SUPREME COURT COPY

No: S 016883 DEATH PENALTY

Related Habeas Corpus: No. S130495
(Superior Court of Marin County, Case No. 10467)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE v. JARVIS J. MASTERS,

APPELLANT'S SUPPLEMENTAL BRIEF

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE v. JARVIS J. MASTERS

APPELLANT'S SUPPLEMENTAL BRIEF

I. THE TWELVE DENIALS OF MASTERS RIGHTS MUST BE JUDGED *IN TOTO* AS A DENIAL OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL, AND HIS RIGHT TO PRESENT A DEFENSE

In the first seven arguments of his opening brief, appellant Masters presented twelve errors and violations which denied him his state and federal constitutional rights to present a defense, and his constitutional right to State disclosure that witness Bobby Evans had lied, that inducements and promises were made to him, and that he received rewards for his testimony:

1. The denial of a right to a lineup after Rufus Willis completely mis-described Jarvis Masters, and instead precisely described Harold Richardson (AOB 49-79; ARB 11-21);

2. The denial of a right to recall Rufus Willis to confront and cross-examine him at the preliminary hearing after Harold Richardson's admissions were disclosed to the defense (*Id.*);

3. The denial of the right to show Harold Richardson to Rufus Willis to ask him whether Richardson was the fourth co-conspirator (*Id.*);

4. The pre-trial denial of the defense motion for severance based upon the mistaken findings that the Harold Richardson and Charles Drume admissions were unreliable (AOB 122-129);

5. The denial of the defense motion to dismiss after all of the above errors had been made (AOB 74-76);

6. The exclusion at trial of Harold Richardson's admissions that he was the fourth co-conspirator (who performed the roles the State attributed to Masters) as irrelevant (AOB 93-94, 114-118; ARB 22-52);

7. The exclusion of Harold Richardson's admissions under Evidence Code section 352 (AOB 92-94, 114-118; ARB 22-52)

8. The exclusion of Charles Drume's against-penal-interest admissions as unreliable (AOB 90, 93, 95-96, m. 35, 101, 103-105, 107-108, 114-118, 120-121, 123; ARB 22-52);

9. The exclusion of Harold Richardson's against-penal-interest admissions to Broderick Adams (AOB 85, 97, 106, 116, 121; ARB 22, 28, 29, 34, 37, 38-39, 42-46, 51-52);

10. The failure to disclose evidence of James Hahn's concealments, Bobby Evans' lies, evidence that the State would take care of Evans, evidence of substantial promises and inducements to Evans, and evidence of the State's performance of its promises (AOB 165-195; ARB 63-84);

11. The trial court's refusal to allow the defense to re-open after the defense discovered (1) that Evans lied about promises made to him and his expectations of benefits for his testimony, (2) promises and inducements made to him, and (3) evidence of the State's performance of its bargain (*Id.*);

12. The District Attorney and trial court refusals to grant Harold Richardson and Charles Drume use immunity to provide Masters with a "meaningful opportunity to present a complete defense" (AOB 196-214).

Each of the twelve errors was prejudicial, but the real effect of them can only be assessed in combination, as they fed into a complete denial of his right to present a complete defense, and thus also a denial of his rights to due process and a fair trial. Accordingly, they must be assessed under the federal *Chapman* standard. Given the totality of the evidence undercutting the veracity of the prosecution witnesses, and the exclusion of directly exonerating evidence, the State cannot possibly show that the errors were harmless beyond a reasonable doubt. Moreover, while appellant contends that these errors in combination rise to a federal constitutional level, the cumulative and combined errors also far surpass the State standard for prejudicial error.

In this brief, appellant will update the relevant law as it has developed over the 12 years since the filing of Appellant's Reply Brief in November, 2003.

II. THE POLICY BEHIND *CUDJO* IS DESIGNED TO PREVENT SMALL EVIDENTIARY ERRORS FROM BEING TURNED INTO CONSTITUTIONAL ERRORS

In his opening brief, appellant argued that the collective errors set forth in Arguments I-VII cumulatively resulted in a constitutional denial of due process and his Sixth Amendment right to present a

defense. (AOB 128 *et seq.*) Much of the argument attempted to distinguish and urge modification of a distinction set forth by this court in *People v. Cudjo* (1993) 6 Cal.4th 585, between errors which result from "*general rules* of evidence or procedure which preclude material testimony . . . for arbitrary reasons . . ." and those which result from "mere erroneous exercise of discretion" under rules which do not themselves implicate the federal constitution." (AOB 131-132, quoting *Cudjo* at 611.)

Appellant argued against this distinction, relying in part on Justice Kennard's dissent in *Cudjo*, subsequent cases by this court, and, most importantly, such high court cases as, principally, *Chambers v. Mississippi* (1973) 410 U.S. 284, and *Crane v. Kentucky* (1986) 476 U.S. 683. (AOB 128-138.) Appellant also argued that post-*Cudjo* opinions by the Supreme Court had undercut the *Cudjo* distinction, (AOB 137-139, citing and discussing, *inter alia*, *Montana v. Egelhoff* (1996) 518 U.S. 37, and *Lilly v. Virginia* (1999) 527 U.S. 116.)

While *Cudjo* has not been overruled, subsequent decisions have narrowed its scope. Thus, *People v. Fudge* (1994) 7 Cal.4th 1075, 1103 states:

> "Although completely excluding evidence of an accused's defense theoretically could rise to this [constitutional error] level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 58.)"

People v. Cunningham (2001) 25 Cal.4th 926, 957 reaffirmed *People v. Fudge, supra*, and made it clear that *Cudjo* applies to "exclusion of defense evidence on a minor or subsidiary point":

> "Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. (*People v. Fudge, supra,* 7 Cal.4th 1075, 1103.) Accordingly, such a ruling, if erroneous, is 'an error of law merely,' which is governed by the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, 299 P.2d 243, *People v. Fudge, supra*, 7 Cal.4th at 1103.)"

Cudjo itself appears to embrace this distinction. Thus, *Cudjo* states that its articulated rule is designed to prevent small evidentiary errors from being turned into constitutional errors:

> "Nonetheless, absent clearer guidance from above, we will not lightly assume that a trial court invites federal constitutional scrutiny each and every time it decides, on the basis

of the particular circumstances, to exclude a defense witness as unworthy of credit."

People v. Cudjo, supra, 6 Cal.4th at 612.

None of these cases, moreover, come close to the enormity of errors in this case, which in combination entirely eviscerated appellant's attempts to show his innocence.

III. THE *CUDJO* "MERE" EVIDENTIARY ERROR DISTINCTION PROVIDES NO CLEAR STANDARD

While the policy behind *Cudjo* may be reasonable, its line of distinction - "mere" evidentiary errors - provides no clear guidance. Indeed, the distinction is directly contrary to Unites States Supreme Court decisions in *Delaware v. Van Arsdall* (1986) 475 U.S. 673; *Webb v. Texas* (1972) 409 U.S. 95, 97-98; *Olden v. Kentucky* (1988) 488 U.S. 227, 232, 233; *Simmons v. South Carolina* (1994) 512 U.S. 154, 165; and United States Circuit Court of Appeal decisions in *Franklin v. Henry* (9 Cir. 1997) 122 F.3d 1270, 1272-1273; *DePetris v. Kuykendall* (9 Cir. 2001) 239 F.3d 1057, 1062-1063; and *Perry v. Rushen* (9 Cir. 1983) 713 F.2d 1447, 1452-1455. When important rights are at stake, judicial error is no more constitutionally tolerable than legislative error.

Holmes v. South Carolina (2006) 547 U.S. 319 is on point. The trial court excluded defense-proffered evidence of a third party's

guilt, applying a holding of the South Carolina Supreme Court which allowed exclusion of third-party-culpability evidence if the State's evidence of guilt, especially forensic evidence, was strong enough to overcome the evidence against him to raise a reasonable inference of his own guilt. *Id.* at 324. The Supreme Court reversed, holding that, as in *Chambers*, *Crane, et al.,* the judicial rule unreasonably focused on the strength of the prosecution's case even if the proffered evidence had great probative value. *Id.* at *328-331.* In this case, the trial court unreasonably denied the clear probative value of Richardson's statement to the prison officials, and thereby denied Masters' right to present a defense.

The *Cudjo* distinction is also contrary to three recent decisions by the Ninth Circuit United States Court of Appeals. In *Cudjo v. Ayers* (9 Cir. 2012) 698 F.3d 752, the Ninth Circuit explicitly rejected this Court's distinction between general rules and mere evidentiary errors, under *Chambers*, calling it a distinction without a difference, and finding that it was contrary to settled established Supreme Court precedent. *Id.* at 766-768; and see generally the full discussion, *Id.* at 762-769. The court found the facts there "materially indistinguishable" from *Chambers. Id.* at 754. *See also, Chia v. Cambra* (9 Cir. 2004) 360 F.3d 997 [trial court's exercise of

discretion excluding statements by alleged co-conspirator was "patently unreasonable" and constituted constitutional error]; *Lunbery v. Hornbeak* (9 Cir. 2010) 605 F.3d 754 [the exclusion of third-party-culpability evidence excluded testimony that "bore persuasive assurances of trustworthiness" and "was critical to [Kristi's] defense" and denied defendant her constitutional right to present a defense]

Accordingly, appellant urges this Court to overrule, or at least distinguish the *Cudjo* formulation, acknowledging that in this case, the sheer number of errors – which serially eviscerated appellant's defense, excluded trustworthy and necessary exculpatory evidence, withheld exculpatory evidence – nullified appellant's constitutional entitlement to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky* (1986) 476 U.S. 683, 690

IV. *UNITED STATES v. STRAUB*

In his opening brief, appellant argued that the trial court erred in denying use immunity for Richardson and Drume. (AOB 196-214)

This Court's most recent case on the subject, *People v. Stewart* (2004) 33 Cal.4th 425, carried forward the Court's practice of assuming without deciding that a trial court has the inherent judicial authority to grant immunity over the objection of the prosecution. As

in earlier cases, *Stewart* held that the applicable test was not met. *Stewart*, 33 Cal.4th at 468; *In re Williams* (1994) 7 Cal.4th 572, 610; *People v. Cudjo* (1993) 6 Cal.4th 585, 619; *People v. Hunter* (1987) 49 Cal.3d 957, 974.[54]

In his opening and reply briefs, appellant argued that this case met the *Stewart* test. (AOB at 201-203; ARB at 85-89.) He stands by that argument, but also urges the court to decide both that a trial court *has* the authority to grant judicial immunity over the objection of the prosecutor, and that the *test* to be applied is the test adopted by the Ninth Circuit in *United States v. Straub* (9 Cir. 2008) 538 F.3d 1147. Under that two-part test, the defendant need only show (1) that the witness's proffered testimony would have been at least minimally relevant; and (2) that the prosecution grant of immunity to

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[54] Appellant assumes here there is no question that Richardson's judicially compelled testimony regarding his statements to the prison officials that he, rather than Masters, was the fourth conspirator, was relevant and admissible notwithstanding his Fifth Amendment privilege. See, *e.g.*, *People v. Samaniego (2009)* 172 Cal.App.4th 1148, 1175 (Third party culpability evidence "is treated like all other evidence; if relevant it is admissible"); *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1128 (the Fifth Amendment is not "a guarantee against officially compelled disclosure of potentially self-incriminating information"); see also *Holmes v. South Carolina* (2006) 547 U.S. 319, 328-329, (rule that evidence about a third party's alleged guilt may be excluded if there is strong evidence of a defendant's guilt, especially strong forensic evidence, "violate[d] a criminal defendant's right to have a meaningful opportunity to present a complete defense")

prosecution witnesses and denial of immunity to a defense witness had the *effect* of distorting the fact-finding process. *Id.* at 1157-1158.

Applying the *Straub* formulation to this case, the error is still more clear: (1) Richardson's presumed testimony, if consistent with his out-of-court statement which was also excluded, directly contradicted the Rufus Willis testimony inculpating appellant Masters; and (2) the prosecutor's refusal to grant Richardson (and Drume) use immunity could indeed be found to be purposeful, but certainly had the *effect* of distorting the fact-finding process. *See also Maldonado v. Superior Court* (2012) 53 Cal.4th 1112, 1125, 1128 [State may compel potentially incriminating testimony despite witness's invocation of *5th Amendment* privilege, which is only implicated if and when those answers are used in a criminal proceeding against the person who gave them].

However, as set forth in Appellant's Opening Brief at 201-203, even if the Court prefers the more exacting *Stewart* test, that test is met in this case.

V. THE POTENTIAL BENEFITS OF A LINEUP WERE NOT SPECULATIVE

In *People v. Mena* (2012) 54 Cal.4th 146, this Court held both that (1) a trial court's denial of defendant's pretrial request for a

lineup was reviewable on appeal, notwithstanding the failure of the defendant to seek pre-trial writ review of the denial; and (2) the failure of due process that arose from the denial was a failure of state due process, subject to the *Watson* standard of prejudice. In *Mena*, as perhaps in most cases, application of the State standard of prejudicial error precluded a finding of prejudice, in no small part because of the speculation as to the possible result of the line-up. *People v. Mena*, *supra*, 54 Cal.4th at 162.

In this case, by contrast, the potential benefits of a lineup were far from speculative. Willis' description of the fourth co-conspirator absolutely did not match Jarvis Masters, but instead precisely matched Harold Richardson, who admitted all the roles attributed to Jarvis Masters. By any measure, the denial of this once-in-a-lifetime crucial lineup was irredeemable and prejudicial.

This error, moreover, must also be judged in the context of all of the errors that followed it. *Masters was not simply denied a crucial lineup.* He was also not allowed to put on his principal defense that he was not the person identified by Willis. Willis' testimony by itself, moreover, was not sufficient to convict Masters. His testimony required corroboration. By providing that corroboration, Evans turned the tide in favor of the prosecution. (AOB 165-166; 193-195;

People's Exhibit 268, p.2) Denying Masters a lineup to prove his innocence at the outset, the opportunity to put on the heart of his case, and a fair opportunity to impeach the testimony of the State's principal corroborating witness, in combination, devastated Masters ability to defend himself against the State's accusations. These cumulative and combined errors denied Masters a "meaningful opportunity to present a complete defense" and his right to a fair trial.

VI. THE ERRORS WERE PREJUDICIAL UNDER BOTH THE FEDERAL AND THE STATE STANDARDS

As amply shown here and in prior briefing, the constitutional violations described require the State to show that the errors were harmless beyond a reasonable doubt. *Chapman* v. *California* (1967) 386 U.S. 18, 24. Given the thrust of the excluded material – all pointing to Masters' innocence – the State cannot make such a showing.

It is also true that appellant has met his state-law burden of showing it is reasonably probable that the jury would have reached a different result absent the error, is met. "We have made it clear in this context that 'probability' in this context does not mean more likely that not, but merely a *reasonable chance*, more than an *abstract possibility*." *Cassim v. Allstate Insur. Co.* (2004) 33 Cal.4th

780, 801 (emphasis in original), quoting *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715. *Accord, People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918; *Kinsman v. Unocal Corp.* (2006) 27 Cal.4th 659, 682; *People v. Jefferson* (2015) 238 Cal.App.4th 494, 508; *People v. Campbell* (2015) 233 Cal.App.4th 148, 173-174; *People v. Ross II* (2007) 155 Cal.App.4th 1033; *People v. Racy* (2007) 148 Cal.App.4th 1327, 1335-1336. Even with the single instance of the Harold Richardson admissions, (made during prison de-briefing) the standard is met. Had the Richardson admissions been presented to the jury, rather than being withheld from the jury, there is far more than "an abstract possibility" that there would have been a different result. *A fortiori*, it is also met with the twelve errors presented in this case.

DATED: October 23, 2015 By: _____

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 2713 words as counted by the Corel Word Perfect word-processing program used to generate the brief.

DATED: October 23, 2015 By: _____

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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 October 23, 2015, I served the within:

APPELLANT'S SUPPLEMENTAL BRIEF

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Ken Ward