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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JARVIS J. MASTERS, Petitioner, v. RON BROOMFIELD, Acting Warden, California State Prison at San Quentin, Respondent.	CASE NO. 4:20-cv-08206 **PETITIONER'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** Petition Filed: August 10, 2022 Judge: Hon. Haywood S. Gilliam, Jr. Hearing Date: October 27, 2022 at 2:00 p.m.

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I. INTRODUCTION

Jarvis Masters has been on death row for 32 years, including 21 years in solitary confinement, for a crime that he did not commit.[1] Despite these circumstances, he has always remained hopeful that his conviction will one day be overturned. Since his conviction in 1990, in a trial riddled with constitutional issues, overwhelming evidence has subsequently revealed what Jarvis has maintained for over 30 years: he is innocent.

The State acknowledges that "[o]nly if the evidence is too powerful to conclude anything but the contrary should the court grant relief." Dkt. No. 54 ("Opp'n") at 3 (quoting *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007)) (internal quotation marks omitted). That is exactly the case here.[2] In its opposition, the State glosses over the mountain of evidence pointing to Masters' innocence: the prosecutorial misconduct at Masters's trial, the withholding of contemporaneous witness testimony, the failure to admit exculpatory evidence, and the subsequent recantations by key trial witnesses. For each of these reasons, Masters's conviction and subsequent denials of relief were contrary to, or unreasonable applications of, established Supreme Court precedent.[3]

As the State acknowledges, the "historic meaning of habeas corpus [is] to afford relief to those whom society has grievously wronged." Opp'n at 33 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). It is hard to find a more grievous wrong than an innocent man forced to spend 32 years on death row for a crime he did not commit, and for which the evidence overwhelming proves that fact. For these reasons and those set forth below, Masters urges this Court to grant his petition for habeas relief.

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[1] See Section II of Petitioner's Opening Brief (Dkt. No. 47 ("Mot.")) for a history of the case proceedings.

[2] The State requests that a judgment be entered in its favor and that Masters's habeas petition be denied, *see* Opp'n at 33, but this is inappropriate request because the State has not filed its own motion for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c).

[3] Remarkably, the State spends the majority of its brief on reciting testimony in the record and summarizing case law, with very little argument to support their claims. *See generally* Opp'n.

II. ARGUMENT

A. The Opposition Confirms That the Exclusion of Exculpatory Evidence Was in Violation of *Chambers* and Its Progeny (Claims 1 and 2)

The pleadings establish that Masters is entitled to habeas relief because the exclusion of the confessions by Harold Richardson and Charles Drume violated clearly established law. As a threshold matter, the State's interpretation of *Chambers* is misguided and fails to account for *Cudjo v. Ayers*, 698 F.3d 752 (9th Cir. 2012)—binding precedent in this Court. Further, the State's arguments as to the credibility of the Richardson and Drume Confessions[4] and their importance to Masters's defense are equally flawed. In fact, and as described in Masters's pleadings, the Richardson Confessions bore multiple indicia of credibility and were clearly critical to Masters's case.

1. The State Misinterprets *Chambers v. Mississippi* and Ignores *Cudjo v. Ayers*

The State attempts to characterize *Chambers* as "a very fact-specific ruling tied heavily to an archaic common-law voucher rule[.]" Opp'n at 14. But the Ninth Circuit expressly rejected this interpretation of *Chambers* in *Cudjo*, a case which bears numerous factual similarities to the present case. *See* Traverse at 9. The State ostensibly has no response to *Cudjo*, and instead relies on factually inapposite cases. *See Crane*, 476 U.S. at 691 (involving a defendant who was prevented from attempting to show at trial that his confession was unreliable because of the circumstances under which it was obtained, and neither the State Supreme Court nor the prosecution "advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence"); *Holmes v. South Carolina*, 547 U.S. 319, 324–25, 329 (2006) (involving a state rule that prohibited the introduction of evidence about a third party's alleged guilt when there was strong forensic evidence implicating the defendant). This analysis should be rejected.

In *Cudjo*, the California Supreme Court upheld the exclusion of an exculpatory confession, distinguishing *Chambers* on the grounds that the witness "invoked his Fifth Amendment right, rather than the outdated voucher rule from *Chambers*." 698 F.3d at 766. In doing so, the California Supreme Court interpreted *Chambers* in the same manner that the State asks the Court to here, reasoning that

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[4] The Richardson and Drume Confessions are defined in Masters's Traverse. *See* Dkt. No. 40 ("Traverse") at 1, n. 1.

"[t]he United States Supreme Court has held that the constitutional right to present and confront material witnesses may be infringed by *general rules* of evidence . . . . However, the high court has never suggested that a trial court commits constitutional error whenever it individually assesses and rejects a material defense witness as incredible." *Cudjo*, 698 F.3d at 766. Overturning the California Supreme Court's interpretation, the Ninth Circuit expressly rejected the reasoning that the State now urges the Court to accept. The Ninth Circuit reasoned:

> It is not entirely clear what the California Supreme Court meant when it referred to "general rules of evidence." . . . It is true that many Supreme Court cases in this area of the law deal with challenges to well-established rules of evidence. However, this merely reflects the fact that these types of rules often embody the important government interest necessary to overcome a defendant's right to present a defense . . . . Thus, the typical presence of a general evidentiary rule in the cases cited by the California Supreme Court results from a requirement on the government, rather than a requirement on the defendant. ***To hold otherwise would be to turn the constitutional right to present a defense on its head.*"** *Id.* at 767 (emphasis added).

Like in *Cudjo*, the State now attempts to cabin *Chambers*'s applicability to cases involving the application of evidentiary rules, as opposed to credibility determinations. But *Chambers v. Mississippi*, 410 U.S. 284 (1973) and its progeny reach more broadly than to only such a specific subset of cases. Also like *Cudjo*, the present case is "materially indistinguishable" from *Chambers* on the facts. As in *Chambers* and *Cudjo*, here, Richardson and Drume "had allegedly previously confessed to the crime; the defense was prevented from cross-examining the alternate suspect at trial; and the trial court's application of the hearsay rules prevented the defendant's witness from testifying to the alternate suspect's confession." *Id.* at 765–67. The State nonetheless urges the Court to accept the exclusion of the Richardson and Drume Confessions as reasonable. Given that the Richardson and Drume Confessions bear significant indicia of reliability and are critical to Masters's defense, doing so would turn Masters's "constitutional right to present a defense on its head." *Id.* at 767.

2. The Opposition Fails to Demonstrate That the Exclusion of the Richardson Confessions Was Not in Violation of *Chambers* and Its Progeny (Claim 1)

i. The State's Arguments Regarding the Credibility of the Richardson Confessions Are Meritless

The State argues that it was reasonable to exclude the Richardson Confessions because Richardson confessed just over a year after Sergeant Howell Burchfield's murder and because his confessions were not sufficiently corroborated. The State's arguments are short-sighted, ignoring

material facts bearing on the credibility of Richardson's confessions. As the pleadings demonstrate, the Richardson Confessions bore multiple indicia of reliability.

First, the State places undue emphasis on the lapse of time between the Burchfield murder and the Richardson Confessions. In doing so, the State yet again fails to address why it was reasonable for the trial court to admit statements by Bobby Evans, ***made nearly four years after the murder***, but exclude statements made by Richardson. *See* Dkt. No. 1 ("Pet.") ¶ 42; Traverse at 7; Mot. at 11. As outlined in Masters's pleadings, *Chambers* and its progeny make clear that a lapse of time is not dispositive of credibility when other indicia of reliability are present. In fact, in *Cudjo*, the Ninth Circuit ruled that the exclusion of an out-of-court statement violated *Chambers* even though the excluded statement was not raised "for a long time" and was only prompted by an interview with an investigator. *Cudjo*, 698 F.3d at 760.

Second, as described in Masters's pleadings, the Richardson Confessions were corroborated by the testimony of multiple witnesses. For instance, the State does not address that the pertinent physical description provided by Rufus Willis—one of the prosecution's key witnesses—matched that of Richardson, not Masters. The State likewise downplays the fact Lawrence Woodard and Andre Johnson both testified that the Black Guerilla Family ("BGF") would not pass a weapon from the fourth tier (where Masters was housed) to the second tier. Despite the State's conjecture, it cites no testimony that the BGF would not pass a weapon *within* the second tier.

In fact, contrary to the State's assertions otherwise, Richardson's role in the murder was corroborated by Woodard and Michael Rhinehart, who both unambiguously confirmed that Richardson was involved in the murder of Burchfield, and that Masters was not. When asked if Richardson was "part of the plan," Woodard responded, "yes," and confirmed that Richardson was present at the relevant planning meetings. 4 RH 227 (AG051825). To the contrary, Woodard stated that Masters was "opposed" to the plan and that he "didn't feel it was the right thing to do." Woodard also stated that he "isolated" Masters after he voiced his opinions against the plan, and that Masters therefore was not "part of any of those discussions" involving the plan. 4 RH 223–28 (AG051820–26). Similarly, Rhinehart testified that Richardson *told him* about the plan to kill Burchfield, and Masters voted against the plan to kill Burchfield. 5 RH 317–19 (AG051915–17).

Nonetheless, the State suggests that the Richardson Confessions lack credibility because they are not perfectly consistent with the entirety of the state court record (consisting of hundreds of volumes). But these inconsistences are immaterial. For instance, Richardson's exclusion of Drume and Rhinehart from his list of coconspirators is easily explained by the fact that Richardson's confessions clearly distinguish between planners of the conspiracy and mere participants. *See* Traverse at 8. And moreover, *Cudjo* makes clear that a statement need not be perfectly consistent with the entirety of the record for its exclusion to be unreasonable. *See Cudjo,* 698 F.3d at 760–70 (granting habeas relief although statements were partially inconsistent with other evidence). Critically, the State's diversions ignore a key *consistency* across the testimony of nearly all the materials witnesses in this case, including Richardson, Drume, Woodard, Rhinehart, Evans, Johnson, and Willis: ***Jarvis Masters was not involved in the murder of Howell Burchfield***.

ii. The State's Arguments Regarding the Importance of the Richardson Confessions Are Meritless

As the pleadings demonstrate, there can be no serious dispute that the Richardson Confessions were critical to Masters' defense. *See* Pet. ¶ 41; Traverse at 10–11; Mot. at 13–14. Thus, it is no surprise that the trial court judged the Richardson Confessions as "extremely significant" to Masters, even despite the inclusion of other testimony. Pet. ¶ 83, 89; Mot. at 13–14. Nonetheless, the State attempts to distinguish *Chambers* on the grounds that "a statement that one particular person admitted involvement did not establish that Masters was not involved." Opp'n at 13. The State also argues that it was reasonable for the California Supreme Court to conclude that the Richardson Confessions "did not clearly exculpate Masters" because Richardson did not "imply or state his list of coconspirators was exhaustive." *Id.* at 7. On both accounts, the State misses the point. Masters was convicted of the very act that Richardson admitted to, such that the Richardson Confessions establish that Masters was not involved in that part of the crime—in other words, that Masters is innocent. *See* Mot. at 13–14.

For these reasons, the exclusion of the Richardson Confessions violated *Chambers* and *Cudjo*, and Masters is entitled to habeas relief on that ground.

3. The Opposition Fails to Demonstrate That the Exclusion of the Drume Confessions Was Not in Violation of *Chambers* and Its Progeny (Claim 2)

The State's arguments that the California Supreme Court properly affirmed the trial court's decisions to exclude the Drume Confessions are identical to its arguments in support of excluding the Richardson Confessions. *Compare* Opp'n at 4–16 *with id.* at 17–19. And, just as with the Richardson Confessions, *see supra* Section II.A.2, the State's arguments as to the Drume Confessions misconstrue and misapply United States Supreme Court jurisprudence.

Significantly, the State simply ignores the Drume Confessions' numerous indicia of reliability. *See* Opp'n at 17–19. As the California Supreme Court noted, the Drume Confessions are statements against penal interest. *See People v. Masters*, 62 Cal. 4th at 1058 ("The parties do not dispute Drume's . . . statements were against his penal interest."); *see also* Pet. ¶ 104; *Williamson v. United States*, 512 U.S. 594, 599 (1994) ("[R]easonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true."); *Chia v. Cambra*, 360 F.3d 997, 1004–05 (9th Cir. 2004) (citing Fed. R. Evid. 904(b)(3)) ("Self-inculpatory statements have long been recognized as bearing strong indicia of reliability."). Drume has repeatedly and consistently confessed that he, not Masters, manufactured the weapon used to kill Burchfield, Pet. ¶ 97, and has even sworn to this under penalty of perjury in an affidavit, *id.* ¶ 108.

The State also ignores the other evidence corroborating the Drume Confessions. *See Chia*, 360 F.3d at 1006 ("When a defendant seeks to introduce an out-of-court statement, the corroboration of the contents of that statement with other evidence is a factor weighing in favor of its reliability." (citing *Chambers*, 410 U.S. at 300)). For example, Drume was caught on numerous occasions making or possessing weapons like the ones he confesses to having made for Burchfield's murder. In March 1985, shortly before Burchfield's death, San Quentin authorities found weapon stock in Drume's cell. Pet. ¶ 107 (citing 17 CT 5089). And when Drume confessed to the authorities soon after Burchfield's death that he was involved in another planned attack against a second guard, Drume had additional weapons, which he turned over to the authorities. *Id.* (citing HC Pet. Ex. 4 ¶ 5).

Moreover, as with the Richardson Confessions, the fact that Drume confessed two and a half years after the murder does not indicate unreliability, *see* Opp'n at 19, both because of the Drume

Confessions' multiple other existing indicia of reliability, and especially given the State's heavy reliance on a witness (Evans) who came forward almost ***two years*** after Drume and ***four years*** after the murder. *See supra* at II.A.2.i.

Instead of refuting the indicia of reliability, the State argues that the Drume Confessions lacked credibility because of the purported inconsistencies with the Richardson Confessions. *See* Opp'n at 19. Specifically, the State argues that the Drume Confessions are contradicted by: the Richardson Confessions, the evidence regarding the metal used to make the knife, and evidence regarding BGF weapons passing protocol. *See id.* The State also argues that the lack of testimony implicating Drume in the planning or executing of the murder or indicating that Drume was the chief of security of the BGF calls into question the reliability of the Drume Confessions. *See* Opp'n at 19.[5] The alleged inconsistencies between the Richardson Confessions and the Drume Confessions, as well as between the Drume Confessions and other evidence, are not dispositive in light of the other strong indicia of reliability of the Drume Confessions (or the Richardson Confessions). And, the Drume Confessions' possible conflict with BGF protocol prohibiting the passing of weapons between tiers (which may or may not have been adhered to that night) and the fact that metal was removed from fellow inmate Carruther's bed and pieces consistent with that metal were found following the murder (which may or may not have been used in the weapon used to murder Burchfield) does not undermine all the existing indicia of reliability, and does not show that the Drume Confessions are demonstrably false to the point that Masters had no right to present his exculpatory evidence to the jury. Thus, because these inconsistencies do not demonstrate that the Drume Confessions were false, and because of their multiple indicia of reliability, they should have been admitted for consideration by the jury. *See Cudjo*, 698 F.3d at 763.[6]

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[5] The State misrepresents Woodard and Rhinehart's testimony regarding Masters being the chief of security of the BGF. The State claims that both witnesses testified that Masters was the chief of security of the BGF at the time of Burchfield's murder. But the testimony is far less definitive than that. Indeed, Woodard testified that he demoted Masters from his position as chief of security, but does not indicate when he did so. *See* AG051841, AG051932. Similarly, Rhinehart testifies only that Masters was chief of security prior to the Burchfield murder, but does not testify regarding who was chief of security at the time of the murder. *See* AG051935.

[6] Nowhere in its opposition does the State argue that the Drume Confessions would not have been critical to Masters's defense, effectively conceding this point. *See generally* Opp'n.

For these reasons, the exclusion of the Drume Confessions violated *Chambers* and *Cudjo*, and Masters is entitled to habeas relief on that ground.

B. The Opposition Confirms That the California Supreme Court's Finding Regarding Withheld Evidence from Masters Unreasonably Applied *Brady* and Its Progeny (Claim 3)

Masters has demonstrated that the prosecution withheld critical, material evidence at trial, and that the California Supreme Court's decision to the contrary was an unreasonable application of established United States Supreme Court precedent under *Brady v. Maryland,* 373 U.S. 83 (1963). *See* Mot. at 22–25. In its response, the State addresses ***none*** of the precedent that shows the Court's decision was unreasonable. *See* Opp'n at 25–31. These statements should have been admitted, just like others that were used to implicate Masters, and the jury should have been entitled to weigh the veracity.[7] Rather than refuting Masters's arguments, the State extensively quotes from the California Supreme Court's decision and repeats the Court's conclusions, noting the referee's finding that "Masters was aware of Evans's lack of credibility and had extensively urged the jury not to believe him," and asserting that the withheld evidence was not material "[g]iven the extensive cross-examination attacking Evans' credibility and the fact that the jury was made aware that Evans was given a promise of safety, and that his goal was to avoid returning to state prison, which is what occurred[.]" *Id.* at 22–23. This is an unreasonable application of established Supreme Court precedent and must be rejected.

Withheld evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75 (2012) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

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[7] It is the jury's purview to make decisions on credibility, not the State. Opp'n at 15 (quoting *Crane*, 476 U.S. at 686).

The fact that Masters was able to present *some* evidence attacking Evans's credibility does not mean the withheld evidence was unlikely to have changed the outcome. *See* Pet. ¶¶ 164–172. In fact, the opposite is true: if Masters could have presented the withheld evidence, he would have been able to more effectively show the jury why Evans was not trustworthy. *See United States v. Agurs*, 427 U.S. 97, 113 (1976) ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

The government withheld critical impeachment evidence including, but not limited to, that (1) Evans was a habitual informant who had repeatedly and consistently provided false information in the past; (2) Evans and Officer James Hahn had a pre-existing, ongoing working relationship, which included Hahn referring Evans to other government agencies for paid informant work, and that the extent of this relationship was greater than what was described at Masters's trial; (3) Hahn had promised Evans he would postpone Evans's sentencing for an unrelated conviction in exchange for his testimony against Masters, contrary to Evans's testimony otherwise; and (4) at the time of Masters's trial, Evans was one of few suspects in the unsolved San Francisco murder of James Beasley, Sr. *See* Pet. ¶¶ 125–129, 130–135, 142–153; 8 RHRT 433–34, 448–49, 453–54, 460–61 (AG052032–33, AG052047–48, AG052052–53, AG052059–60); 79 RT 17014–15, 17021 (AG031023–24, AG031030); 3 RHRT 172, 181–92 (AG051770, AG051779–90). Evans later recanted his testimony, admitting that Masters "never told him" he was involved in Burchfield's murder, he "did not know anything that linked Masters to the Burchfield murder," and, in fact, that ***he had never met Masters "at all."*** Referee Report at 5 & n.2 (emphasis added).[8]

Evans's testimony was crucial to the jury's verdict—a fact that is undisputed by the State. After nine days of deliberation, the jury reached its verdict of guilt with respect to Masters *only after requesting a "readback" of Evans's testimony.* 78 RT 16906 (AG030917); 79 RT 17082, 17093 (AG031091, AG031102). Had the jury heard the withheld impeachment evidence, the likelihood of a different verdict is more than enough to "undermine confidence in the outcome of the trial." *Smith*, 565 U.S. at 75.

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[8] The State admits that Evans "denied ever speaking to Masters or having any knowledge of his involvement in the Burchfield murder." Opp'n at 23.

Finally, the State makes no attempt to defend the Court's failure to weigh the cumulative harm caused by all of the withheld evidence. Contrary to established United States Supreme Court precedent, the California Supreme Court analyzed and dismissed each piece of evidence in isolation. *See In re Masters*, 7 Cal. 5th at 1088–89. This flawed analysis alone is enough to show that the Court's decision was an unreasonable application of *Brady*. *See Kyles*, 514 U.S. at 440–41 (holding that the Court of Appeals improperly made "a *series of independent materiality evaluations*, rather than the cumulative evaluation required by *Bagley*" where the Court of Appeals' opinion "contain[ed] repeated references dismissing particular items of evidence as immaterial" (emphasis added)); *Agurs*, 427 U.S. at 112 ("[T]he omission must be evaluated in the context of the entire record."); *United States v. Shaffer*, 789 F.2d 682, 688–89 (9th Cir. 1986) (analyzing collectively the prejudice resulting from the State's suppression of four different pieces of impeachment material). Nowhere in its response does the State argue otherwise.

For these reasons, this Court should find that the California Supreme Court unreasonably applied *Brady v. Maryland* and its progeny.

C. The Opposition Confirms That the Prosecution Knowingly Presented False Evidence at Masters' Trial Contrary to *Napue* (Claim 4)

In its Opposition, the State misconstrues Masters's *Napue v. Illinois*, 360 U.S. 264 (1959) argument in his opening motion. Specifically, the State argues Masters's *Napue* argument fails because of Masters's reliance on a pre-AEDPA decision, *Jackson v. Brown*, 513 F.3d 1057 (9th Cir. 2008), and "it is not clearly established that a police officer's knowledge of false testimony may be attribute to the prosecution under *Napue*." *See* Opp'n at 25–26. But Masters' motion argues that the prosecutors reasonably should have known that Evans gave false testimony as to his relationship with law enforcement and the benefits he received for serving as an informant, and they failed to correct it, not that Hahn's knowledge may be attributed to the prosecution under *Napue*. *See* Mot. at 20–23. Additionally, the State's argument that Masters cannot establish the knowledge element of *Napue* because he acknowledges that "the prosecution did not knowingly present false evidence" is unavailing. *See* Opp'n at 25. A *Napue* claim requires only that the prosecutors ***should have known*** that the evidence was false. *See Hayes v. Brown*, 399 F.3d 972, 984 (9th Cir. 2005). As described in

Masters's Petition and motion, there is substantial evidence in the record that prosecutors should have known of Evans's relationship with Officer Hahn and Evans's status as a career government informant who often provided false information. *See* Pet. ¶¶ 142–153; Mot. at 20–23. Indeed, Officer Hahn also admitted that in the half dozen or so cases he worked on with Evans, Evans gave Officer Hahn "more false information than true information." 8 RHRT 449:15–20 (AG052048). As the State notes in its Answer, the California Supreme Court imputed some knowledge of false evidence to the prosecution based on Officer Hahn and other investigators' knowledge of Evans, *see* Dkt. No. 30 ("Answer") at 34, and thus, the California Supreme Court unreasonably applied *Napue* when it required evidence of ***actual*** knowledge.

Finally, the State asserts the evidence was not material because "there was ample evidence at trial that provided the jury with strong reasons to question Evans's credibility and to view his testimony with caution or suspicion." *See* Opp'n at 26 (citing *In re Master*s, 7 Cal. 5th a 1078–79). But to demonstrate materiality under *Napue*, a defendant need only demonstrate there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103.[9]

Accordingly, the California Supreme Court unreasonably applied *Napue*, and Masters is entitled to habeas relief on this claim.

D. The Opposition Confirms that Masters is Entitled to Habeas Relief Because He Is Actually Innocent

1. Masters Has Made a "Truly Persuasive" Showing of Innocence Under *Herrera v. Collins*

Masters is also entitled to habeas relief because he is actually innocent. The State does not dispute that ***every*** witness with firsthand knowledge of the plan to kill Burchfield now states that Masters played no role in it. *See* Opp'n at 28. Without any current evidence to support Masters's execution, the State instead attacks the credibility of these witnesses—including its own key trial

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[9] This burden of proof is lower than what is required to establish a *Brady* violation (which Masters has also established). *See Bagley*, 473 U.S. at 682 (*Brady* violation is material when "there is a reasonable probability that . . . the result of the proceeding would have been different"). *Brady* does not require that the defendant show it is more likely than not that withheld exculpatory material affected the outcome. *Napue* requires even less.

witnesses—with delays and purported inconsistencies that are merely the result of the decades-long delay of Masters's direct appeal. *Id.* at 29–33; *see also* Pet. ¶¶ 28–29 (noting that the California Supreme Court affirmed Masters's 1990 conviction in 2016). Such arguments fall far short of the evidence that "point[ed] strongly to [the] petitioner's guilt" in *Herrera v. Collins* and cannot refute Masters's compelling showing of actual innocence. 506 U.S. 390, 418 (1993).

First, the State's arguments against Masters's actual innocence are unpersuasive for several reasons. The State relies heavily on the United States Supreme Court's decision in *Herrera*, *see* Opp'n at 27–29, but neglects to mention *Herrera*'s command that new evidence "must be considered in light of the proof of petitioner's guilt at trial[.]" 506 U.S. at 418. Here, the evidence of Masters's innocence vastly outweighs the evidence of his guilt: as noted above, ***every*** witness who was involved in the plan to kill Burchfield now supports Masters's innocence, and even the State itself emphasizes that ***its own*** "key witnesses," Willis and Evans, were "liars with highly unreliable and selective memories." Opp'n at 29 (quoting *In re Masters*, 7 Cal. 5th 1054, 1065 (2019)). Such evidence falls far short of the "two eyewitness identifications, numerous pieces of circumstantial evidence, and a handwritten letter in which petitioner . . . offered to turn himself in" in *Herrera*, and thus cannot refute Masters's showing of actual innocence. 506 U.S. at 418.

Second, the State argues that the statements supporting Masters's innocence were made "after a long delay and with no explanation." Opp'n at 30. But the record clearly explains why Masters did not immediately present the statements supporting his innocence: Masters's direct appeal was not resolved for several decades after his conviction, and Masters did not have the opportunity to present new evidence of his innocence during that process. *See Martinez v. Ryan*, 566 U.S. 1, 13 (2012) (noting that direct appeals are "without evidentiary hearings" and thus "may not be as effective as other proceedings for developing the factual basis" for claims of relief). And in any event, the State's claims of delay mischaracterizes the Richardson and Drume Confessions, which were made soon after the murder and ***before*** one of the State's own key witnesses had come forward. *See* Traverse at 21. Thus, the State's attempts to analogize the evidence supporting Masters's innocence to the "11th hour" statements in *Herrera*, 506 U.S. at 417, are unpersuasive.

Third, the State's reliance on the purported inconsistencies between the witness statements supporting Masters is also unavailing. All of the witness statements corroborate each other on the essential fact that Masters was not involved, Traverse at 25, while the alleged inconsistencies focus on ancillary aspects of the case, such as whether Masters attended certain meetings. Opp'n at 30. These inconsistencies are unsurprising in light of the decades-long delay in Masters's direct appeal, which could have caused witnesses' memories of minor details to fade. And the State's suggestion that the inconsistencies reflect the witnesses' intentional efforts to aid Masters as a "member[] of the same prison gang," Opp'n at 29 (quoting *In re Masters*, 7 Cal.5th at 1065–66), cannot explain why many of the same witnesses testified against Masters at his trial and continue to implicate other gang members or even themselves. *See* Traverse at 20–25. As a result, Masters has met even the "extraordinarily high" standard to demonstrate actual innocence under *Herrera*. 506 U.S. at 417.[10]

2. AEDPA Cannot Require the Execution of the Actually Innocent

The State also argues that Masters's actual innocence claim would be barred by AEDPA, even if he can make a sufficient showing of actual innocence. Opp'n at 27 (citing 28 U.S.C. § 2254). But this argument is contrary to United States Supreme Court precedent, which recognizes that "new substantive rules . . . apply retroactively on federal collateral review." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562 (2021). *Herrera*'s actual innocence rule is such a substantive rule, as it provides that a particular punishment—execution of the actually innocent—is "altogether beyond the State's power to impose." *Montgomery v. Louisiana*, 577 U.S. 190, 201 (2016); *compare Schlup v. Delo*, 513 U.S. 298, 314 (1995) (noting that the *Herrera* theory bars execution of the actually innocent, "even if the proceedings that had resulted in [their] conviction and sentence were entirely fair and error free") *with Welch v. United States*, 578 U.S. 120, 130 (2016) (holding that a new rule was substantive because it applied even where "impeccable factfinding procedures" were used) (quoting *United States v. U.S. Coin & Currency*, 401 U.S. 715, 724 (1971)). Thus, the principles set forth in *Herrera* relate to substantive, rather than procedural rules, and therefore should apply retroactively to Masters's case.

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[10] Further, the State's argument that the "high standard" required by *Herrera* and *Schlup* require "even more," fails to articulate what that "more" is and why Masters has not satisfied that burden. Opp'n at 28.

Moreover, AEDPA cannot bar retroactive application of the actual innocence rule. While the Ninth Circuit has interpreted 28 U.S.C. § 2254(d)(1) to limit federal *habeas* relief for retroactively applicable substantive rules, it has not considered whether such a limit is constitutional. *See Demirdjian v. Gipson*, 832 F.3d 1060, 1076 & n.12 (9th Cir. 2016). It is not; § 2254 must yield to the Constitution, which "*requires* substantive rules to have retroactive effect regardless of when a conviction became final." *Montgomery*, 577 U.S. at 200 (emphasis added); *see also id.* at 203 (holding that "a court has no authority to leave in place a conviction or sentence that violates a substantive rule"). By limiting *habeas* relief to the "governing legal principle . . . at the time the state court renders its decision," *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003), § 2254(d)(1) bars consideration of retroactively applicable new rules, which by definition cannot be in existence at the time of the original conviction. *See Chaidez v. United States*, 568 U.S. 342, 348 n.4 (2013) ("'[C]learly established' law is not 'new' within the meaning of *Teague*."). It therefore forbids the retroactive application that *Montgomery* ***requires***, and cannot constitutionally require this court to deny Masters's actual innocence claim.

III. CONCLUSION

For the foregoing reasons, Masters respectfully requests that this Court enter an order granting the writ of habeas corpus and vacating the criminal judgment and sentence entered against him, as they were contrary to, and an unreasonable application of clearly established federal law. He also asks that the Court provide such other relief as the Court may deem to be appropriate in this case.

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Respectfully submitted,
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CERTIFICATE OF SERVICE

On September 22, 2022, I electronically filed the foregoing with the Clerk of this Court by using the CM/ECF system which will send a notice of electronic filing to all persons registered for ECF. All copies of documents required to be served by Fed. R. Civ. P. 5(a) and L.R. 5-1 have been so served.

/s/ Kathryn Panish
Kathryn Panish