.) Moreover, although he was "supposed to be Usalaama, Chief of Security," he was sidelined by Lawrence Woodard as incompetent and insubordinate. (*Id*. at 5, ¶ 13.) Most important, Masters would not have been involved in the manufacture of the murder knife. "He was not fully trusted and considered reliable. Another reason is that Usalaama would not have been making weapons." (*Ibid*.) "I

never had any knowledge of Masters ever sharpening the murder knife, ever having had it, ever even having seen it. We did not give him any role in conjunction with the killing of Burchfield." (*Id*., at 6, ¶ 6.)

All of this is in direct conflict with Willis's testimony at the trial and is new evidence for purposes of section 1473, subdivision (b)(3)(B). It was (1) discovered after trial; (2) could not have been discovered before trial by the exercise of due diligence, because Willis refused to speak with them, and was hidden from the defense team (see AOB at 54 and fn. 24.); (3) is admissible as a statement against penal interest, because it admits to perjury; and (4) was not merely cumulative, corroborative, collateral, or impeaching.

In terms of its impact, pursuant to subdivision (b)(3)(A), it is credible for many reasons. Petitioner refers the court to its Exceptions Brief, at pages 13-30, and in particular to Willis's confirmations of his statements both to investigator Melody Chavez in 2001 and to investigator Chris Reynolds in 2010, the former of which was incorporated into Willis's declaration and the latter of which is further new evidence under the statute. (See hearing-record cites in PEB, at 16-17.) Second, it is consistent with Willis' letter of apology to Masters, written at the same time as his declarations exonerating Masters, and written entirely of his own accord. (See PEB at 20; Pet. Ex. 20; 11 RHRT 596.) All of this is new evidence. Third, it is consistent with Harold Richardson's statement to Jeanne Ballatore, excluding Masters from the conspiracy in its unredacted portion. (See PEB at 13-15, and (C), *infra.*) The cited subsection below concerns redacted parts of the

statement. While the unredacted portion was excluded at trial, it was admitted by the referee; as such, it is the due process equivalent of new evidence.

In addition, Willis's declaration is his *only* statement given under penalty of perjury which was not tied to some benefit, or avoiding a worse outcome. Willis described in detail in his declaration the compulsion he was under from the District Attorney to testify as he did, and to assist Investigator Numark in the manufacture of the evidence against Masters. (Willis Dec. at 1-7, and in particular ¶¶ 2, 3, 4, 5, 10, 11, 12, 14.) Finally, it is credible for the same reason that it is admissible: it is a statement against Willis's penal interest, because everything he says regarding Masters is an admission of perjury in a murder case. (Pen. Code §§ 126, 801, 803(c).) Finally, and most important, it is indeed of such decisive force and value that it would have more likely than not changed the outcome of the trial. No rational jury that was presented with this declaration, whether alone or along with other new evidence discussed herein, would have convicted Jarvis Masters. Without a doubt, the jury would have agreed with the referee that Rufus Willis was a liar.

C. THE PORTIONS OF THE BALLATORE MEMORANDUM OF HAROLD RICHARDSON'S DEBRIEFING STATEMENT THAT WERE REDACTED AT TRIAL CONFIRM THE CREDIBILITY OF HIS STATEMENTS ABOUT THE BURCHFIELD MURDER WHICH EXCLUDED MASTERS FROM THE CONSPIRACY

As stated in petitioners exceptions brief, at 97-98, the portions of the Ballatore Memo which were redacted before the trial, and thus not available to trial counsel, specifically constitute new evidence. Pursuant to subsection (b)(3)(B), it is new evidence

that was (1) discovered after trial; (2) could not have been discovered before trial because the magistrate redacted it; (3) was admissible at trial because it contained any number of statements against both penal and social interest – indeed, his very survival given the content of it; and (4) was not merely cumulative, corroborative collateral, and impeaching, because viewed as a whole document with the now unredacted portion, Harold Richardson's statement was both credible and exonerating for Masters, and contradicted the Willis testimony at trial.

Given that the Ballatore Memorandum was admitted by the referee, the trial court's doubts about Richardson's credibility are no longer before the court. Even viewed from the standpoint of the trial judge, however, whatever doubts the trial court had about the credibility of memo were resolved by the redacted portions. Especially important – and inexplicable in terms of what should or should not have been hidden from the defense – is the final paragraph of the memo, on page 3, *following* the paragraph which left Masters out of the Burchfield conspiracy, which includes the following statements from Ms. Ballatore: **[13 words redacted.]**

Those facts also satisfy the materiality standards embodied in subsection (b)(3)(A). At huge risk to his well-being should the prison authorities not believe him **[remainder of paragraph redacted, except citation:]** (Ex. 54, at 1-2.)

Returning to subsection (b)(3)(A), the redacted portions of the memo were not only new evidence, they were credible, for the reasons just set forth. They were material because they showed Richarson's status in the BGF, his intimate knowledge of BGF personnel and activities, and thus fully supported his description of the Burchfield conspiracy (which left Masters out). They were presented as soon as procedurally feasible. And, had the defense been shown them, they would be been able to overcome the court's doubts about his credibility; had the court admitted it, it would have had to sever Masters' trial from Woodard's and Johnson's; and had the jury seen it, it would more likely than not have led to a different result.

III. THE WITHHELD EVIDENCE THAT BOBBY EVANS WAS THE PRINCIPAL SUSPECT IN A MURDER CASE IN SAN FRANCISCO AND WAS A LONG-TIME INFORMANT, AND HIS RECANTATION, WOULD MORE LIKELY THAN NOT HAVE CHANGED THE OUTCOME OF THE TRIAL

The evidence presented in the evidentiary hearing that Bobby Evans was, at the time of the trial herein, the principal suspect in a murder case in San Francisco was found by the referee to be "new evidence" for the purpose of the habeas proceeding. (Referee's Report, at p. 11.)[1] It is also new evidence under section 1473, subdivision (b)(3)(B): It was (1) discovered after trial; (2) could not have been discovered prior to trial by the exercise of due diligence; and (3) is admissible and not merely cumulative, corroborative, collateral, or impeaching. It was not merely impeaching because, had the trial court been aware of this information, it would have been bound to appoint counsel for Mr. Evans, who in turn would have been highly unlikely to allow him to take the stand and expose himself to cross-examination by defense counsel, and would instead have asserted his right against self-incrimination. (PEB, at 167.) And if that were so, then most of Willis's co-conspirator testimony would have gone uncorroborated, and thus of no weight.

Also qualifying as new evidence under the statute was Evans's recantation of his trial testimony, and his admission that he had been a long-time law enforcement informant prior to his testimony at the trial. Contrary to the referee's erroneous finding that it was not "new" but merely "different" evidence (Referee's Report, at 9), Evans's

[1]That it was also *Brady* material is discussed in prior briefing. (See PEB, at 148-150.)

deposition testimony before the referee that he lied at trial about Masters' involvement in the planning of the crime (Evans Deposition at 41-42) – backed up by the referee's own finding that he lied at trial (Referee's Report, at 8) – is quintessentially new evidence. Its effect, as was the effect of the evidence that he was a murder suspect at the time of the trial, would have been to eviscerate, if not eliminate, the principal corroboration for Willis's testimony.

Evans's credibility in his deposition was substantially corroborated by the testimony of three law enforcement officers, James Hahn, James Moore, and Robert Connor regarding his substantial informant activities. (See PEB, at 31-34.)

Evans' direct recantation of his trial testimony regarding Masters' involvement in the crime, supported by the referee's finding that he lied at trial, and the withheld-at-trial evidence that he was both a murder suspect at the time of trial and a long-time informant for local and state law enforcement agencies, was new evidence under section 1473 that was, under subsection (b)(3)(A), (1) credible and uncontested; (2) was undoubtedly material; (3) was presented without substantial delay at the first opportunity in which it could have been presented; and, most importantly (4) would have more than likely than not changed the outcome of the trial.

IV. VIEWED CUMULATIVELY, THE NEW EVIDENCE NOT ONLY MORE LIKELY THAN NOT, BUT WITHOUT QUESTION WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL

Viewed cumulatively, the evidence discussed in this brief eviscerates the core of the prosecution's case.

The State's case rested primarily on three pillars:

1. The Rufus Willis testimony.

2. The Bobby Evans corroborative evidence upon which the jury heavily relied because (a) the court declared Evans to be an expert on the meaning of BGF communications; and (b) the jury's guilty verdict was returned shortly after they heard a read-back of the Evans testimony.

3. The two kites in Masters' handwriting, which the District Attorney described as the "choke chain" around Jarvis Masters neck and this court referred to as helping to establish the harmlessness of three asserted appellate errors.

The new evidence discussed above is mutually corroborating, is consistent with other evidence petitioner presented in the reference hearing, and presents much more than a more-likely-than-not different outcome. The Willis Declaration and Dr. Leonard's authorship analysis prove his perjury, and refutes the referee's dismissive claim that she knew Willis was liar, but couldn't be sure whether he was lying at trial or after trial, and thus would rely on the jury's findings. (Referee's Report at 9-10.) The statement of Harold Richardson provides a list of the coconspirators which nearly matches the prosecution's, but leaves out Masters. Bobby Evans' recantation, and the information

that Bobby Evans both was a serial government informant and that he was the principal suspect in a murder case *at the time of the underlying trial herein*, would likely have prevented his testimony altogether, leaving the state without the required corroboration of Willis. Viewed as a three-legged stool, the prosecution's case would be flat on the ground.

Petitioner believes that each of the three items of new evidence, viewed alone, are sufficient to meet the standard of more likely than not changing the outcome of the trial. Cumulatively, they surely would have.

Dated: August 22, 2018 (Orig. dated December 15, 2017)

Respectfully submitted,

_____

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Attorneys for Petitioner Jarvis Masters

CERTIFICATE OF WORD COUNT

I, Richard I. Targow, attorney for petitioner herein, hereby certify that the foregoing brief, while not appearing to come under the provisions of California Rule of Court 8.630(b), consists of 3227 words.

_____

RICHARD I. TARGOW

DECLARATION OF SERVICE BY MAIL

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

I, RICHARD I. TARGOW, certify:

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

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California Appellate Project

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Jarvis J. Masters, Petitioner
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_____
RICHARD I. TARGOW
Attorney at Law

STATE OF CALIFORNIA
Supreme Court of California

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