IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION _____

IN RE SCOTT EDGAR DYLESKI, Petitioner, v. SUPERIOR COURT OF CONTRA COSTA COUNTY, Defendant. _____/ PEOPLE OF THE STATE OF CALIFORNIA, and Office of the Attorney General Real Parties in Interest. _____/	NO. [Contra Costa Superior Court No. 5060254]

PETITION FOR WRIT OF MANDATE

After Denial of Motion for DNA Testing (Penal Code § 1405)

HONORABLE BARBARA ZUNIGA
Order dated January 8, 2013

KATHERINE HALLINAN, SBN 273902
SARA ZALKIN, SBN 223044
506 Broadway
San Francisco, CA 94133
415-986-5591

Attorneys for Petitioner
Scott Edgar Dyleski

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PETITION

TO THE HONORABLE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT:

1. Petitioner SCOTT EDGAR DYLESKI is in the custody of the California Department of Corrections and Rehabilitation. He is currently incarcerated in Salinas Valley State Prison (CDC No. F46590) in Salinas, California, by Martin Hoshino, Secretary of the California Department of Corrections and Rehabilitation, and Randy Grounds, Warden.

2. Petitioner is confined pursuant to the Judgment of the California Superior Court, County of Contra Costa, Case No. 5060254-0, serving a sentence of life without the possibility of parole for the murder of Pamela Vitale on October 15, 2005.

Petitioner did not testify. He was convicted on August 28, 2006 of first-degree murder, and was sentenced on September 26, 2006. On direct review, this Court affirmed the judgment and sentence in an unpublished opinion (A115725). The California Supreme Court denied review on August 12, 2009 (S173389). The United States Supreme Court denied *certiorari* on or about May 24, 2010. (5 CT 1729-1734; 15 RT 4300-4307.)

Petitioner requests that this Court take judicial notice of the record on file in this proceeding, which was prepared for his direct appeal.

3. This petition is brought as a separate proceeding, to challenge the denial of his motion for DNA testing pursuant to California Penal Code § 1405. However, Mr. Dyleski is actively pursuing habeas corpus relief, as detailed below, which is relevant to this Court's review of the denial of said motion.

Through present counsel, Mr. Dyleski filed a Petition for Writ of Habeas Corpus in the trial court on May 23, 2011. The petition was denied without prejudice by written order that was signed on June 16, 2011 but not served until July 13, 2011. On August 12, 2011 petitioner filed an Amended Petition that the Honorable Barbara Zuniga, who presided at trial, denied by written order of October 10, 2011.

On December 28, 2011, counsel filed a new habeas petition in this Court (A134128). After informal briefing, the petition was summarily denied by order of July 2, 2012. Petitioner requests that this Court take judicial notice of the petition and accompanying exhibits.

On October 1, 2012, counsel presented a new habeas petition to the California Supreme Court, pursuant to that court's original jurisdiction, along with an Application for Permission to File an Oversized Brief in Excess of 14,000 Words. On October 2, 2012, the Court granted the Application. The new petition was approximately 277 pages, and included 40 exhibits (S205700). That petition is still pending.

On October 16, 2012, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of California (No. CV 12-05336 SI). However, Petitioner requested that his federal petition be held in abeyance while he exhausts his remedies in the California state courts. That request was granted on November 8, 2012.

4. The procedural history of the Motion for DNA Testing Pursuant to Penal Code § 1405 is as follows:

Petitioner filed his moving papers and exhibits thereto on June 11,

2012, in which he sought access to three items of physical evidence for forensic analysis by his expert, Dr. Edward Blake, at Petitioner's expense. In the alternative, he expressly requested a hearing, pursuant to Penal Code § 1405(e). (See Exhibit 1, Motion for DNA Testing Pursuant to Penal Code § 1405 and accompanying exhibits therewith (hereinafter "Motion for DNA Testing").)

The District Attorney filed an opposition on July 16, 2012. (See Exhibit 2, Opposition.)

On July 23, 2012, the trial court ordered the District Attorney to provide all the laboratory reports, underlying data and laboratory notes prepared in connection with the DNA testing, pursuant to Penal Code § 1405(d), by August 6, 2012. (See Exhibit 3, Unreported Minute Order, dated July 23, 2012.)

On August 2, 2012, the court extended the deadline at the prosecution's request (which Petitioner did not oppose) to August 20, 2012. Further, the court directed Petitioner to file his reply, if any, to the opposition by August 27th, and stated that its decision as to whether a hearing would be necessary would be made by September 24, 2012, and that such a hearing, if required, would be held on October 5, 2012. (See Exhibit 4, Unreported Minute Order, dated August 2, 2012.)

Petitioner filed a reply to the district attorney's opposition on or about August 24, 2012. (See Exhibit 5, Reply to Opposition.)

On November 8, 2012, the Court denied the request for a hearing, and proclaimed its anticipation of reaching a decision no later than

December 3, 2012. (See Exhibit 6, Unreported Minute Order, dated November 8, 2012.)

On November 30, 2012, the Court issued another order, apologizing for the delay but "overwhelmed" by a current trial, and advised that the court hoped to have a ruling on file by the end of December. (See Exhibit 7, Unreported Minute Order, dated November 30, 2012.)

The Decision/Order denying the motion for DNA testing was filed on December 27, 2012. (See Exhibit 8, Decision/Order, dated December 27, 2012.) On January 8, 2013, the Court issued another minute order, noting corrections to the Decision/Order. (See Exhibit 9, Decision/Order, dated January 8, 2013 (hereinafter "Decision/Order") and Exhibit 10, Unreported Minute Order, dated January 8, 2013.)

5. As set forth herein, and argued in the accompanying memorandum, the trial court abused its discretion in denying this motion.

Within its own four corners, the written denial is irrational and capricious. The Court failed to apply the presumption that the results of the DNA testing would be favorable to the Petitioner, contrary to *Richardson v. Superior Court* (2008) 43 Cal. 4th 1040, 1047.

The trial court's interpretation of Penal Code §1405(f), which confers discretion to consider evidence not presented at trial, is confusing and inconsistent. At the same time, the trial court improperly conflated the methods of review used to evaluate a petition for writ of habeas corpus and that required by Penal Code §1405, relying heavily upon its previous denial of Mr. Dyleski's Petition for Writ of Habeas Corpus to deny this motion.

Furthermore, the Court repeatedly misstates and improperly manipulates Petitioner's arguments, thereby failing to exercise the honest analysis necessary to the proper exercise of discretion. Petitioner believes these failures by the Court stem from the cognitive bias in favor of the Petitioner's guilt that is apparent throughout the fifteen-page denial.

6. Petitioner presented the following to the trial court in support of his motion:

"To date, post-conviction DNA testing has exonerated 280 people in the United States, 17 of whom had been sentenced to death. On average, each spent 13 years in custody for crimes that they did not commit. Including California, 48 states provide for post-conviction DNA testing." (See Exhibit 1, Motion for DNA Testing, at 3, citing: www.innocenceproject.org.)

Penal Code § 1405(a) authorizes a person who has suffered a felony conviction and is currently incarcerated to seek post-conviction DNA testing. Petitioner meets both criteria.

Penal Code § 1405(c)(1)(A) - (E) lists additional requirements.

The moving party must: "Explain why the identity of the perpetrator was, or should have been, a significant issue in the case." California Penal Code § 1405(c)(1)(A).

The identity of the perpetrator was unequivocally at issue here. The prosecutor conceded at sentencing, "ID was the defense." (See Exhibit 1, Motion for DNA Testing, at 6.)

There was no evidence that Mr. Dyleski was acquainted with Ms.

Vitale or had ever been inside her residence. A wealth of circumstantial evidence - most of which was not presented at trial - indicated that the perpetrator was someone known to Ms. Vitale, who was comfortable in and familiar with the home. There was no evidence of forced entry, and the perpetrator possibly used a key to re-enter the home mid-attack; no evidence of theft; apparent blood in the bathroom shower suggests its use by the perpetrator; a bloody bowl and mug located next to and in the sink respectively, meaning that the perpetrator spent some time tidying up; a pair of bloody glasses found neatly folded on the television evinced a degree of intimacy and care inconsistent with a stranger. The evidence indicated the killer was not in any particular hurry that Saturday. How would Mr. Dyleski know whether someone was going to arrive at any moment? (See Exhibit 1, Motion for DNA Testing, at 6-7.)

Mr. Dyleski had a strong alibi, which his counsel neglected to investigate. There was no scientific time of death investigation. Time of death was based on computer activity and statements made by Ms. Vitale's husband, Daniel Horowitz. (See Exhibit 1, Motion for DNA Testing, at 7; see also Exhibit 5, Reply to Opposition, at 5-6.)

The prosecution's primary theory of motive was that Mr. Dyleski entered the home as part of a credit card fraud scheme with the intent to obtain financial information - except that no items were taken, including a purse and a laptop computer in plain view. An alternative theory involved the recent death of a dog belonging to Petitioner's family, after the dog was run over by another neighbor a few weeks prior. Perhaps, the prosecutor

argued, Mr. Dyleski meant to kill *that* neighbor, but got the address wrong. (See Exhibit 1, Motion for DNA Testing, at 7.)

Petitioner maintains his innocence. His fingerprints were not found at the scene. The only evidence presented to link him to the scene pertains to one of the items he seeks to retest (item 3-10), and an alleged partial shoe print comparison. However, by its very nature, a shoe print cannot establish identity. Nor did item 3-10, the foot swab. Even accepting the stated results from the analysis of item 3-10 does not mean that Petitioner was the source of the male DNA found in the mixed sample. Rather, the evidence established only that he *could not be excluded* as a potential contributor. (See Exhibit 1, Motion for DNA Testing, at 7-8.)

Identity was unequivocally at issue in this case, where there was no confession; no eyewitness; no relationship with the victim; no apparent motive; no history of violence; a strong defense of alibi, and scant, problematic physical evidence that did not place Mr. Dyleski at the scene. (See Exhibit 1, Motion for DNA Testing, at 10.)

The moving party must also: "Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction." California Penal Code § 1405(c)(1)(B). (See Exhibit 1, Motion for DNA Testing, at 10.)

Assessing reasonable probability requires the Court to evaluate "the weight of trial evidence in relation to DNA testing presumably favorable to

petitioner." *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047. In other words, the court must assume that the results of the DNA testing would be favorable, and then assess whether, in light of the trial evidence, it is reasonably probable that favorable DNA testing would have resulted in a better outcome for the accused. (See Exhibit 1, Motion for DNA Testing, at 10-11.)

Petitioner seeks to retest item 3-10, the only forensic evidence that purportedly placed him at the crime scene, and to have tested - for the first time - bloody paper products found in the kitchen trash, that would provide critical evidence tending to identify the actual perpetrator (item 1-113). (See Exhibit 1, Motion for DNA Testing, at 11.)

The testing of item 3-10 was problematic. Mr. Stockwell processed and conducted the initial analysis on behalf of the Contra Costa County Sheriff's Department. He later sent a portion of the sample from item 3-10 to the Serological Research Institute (SERI), for Y-STR DNA analysis. (See Exhibit 1, Motion for DNA Testing, at 8.)

At least four distinct issues pertaining to item 3-10 raise concern as to the validity of the results:

(1) A contaminant identified as male DNA was present during the preliminary testing of item 3-10. There was no effort to determine the source of the contaminant, as time was of the essence. Instead, Mr. Stockwell simply replaced the kit. This was not the first instance of contamination at this laboratory. (See Exhibit 1, Motion for DNA Testing, at 8.)

(2) The replacement kit Mr. Stockwell used was beyond its expiration date. He explained: "[W]e typically would not use a kit past its expiration date. However, it's fine for research purposes, and is why we don't just dispose of them. They are expensive. Each kit costs about $1,000. In this case, I went back and did additional testing to revalidate that kit, even though it was past its expiration date. It was still capable of performing **minimally** for the purpose intended. (See Exhibit 1, Motion for DNA Testing, at 9.)

(3) There were inconsistencies in the quantity of DNA reported in the sample. At SERI, Mr. Harmor obtained a result that was substantially different than that reported by Mr. Stockwell, and was concerned. Upon contact, Mr. Stockwell said that he was pressed for time and "pushing through as many samples as possible." (See Exhibit 1, Motion for DNA Testing, at 8.)

(4) There was evidence of "saturation," which can create "false peaks" or "artifacts" and may lead to unreliable and subjective data. Mr. Stockwell denied saturation at the preliminary hearing, then conceded it at trial. (See Exhibit 1, Motion for DNA Testing, at 9.)

The evidence could not establish whether or not Mr. Dyleski was the male contributor to the mixture present in item 3-10. The statistical probability of inclusion was 1 out of 43,000 Caucasians. Considering the astronomical statistical probabilities that can be reached through genetic testing, which often reach into the quadrillions, the prosecutor's representation of a "match" was disingenuous. **["I think you**

understand now that the DNA from the bottom of her foot, the male DNA, the Y DNA, is in fact the DNA of Pamela's killer."] Thus, the DNA evidence was both troubling and inconclusive. (See Exhibit 1, Motion for DNA Testing, at 9-10.)

Criminalist Taflya collected stained tissues and paper towels from the kitchen trash of the Vitale/ Horowitz household, including two tissues that reacted when chemically screened for blood. These items were found on the top of the garbage can. These items were collected and labeled as items 1-113 and 1-113a. These items have not been tested for DNA evidence. (See Exhibit 1, Motion for DNA Testing, at 14.)

Bloody tissues found on the top of the garbage can at a crime scene such as this are likely to contain the DNA of the perpetrator. Based on the apparent presence of blood, it is highly likely that those tissues were used by the perpetrator. The only other possibility is that Ms. Vitale used and disposed the tissues. However, considering the nature of the attack, it seems unlikely that such an opportunity would arise. (See Exhibit 1, Motion for DNA Testing, at 14.)

If those paper towels were found to contain the DNA of someone other than Ms. Vitale and Mr. Dyleski, it would be highly probative of the identity of the actual killer. Indeed, due to the way they are packaged, an unused tissue or paper towel is unlikely to contain the DNA of another person, until it is removed for use. Tissues and paper towels are typically rubbed against a person's skin, and therefore are good sources to examine for DNA evidence. Forensic analysis will likely reveal the presence of

DNA foreign to Petitioner, which would be highly probative and material to his exoneration. (See Exhibit 1, Motion for DNA Testing, at 14-15.)

Thus, in light of all the evidence, the anticipated results from the requested DNA testing would raise a reasonable probability that the outcome would have been more favorable had those results been available at the time of conviction. (See Exhibit 1, Motion for DNA Testing, at 15.)

Mr. Dyleski's ineffective assistance claim, based on evidence outside the trial record, is inexorably intertwined with the materiality and reasonable probability analysis. Penal Code § 1405(f)(5) provides that "[t]he court in its discretion may consider any evidence whether or not it was introduced at trial." (See Exhibit 5, Reply to Opposition, at 4.)

The evidence of third party culpability, that was not presented at trial, is compelling. Mr. Dyleski had no prior relationship with Ms. Vitale. It is widely accepted that most murder victims know their killer, and that the investigation therefore should begin at home. Her husband, Daniel Horowitz, was the last person to see her and the first to report the murder. (See Exhibit 5, Reply to Opposition, at 5.)

The detectives who interviewed Mr. Horowitz on the night of the murder honed in on some key details (e.g. that the killer was comfortable in and familiar with the home). Andrew Cohen, a friend of Mr. Horowitz (and a San Francisco Police Department Officer at the time), was allowed to visit with him at the station. The recording shows Mr. Cohen's skepticism regarding some of the details in the story Horowitz told (e.g. why there would be blood on the exterior of the front door). (See Exhibit 5, Reply to

Opposition, at 5.)

Despite the apparent inconsistencies and questionable statements in the hours after the murder was reported by Mr. Horowitz, the investigation quickly focused on Mr. Dyleski, due to the contemporaneous investigation of an adolescent credit card scheme in which he was involved. (See Exhibit 5, Reply to Opposition, at 5.)

On direct appeal, this Court previously summarized the evidence presented against Petitioner at trial as follows: opportunity, because he had left home that morning and may not have returned until approximately thirty minutes after the possible time of death; when he returned there were recent scratches and "gouge marks" on his face, and his right hand and wrist were swollen; his involvement in a credit card scheme using information stolen from neighbors; a piece of paper was found in his desk months after his arrest that included the words "knock out" and "kill;" his unusual statements in the days following the murder and concern that his DNA might be found on the body; a duffle bag that had belonged to him was found in an old van near his home, containing items on which Ms. Vitale's DNA was present; a pair of his shoes were found to have Ms. Vitale's DNA on them and the pattern matched a print found at the crime scene. (See Exhibit 1, Motion for DNA Testing, at 12.)

Although the evidence, when considered together, may seem persuasive, it is coincidental, non-direct, and subject to alternate reasonable explanations. (See Exhibit 1, Motion for DNA Testing, at 12-13.)

The prosecutor repeatedly emphasized item 3-10 in closing

argument: "[T]he only DNA under Pamela Vitale's fingernails was Pamela Vitale's. But that's not true of her feet. And her right foot was exposed, including her toenails. And when I talk about DNA, I hope you understand the import of that now, that's physical evidence at the scene." (See Exhibit 1, Motion for DNA Testing, at 13.)

The prosecutor argued that item 3-10 identified the actual killer: "I think you understand now that the DNA from the bottom of her foot, the male DNA, the Y DNA, is in fact the DNA of Pamela's killer." (See Exhibit 1, Motion for DNA Testing, at 13.)

The importance of item 3-10 is obvious. Unlike Richardson, where defense counsel presented two expert witnesses regarding the physical evidence at issue (hair comparison), Petitioner's appointed trial counsel did not conduct any independent testing nor present any expert testimony. (See *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1045.) Assuming a favorable result, there would not be a single piece of evidence linking Mr. Dyleski to the crime scene. In light of the circumstantial nature of the remaining evidence against Mr. Dyleski, debunking the only evidence arguably linking Mr. Dyleski to the crime scene would raise a reasonable probability of a more favorable outcome. (See Exhibit 1, Motion for DNA Testing, at 13-14.)

Thus, in light of all the evidence, the anticipated results from the requested DNA testing would raise a reasonable probability that the outcome would have been more favorable had those results been available at the time of conviction. (See Exhibit 1, Motion for DNA Testing, at 15.)

The third statutory requirement is to "identify both the evidence that should be tested and the specific type of DNA testing sought." California Penal Code § 1405(c)(1)(C).

Petitioner seeks to retest item 3-10 (foot swab from the bottom of Ms. Vitale's right foot); and items 1-113 and 1-113a, bloody paper towels and tissues collected from the kitchen trash at the crime scene. (See Exhibit 1, Motion for DNA Testing, at 15.)

The requested forensic examination would involve short tandem repeat (STR) testing of said items. Generally, STR testing involves replication of the sample, through the polymerase chain reaction (PCR). The combined process is referred to as PCR-STR testing. It may also be necessary to conduct Y-STR analysis, which is suited for mixed samples that contain DNA from both male and female contributors, from which the male component is isolated. In this case, item 3-10 was reportedly a mixture containing DNA from Ms. Vitale and at least one male contributor. Proper retesting of item 3-10 may require Y-STR analysis in light of its prior use in this case. (See Exhibit 1, Motion for DNA Testing, at 15-16.)

Fourth, the moving party must: "Reveal the results of any DNA or other biological testing that was conducted previously by either the prosecution or defense, if known." California Penal Code § 1405(c)(1)(D).

The only DNA testing conducted to date was that requested by the prosecution, reported as follows.

Item 1-42: Bloodstain on Mirror in "Shack": A bloodstain found in a shack located next to the Vitale home, occupied by a Mr. Wheeler,

underwent PCR-STR analysis. The odds that an individual unrelated to Mr. Wheeler would share that DNA profile were 1 out of 61 quintillion among Caucasians. (See Exhibit 1, Motion for DNA Testing, at 16.)

Item 3-10: Bloodstain from Ms. Vitale's Right Foot: PCR-STR testing reportedly yielded a mix of female and "a trace level of" male DNA. The female profile matches that of Ms. Vitale. Petitioner was a potential source. Assuming a single contributor for the partial male profile, the statistical probability of such a match would be 1 in 43,000 Caucasians.

This sample was then provided to SERI for further testing, using new Y-STR technology. Petitioner could not be excluded as the contributor. There was no other "match" found in the 3,561 male profiles included in the Y-STR database maintained by Applied Biosystems, Inc. (See Exhibit 1, Motion for DNA Testing, at 16.)

Item 13-9: Black Duffel Bag: Two apparent blood stains (items 13-9-1 and 13-9-2) found on the exterior of a black duffel bag found in the Toyota van near Petitioner's residence were tested. Both stains were found to be a mixture, with a predominant female component and a trace male component. Ms. Vitale was the likely source. The statistical probability of such a match was 1 in 13 quadrillion. Although Mr. Dyleski was found to be a potential contributor to the minor component of 13-9-1, "the strength of this inclusion is limited due to the limited profile." The statistical probability of another person with the same DNA profile as the minor contributor was 1 out of 560 Caucasians. (See Exhibit 1, Motion for DNA Testing, at 17.)

Item 13-9-2 provided a "weak and degraded profile." Ms. Vitale was a potential contributor, but because the profile only contained nine STR loci, and the sample was weak and degraded, the strength of the inclusion was diminished. The statistical probability of an individual having such a DNA profile was estimated to be 1 in 98 Caucasians. No conclusion was reached as to whether Mr. Dyleski's profile was present. However, at least one allele was observed that did not match either Ms. Vitale or Mr. Dyleski. (See Exhibit 1, Motion for DNA Testing, at 17.)

Item 13-9B: Glove: A black right-hand glove found in the black duffel bag was swabbed in four separate locations: two on the exterior and two interior (items 13-9B1 and 13-9B2; items 13-9B3 and 13-9B4, respectively). Ms. Vitale was the likely source of the DNA found in items 13-9B1, 2, and 3. The statistical probability was 1 in 13 quadrillion among Caucasians. (See Exhibit 1, Motion for DNA Testing, at 18.)

13-9B4 was a mixture of male and female DNA. Ms. Vitale was the likely source of the major female component, with the statistical probability of such a profile being one in one hundred billion among Caucasians. Petitioner was excluded as a possible source of the minor component. (See Exhibit 1, Motion for DNA Testing, at 18.)

Item 13-9C: Balaclava: A balaclava found in the duffel bag was tested in six areas, including four "bloodstains" and two "background DNA cuttings" (Items 13-9C1-6). Ms. Vitale was the likely source of the four bloodstains, with a statistical probability of 1 out of 13 quadrillion. Petitioner was the likely source of item 13-9C2, a background DNA sample

taken from the mouth area of the mask. The statistical probability of such a profile was one in 780 trillion among Caucasians. Item 13-9C6 was a degraded DNA mixture; neither Ms. Vitale nor Petitioner could be excluded as potential contributors, but three alleles were foreign to both of them. (See Exhibit 1, Motion for DNA Testing, at 18-19.)

Item 13-9D: Black Long-Sleeve Shirt: Of five stains collected from the black shirt found in the duffel bag, only one provided DNA typing results. Mr. Dyleski was the likely source of that stain (item 13-9D3), with a statistical probability of such a profile being 1 in 780 trillion Caucasians. (See Exhibit 1, Motion for DNA Testing, at 18.)

Item 22-1: Land's End Shoes: Four stains from shoes reportedly owned by Mr. Dyleski were examined, and three provided DNA typing results. Ms. Vitale was found to be the likely contributor to two of these stains (items 22-1H and 22-1P), with a statistical probability of 1 in 13 quadrillion Caucasians. The third stain was a "degraded DNA mixture profile comprised of at least three individuals." Although both Ms. Vitale and Mr. Dyleski could not be excluded as potential contributors, the complexity of the mixture coupled with the degraded nature of the profile "greatly diminished" the strength of these conclusions. (See Exhibit 1, Motion for DNA Testing, at 19.)

Item 87-1: Folding Knife: A swab taken from a folding knife (item 87-1D) owned by Mr. Dyleski provided a degraded profile, that contained the DNA of at least three individuals. Ms. Vitale was not a potential contributor. (See Exhibit 1, Motion for DNA Testing, at 19-20.)

Item 1-1A: Water Bottle From Crime Scene: Two swabs were taken from the mouth of a water bottle that was found at the scene with blood stains on it (items 1-1A1 and 1-1A2). Both swabs yielded a profile consistent with Ms. Vitale, with a statistical probability of 1 out of 13 quadrillion Caucasians. Both samples also contained a trace component profile that contains at least one male contributor. Petitioner could not be excluded as a potential contributor, although the statistical probability was only 1 in 7 for Caucasian males. Jena Reddy, Joe Lynch, Gerald Wheeler, and Daniel Horowitz were excluded. (See Exhibit 1, Motion for DNA Testing, at 20.)

Item 1-2A1: Lance Burton Mug from Crime Scene: Item 1-2A1, a mug found in the sink with apparent blood stains, was swabbed. It contained a mixture of a major male profile and trace profile of at least one other person. The major contributor matched Daniel Horowitz, with a statistical probability of one in 70 billion among Caucasians. Neither Ms. Vitale or Mr. Dyleski could be excluded as potential contributors to the trace component. (See Exhibit 1, Motion for DNA Testing, at 18.)

Item 102B1: Art Institute Mug from the Scene: Another mug found at the scene only provided a degraded major female component and a trace profile of at least one male. The major component was consistent with Ms. Vitale (1 in 100 billion Caucasians). Petitioner was excluded as the contributor of the trace profile; Mr. Horowitz was not excluded. (See Exhibit 1, Motion for DNA Testing, at 20-21.)

Items 1-4, 1-5, 1-15, and 1-29: Blood Stains from the Scene: Each of

the blood stains from the crime scene were attributed to a single female source and matched Ms. Vitale's DNA profile. No foreign DNA was detected. (See Exhibit 1, Motion for DNA Testing, at 21.)

Items 3-12 and 3-13: Fingernail Scrapings: Each of the fourteen samples taken from Ms. Vitale's fingernails were attributed to her, with no foreign DNA reportedly detected. (See Exhibit 1, Motion for DNA Testing, at 21.)

Item 3-28: Swabs from Ms. Vitale's Rings: Four swabs were taken from the rings worn by Ms. Vitale. All were found to contain a DNA profile consistent with Ms. Vitale. One contained a trace female component profile that did not match any known references. (See Exhibit 1, Motion for DNA Testing, at 21.)

Finally: "State whether any motion for testing under this § previously has been filed and the results of that motion, if known." California Penal Code § 1405(c)(1)(E). This is Petitioner's first such motion. (See Exhibit 1, Motion for DNA Testing, at 21.)

7. California Penal Code § 1405(f) provides that the court "shall" grant the motion if it determines all of the following have been established:

> (1) The evidence to be tested is available and in a condition that would permit the DNA testing requested in the motion.
>
> (2) The evidence to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced or altered in any material aspect.
>
> (3) The identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

(4) The convicted person has made a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator....

(5) The requested DNA testing results would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction. The court in its discretion may consider any evidence whether or not it was introduced at trial.

(6) The evidence sought to be tested meets either of the following conditions:

(A) The evidence was not tested previously.

(B) The evidence was tested previously, but the requested DNA test would provide results that are reasonably more discriminating and probative of the identity of the perpetrator...or have a reasonable probability of contradicting prior test results.

(7) The testing requested employs a method generally accepted within the relevant scientific community.

(8) The motion is not made solely for the purpose of delay.

(Penal Code § 1405(f)(1)-(8).) (See Exhibit 1, Motion for DNA Testing, at 22-23.)

As for Penal Code §1405(f)(1) and (f)(2), Petitioner averred, that, to his knowledge, the evidence sought to be tested is available and in a condition to be tested, and that it has been subject to a sufficient chain of custody. (See Exhibit 1, Motion for DNA Testing, at 22-23.)

Penal Code §1405(f)(3) requires a finding that identity was, or should have been a significant issue in the case. As detailed above, and in the accompanying memorandum, Petitioner has made this showing, especially with respect to the "should have been" clause. (See Exhibit 1, Motion for DNA Testing, at 24.)

Penal Code §1405(f)(4) requires "a prima facie showing that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator." As set forth above, and in the accompanying memorandum, Petitioner has met this requirement. (See Exhibit 1, Motion for DNA Testing, at 24-26.)

Petitioner contends that the requested tests "would raise a reasonable probability that, in light of all the evidence, the convicted person's verdict or sentence would have been more favorable if the results of DNA testing had been available at the time of conviction." Penal Code § 1405(f)(5). (See Exhibit 1, Motion for DNA Testing, at 26.)

Item 3-10 was the only evidence arguably linking Petitioner to the crime scene, and was critical to the prosecution's case. Thus, controverting the claim that his DNA was obtained in the swab the bottom of the victim's foot - where there is no other evidence physically linking him to the crime scene - would have likely resulted in a more favorable outcome at trial. The bloody tissues (1-113) were likely used by the perpetrator to clean up after the crime, and thus the expected presence of a third party's DNA on that item, to wit, Mr. Horowitz, would be highly probative of the killer's identity, and would likely have raised a reasonable doubt as to Mr. Dyleski's guilt. (See Exhibit 1, Motion for DNA Testing, at 26-27.)

False evidence is considered substantially material or probative "if there is a 'reasonably probability' that, had it not been introduced, the result would have been different. *See In re Sassounian* (1995) 9 Cal.4th 535, 546. "[A] 'probability' in this context does not mean more likely than not, but

merely a *reasonable chance*, more than an *abstract possibility*." *People v. Soojian* (5th Dist. 2010) 190 Cal.App.4th 491, *citing People v. Watson* (1956) 46 Cal.2d 818, 837. (See Exhibit 1, Motion for DNA Testing, at 27-28.)

At issue in *Soojian* was the denial of defendant's motion for new trial based on new evidence. The stated basis for denial was "that Soojian was required to establish that the new evidence would have resulted in a different verdict, i.e., the new evidence made it reasonably probably that an objective jury" would have found him "not guilty." *See id.* at 518. This was error, because the inquiry should have been whether the new evidence "made it reasonably probable that a single juror would have found him not guilty, thus causing a hung jury." *See id.* at 519. (See Exhibit 1, Motion for DNA Testing, at 27-28.)

While this is a motion for post-conviction DNA testing, and *Soojian* concerned a motion for a new trial (Penal Code § 1181), the reasoning applies with equal force. (See Exhibit 1, Motion for DNA Testing, at 28.)

Pursuant to Penal Code §1405(f)(6), the items sought for testing must either not have been tested previously or the testing sought must be "reasonably more discriminating and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results." (See Exhibit 1, Motion for DNA Testing, at 28.)

Petitioner has set forth the previous results pertaining to item 3-10, above, to which he adds that:

The first injection was below the threshold diagnostic level; in other words, it was an insufficient sample. Mr. Stockwell performed additional manipulations on the sample and subjected it to further injections in order to increase the intensity and raise the minor component to the machine's threshold. However, this caused saturation with two peaks. The evidence was inconclusive as to whether or not Mr. Dyleski was the male contributor in the item 3-10 sample. The statistical probability of inclusion was 1 out of 43,000 Caucasians. Considering the astronomical statistical probabilities that are possible with genetic technology, which often reach into the quadrillions, representing this statistic as a "match" is disingenuous. Thus, the forensic evidence was both troubling and inconclusive. (See Exhibit 1, Motion for DNA Testing, at 29-30.) Accordingly, independent review of item 3-10, as recommended by Dr. Edward Blake, Petitioner's expert, would be reasonably probable to result in a more positive outcome. At a minimum, assuming a favorable result, the integrity and reliability of this physical evidence would be properly challenged for the first time. (See Exhibit 1, Motion for DNA Testing, at 8-14.)

Items 1-113 and 1-113A were never analyzed for DNA, but a presumptive screen for the possible presence of blood took place. Two tissues were presumptively positive for blood (1-113A). To Petitioner's knowledge, there was no further testing. (See Exhibit 1, Motion for DNA Testing, at 30.)

The final criteria are readily met, and not disputed, to wit, that "[t]he testing requested employs a method generally accepted within the relevant

scientific community; and that "[t]he motion is not made solely for the purpose of delay." California Penal Code §§1405(f)(7) and (f)(8), respectively. (See Exhibit 1, Motion for DNA Testing, at 30-31.)

8. The California Supreme Court has pronounced that "the standard of review of a trial court's ruling on a § 1405 motion is abuse of discretion." *Richardson v. Superior Court* (2008) 43 Cal. 4th 1040, 1047.

9. The Court's denial contains a number of inaccuracies. In its denial, the Court stated that the motion was made in furtherance of a writ currently pending in the First District Court of Appeal. "However, the Court of Appeal denied the writ on July 11, 2012." (See Exhibit 10, Decision/Order, at 2.) Although this is literally true, in fact, at the time the Court's denial was issued, as today, Petitioner had writs pending in two separate courts (the California Supreme Court and the United States District Court for the Northern District of California). Moreover, the requested DNA testing, while clearly relevant to the pending Petitions, is an independent proceeding, not directly tied to any currently pending, or previously denied petitions, and as such, the success or failure of said petitions should not determine the outcome of the request for DNA testing. See Penal Code § 1405(m) (" Notwithstanding any other provision of law, the right to file a motion for postconviction DNA testing provided by this section is absolute and shall not be waived.")

10. The Court wrote: "Petitioner references language from *Osborne v. Dist. Atty's Office for the Third Judicial* (9th Cir. 2008) 521 F.3d 1118 to argue the focus of a *Penal Code § 1405* motion is whether a defendant is

entitled to develop exculpatory evidence and not whether a defendant is entitled to ultimate relief based on the results. The principle of law is correct. However, *Osborne, Ibid.* was reversed by the United States Supreme Court in *Osborne v. Dist. Atty's Office for the Third Judicial* (2009) 557 U.S. 52." (See Exhibit 10*,* Decision/Order, at 2.)

This overlooks the fact that the *Osborne* citation was a quote from *Richardson v. Superior Court* (2008) 43 Cal. 4th 1040. (See Exhibit 5, Reply to Opposition, at 9.) Regardless, the United States Supreme Court's opinion did not change the law, as the court concedes: "[t]he principle of law is correct." (See Exhibit 10*,* Decision/Order, at 2.) See also *Osborne, supra*, 553 U.S. at 66.

11. Next, the court unfairly states: "Nevertheless, Petitioner continues to argue incompetence of counsel issues *must* be considered by this Court in determining whether the evidence sought to be tested is 'material.'" (See Exhibit 10, Decision/Order, at 2 [emphasis added].)

"Petitioner maintains *Penal Code* § 1405(f)(5), specifically, the language 'The court, in its discretion, may consider any evidence whether or not it was introduced at trial,' allows this Court to consider incompetence of counsel claims to put the present motion in context. However, Petitioner has not cited any case law that supports this interpretation of the statute nor could the Court find any such authority." (See Exhibit 10, Decision/Order, at 2-3.)

Petitioner points to the plain language of the subsection quoted above as the very authority for his claim. Penal Code § 1405(f)(5)

unambiguously confers the court's discretion to "consider **any** evidence whether or not it was introduced at trial."

12. The court's refusal to exercise the discretion plainly conferred by the statute constitutes an abuse of discretion. **"A refusal to exercise discretion is itself an abuse of discretion."** *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62-63 [emphasis added.]. Thus, the court's dismissal of the Petitioner's accurate statement of the law, i.e., that the statute permits the Court to consider evidence not presented at trial, and its refusal to review such evidence, was an abuse of discretion.

13. The court emphasized its previous rejection of "many of the same claims of incompetence argued in this motion in the previous writ proceeding," and took judicial notice as such. (See Exhibit 10, Decision/Order, at 3.) In this fashion, the court itself jumbled the principle at issue in *Osborne*, as quoted by *Richardson*, and left undisturbed by the United States Supreme Court. In other words, the court uses its previous denial of habeas corpus relief to justify its refusal to exercise discretion, yet the standards are different (developing exculpatory evidence versus entitlement to ultimate relief).

14. Petitioner contends that the court's cognitive bias against him, demonstrated by repeated reference to the "overwhelming evidence" against him, supports his abuse of discretion claim. The error is apparent from the court's treatment of Penal Code § 1405(f)(3), to wit, that "the identity of the perpetrator was, **or should have been,** a significant issue." (See Exhibit 10, Decision/Order, at 3 [emphasis added].) The relevance of Petitioner's

ineffective assistance claims in the context of the present motion is precisely that - identity of the perpetrator should have been a significant issue, because **glaring signs pointed to the victim's husband, Daniel Horowitz.**

15. Penal Code § 1405 "requires us to review...whether the trial court correctly determined petitioner failed to establish that, 'in light of all the [trial] evidence,' the 'requested DNA testing results would raise a reasonable probability'" of a more favorable result. *Richardson, supra,* 43 Cal. 4th at 1047.

"Because this determination is necessarily based upon the trial court's judgment - that is, its evaluation of the weight of trial evidence in relation to DNA testing **presumably favorable** to petitioner - its decision is a discretionary, rather than a ministerial, one." *Id.* [Emphasis added.] Mr. Dyleski submits that the trial court failed to apply the presumption of favorable results, and thereby abused its discretion. Instead, the court concludes: "Petitioner has failed to establish the requested DNA testing results would raise a reasonable probability that, in light of all the evidence, his verdict would have been more favorable....There is no DNA test that can counter the overwhelming evidence of Petitioner's guilt." (See Exhibit 10, Decision/Order, at 15.) Such invective ignores the nature of the request to test the bloody paper towels and tissues from the kitchen trash, and re-test a critical, yet unreliable, item of evidence used heavily by the prosecution in its case-in-chief against Mr. Dyleski, the results of which, **presumably favorable**, would weigh heavily against the prosecution's case (by

excluding Mr. Dyleski and implicating Mr. Horowitz, and removing a key item of inculpatory evidence). (See Exhibit 1, Motion for DNA Testing, at 13-14, 24; Exhibit 10, Decision/Order, at 5.)

16. The court took issue with petitioner's argument that the prosecution conceded identity was at issue in the trial. (See Exhibit 10, Decision/Order, at 4.) (Petitioner notes the correct citation is 15 RT 4291; Exhibit 1, Motion for DNA Testing, at 5.) Rather, said the court, the citation "is actually to trial counsel's argument as to what the defense in the case was. The prosecution did not concede identity was an issue. See prosecution's opening statement and closing arguments. Regardless, identity was disputed." (See Exhibit 10, Decision/Order, at 4.)

17. Next, the court proclaims that "[g]iven the overwhelming evidence against Petitioner...it is difficult to find the requested evidence material to the issue of identity. However, under [*Richardson*], the requested evidence, in the abstract, is relevant." (See Exhibit 10, Decision/Order, at 4.)

18. In the section entitled "Reasonable Probability," the court paraphrases petitioner's arguments in a cursory and incomplete fashion, for ease of disposal. For instance: "First, Petitioner argues there was no direct evidence linking him to the crime scene other than DNA evidence from Vitale's foot. (Item 3-10.)" (See Exhibit 10, Decision/Order at 5.)

The actual argument read: "None of petitioner's fingerprints were found at the scene. The only evidence *presented to link* him to the scene pertained to the same item for which access is sought for retesting (item 3-

10), and an alleged partial shoe print comparison. However, by its very nature, a shoe print cannot establish identity. Nor did item 3-10, the foot swab. *Even accepting the stated results from the analysis of item 3-10 does not mean that petitioner was the source of the male DNA found in the mixed sample. Rather, the evidence established only that he could not be excluded as a potential contributor.*" (Exhibit 1, Motion for DNA Testing, at 7 [emphasis added].) Petitioner has consistently maintained his innocence, and has never agreed that any physical evidence linked him to the scene; rather, his argument pertained to the only evidence "presented to link him to the scene."

The Court never addressed the relevance of the evidence sought to be tested, consistent with the presumption of favorability. Rather, the Court applied just the opposite presumption, to wit: that because the Court believes the evidence of guilt is so overwhelming, it was highly unlikely that there would be such a positive result. (See Exhibit 1, Motion for DNA Testing, at 5-15.) A failure to apply the proper legal burden is an abuse of discretion. "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principled governing the subject of its action . . ." *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737 (internal quotations omitted).

Petitioner requested to retest item 3-10, citing to numerous issues with the original testing, including issues with contamination, inconsistent quantification findings, possible saturation, and the use of an expired kit. (Exhibit 1, Motion for DNA Testing, at 8-9.) Instead of assuming a

favorable result, as legally required, (here, a successful challenge to the physical evidence, believed to be unreliable) the Court insisted that there were no issues with the testing of item 3-10. (See Exhibit 10, Decision/Order, at 10-12.) Thus, instead of addressing the significance had a favorable result been established at trial, the Court insisted that no such finding was possible, because the results were reliable. This directly contradicts the standard the Court is supposed to apply to Petitioner's request. "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." *Jacobs*, *supra*, 156 Cal.App.4th at 737 (internal quotations omitted). Thus, the Court's refusal to apply the presumption of a favorable outcome was an abuse of discretion.

The Court entirely ignores the evidence presented that item 3-10 was significantly relied upon by the prosecutor at trial. Indeed, Mr. Jewett stated in closing that item 3-10 actually identified the killer: **"I think you understand now that the DNA from the bottom of her foot, the male DNA, the Y DNA, is in fact the DNA of Pamela's killer."** (Exhibit 1, Motion for DNA Testing, at 9.) This was not the only mention of item 3-10 made in the prosecution's closing argument. (See Exhibit 1, at 12.) However, the Court points to another comment by Mr. Jewett in closing that "this was not a DNA case," in order to downplay the significance of item 3-10 to Petitioner's conviction. (Exhibit 10, Decision/Order, at 10.) Although it is true that the case against Mr. Dyleski did not entirely rest on DNA, to claim that the only item of evidence placing Mr. Dyleski himself at the

scene of the crime, repeatedly emphasized by the prosecution in closing argument, somehow carried no significance to the verdict is disingenuous.

However, most critically, the Court entirely failed to consider the significance of a favorable challenge to item 3-10. Given that identity was at issue, as conceded by the Court, and the extent to which the prosecution emphasized item 3-10, a reasonable probability of a more favorable result is manifest. Moreover, the significance of such an outcome is even more profound when considered in conjunction with the Petitioner's claims in his habeas corpus petition: that there was substantial evidence that a third party, namely the victim's husband, Daniel Horowitz, was in fact guilty of the crime. When considered in conjunction with the additional evidence of third party culpability, the significance of a successful challenge to item 3-10 is apparent, and the Court's refusal to consider that the testing could prove favorable to the Petitioner amounts to an abuse of discretion.

Further error is shown in the Court's total failure to address Petitioner's argument that testing of the second category (the bloody tissues and paper towels), would be favorable to Petitioner. In fact, the Court makes no mention of this item in its discussion of the reasonable probability prong. The Court's utter failure to apply the standard required under *Richardson* cannot be considered a proper exercise of discretion.

19. Noting, at least in part, some evidence offered by Petitioner that was not introduced at trial, the decision nevertheless misstated another of Petitioner's argument as follows: "In support of his argument the victim knew her killer, Petitioner claims there was no evidence of forced entry into

the Vitale/Horowitz home. Petitioner argues the killer probably used a key to re-enter the home mid-assault. Brent Turvey's supplemental report, Exhibit 2-3, and RT 1927 are cited in support of these contentions. [Paragraph] However, at page 1927 of the trial transcript Alex Taflya, one of the criminalists..., is describing blood smears he observed on the exterior of the front door....This evidence does not support Petitioner's argument the killer re-entered the home with a key much less that there was no forced entry." (See Exhibit 10, Decision/Order, at 5-6.)

The evidence of bloody smears on the door, and the hypothesis based on the position of said blood smears that the perpetrator may have re-entered the home mid- or post-attack, was not proffered as evidence of a lack of forced entry. Rather, it is circumstantial evidence that the perpetrator was familiar with and comfortable in the home (sufficiently comfortable that he did not flee immediately post-attack), and may in fact have had access to a key.

The lack of forced entry, however, has never been contested. There was no damage to the door or the lock; no broken windows or torn screens; and no evidence was presented at trial to suggest forced entry. Thus, the court erred in dismissing petitioner's argument by conflating two separate arguments, and then rejecting evidence as not proving a point that petitioner never set out to prove. This sort of manipulation of facts and distortion of petitioner's argument cannot be considered a proper exercise of judicial discretion.

20. "In addition, Petitioner argues a bloody bowl and mug found

next to the kitchen sink indicates the killer tidied up after the murder; bloody glasses found folded on the television evidence 'a degree of intimacy and care inconsistent with a stranger'; apparently [sic] blood in the bathroom shower suggests it was used by the killer. Petitioner claims all these circumstances indicate the killer was comfortable in the home and also infers [sic] Vitale knew her killer." (See Exhibit 10, Decision/Order, at 6.) The court rejects the expert opinion underlying the above considerations as "based on speculation" and ignoring the physical evidence in the case. (See Exhibit 10, Decision/Order, at 6.)

21. Petitioner submits that it is the trial court who is ignoring the physical evidence - presumed favorable to him - in refusing his expert access to the bloody paper towels/tissues (Item 1-113, 1-113a) and the foot swab (Item 3-10). Dr. Edward Blake, who is one of the top forensic DNA experts in the country, is standing by.

22. Moreover, the physical evidence referenced and dismissed as "speculation" above, did not go unnoticed by the prosecutor, who had argued to the trial court (regarding the dispatch recording):

> Dan Horowitz was Pamela Vitale's husband. He was the last one to see her alive that Saturday morning, and discovered her body Saturday evening. He had some blood on his clothing at the time he was originally contacted by Sheriff's deputies, and some of his clothing bearing blood was found near Ms. Vitale's body. His DNA was found on a broken coffee cup in the kitchen sink that also had a blood smear on it. He was relatively composed at the time the deputies first contacted him, talking on a cell phone to various people he had apparently called before the Sheriff's deputies arrived, including Sheriff's Dispatch (non-emergency). (3 CT 873.)
>
> ***
>
> [T]here is no question that the husband of a deceased woman, last to see her alive, with his DNA inside the residence, including a broken cup, which has her blood on it, is going to

be raised, whether the defense specifically brings out third-party culpability or not. (1 RT 9.)

23. "Petitioner claims there was no evidence supporting the prosecution's theory the killer entered the home to obtain financial information as nothing was taken from the home." (See Exhibit 10, Decision/Order, at 6-7.) Petitioner understands that "[n]othing needs to be taken" for a burglary to occur, and that it is "the intent with which entry is made." (Ibid. at 7.) The intended point was in the context that a felony murder (burglary) with no forced entry, and no property taken, supports Petitioner's claim that identity was *or should have been* at issue. The requested DNA analysis would raise a reasonable probability of a more favorable result had the anticipated evidence - which must be presumed favorable - been presented. See Penal Code § 1405(f)(5).

24. Real parties in interest are the People of the State of California, who prosecuted the petitioner in the court below, and who opposed the Penal Code § 1405 motion; and the Office of the Attorney General.

25. All of the above-named parties are properly joined as parties directly affected by the proceedings below. All of the proceedings concerning this petition have occurred within the territorial jurisdiction of respondent court and this court.

26. Petitioner has a clear, present, and substantial right to the performance of respondent's duty to rule properly on the motion for DNA testing and is beneficially interested in the outcome of the motion.

27. Petitioner has performed all conditions precedent to the filing of this petition.

28. Petitioner has no plain, speedy, or adequate remedy at law other than through this petition.

29. This petition is made to this court in the first instance pursuant to Penal Code § 1405(j).

30. No other petition for writ of prohibition or mandate has been filed in the instant case.

31. The accompanying memorandum of points and authorities and exhibits support petitioner's contentions.

WHEREFORE, Petitioner prays for:

1. A writ of mandate pursuant to California Code of Civil Procedure § 1085, instructing the respondent court to reconsider the Motion for DNA Testing; and/or

2. For such other and further relief as this court may deem proper.

Dated: January 14, 2013

KATHERINE HALLINAN
SARA ZALKIN
Attorneys for Petitioner
SCOTT EDGAR DYLESKI

VERIFICATION

I, SARA ZALKIN, declare:

I am an attorney licensed to practice in the State of California and have my professional office located at 506 Broadway, San Francisco, California 94133. I am one of the attorneys of record for petitioner, SCOTT EDGAR DYLESKI herein.

I have read the foregoing petition and know the contents thereof to be true based upon my representation of the petitioner.

I make this verification because the facts set forth in said petition are within my knowledge and I am more familiar with such facts than is the petitioner herein

Petitioner is unable to make the verification because he is incarcerated in a county other than that in which I have an office and is geographically remote.

I am authorized to file this petition for writ of mandate on Petitioner's behalf.

All facts alleged in the above document, not otherwise supported by citations to the record, exhibits or other documents, are true of my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on January 13, 2013, at San Francisco, California.

SARA ZALKIN

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

Petitioner, Scott Dyleski, is currently serving a sentence of life without the possibility of parole for the murder of Pamela Vitale. In Contra Costa Superior Court, Petitioner filed a Motion for DNA Testing Pursuant to Penal Code § 1405 and exhibits thereto on June 11, 2012, seeking access to three items of physical evidence for forensic analysis by his expert, Dr. Edward Blake, at Petitioner's expense. In the alternative, he requested a hearing, pursuant to Penal Code § 1405(e). (See Exhibit 1, Motion for DNA Testing Pursuant to Penal Code § 1405 and accompanying exhibits therewith (hereinafter "Motion for DNA Testing").)

The Court denied the motion for DNA testing on December 27, 2012. (See Exhibit 8, Decision/Order, dated December 27, 2012.) On January 8, 2013, the Court issued a minute order, noting corrections to the Decision/Order. (See Exhibit 9, Decision/Order, dated January 8, 2013 (hereinafter "Decision/Order") and Exhibit 10, Unreported Minute Order, dated January 8, 2013.) As set forth herein, the trial court abused its discretion in denying this motion.

ARGUMENT

I.

PETITIONER MET HIS BURDENS PURSUANT TO CALIFORNIA PENAL CODE § 1405.

Penal Code § 1405(a) contains a number of requirements that must be met to obtain access to evidence for post-conviction DNA testing. Petitioner has done so in his motion for DNA testing.

The motion must:

(A) Explain why the identity of the perpetrator was, or should have been, a significant issue in the case.

(B) Explain, in light of all the evidence, how the requested DNA testing would raise a reasonable probability that the convicted person's verdict or sentence would be more favorable if the results of DNA testing had been available at the time of conviction.

(Penal Code § 1405(c)(1)(A)-(B).)

The statute also requires a petitioner to include a variety of technical items in the motion, such as identifying the items to be tested and the type of testing sought (Penal Code § 1405(c)(1)(C)); the results of any previous testing (Penal Code § 1405(c)(1)(D)); and whether any motion under section 1405 has previously been brought. (Penal Code § 1405(c)(1)(E).) Petitioner delineated each of the required items in his motion. (See Exhibit 1, Motion for DNA Testing.)

A. The Identity of the Perpetrator Was a Significant Issue at Trial.

Penal Code § 1405 (C)(1)(A) requires a showing that the identity of the perpetrator of the crime was, or should have been, a significant issue in the case.

The identity of the perpetrator was unequivocally at issue here, as the Court conceded in its decision. (See Exhibit 10, Decision/Order, at 4.) Although the Court conceded this point, it is necessary to reiterate the evidence that identity was at issue. It provides the context required to

understand the significance of the items Petitioner is seeking to test, as well as the Court's abuse of discretion, discussed below. It is because the identity of the killer was so controversial that a favorable result of the testing sought herein would have had a reasonable probability of causing a more favorable result at trial.

There was no evidence that Mr. Dyleski was acquainted with Ms. Vitale or had ever been inside her residence. Yet, a wealth of circumstantial evidence - most of which was not presented at trial - indicated that the perpetrator was someone known to Ms. Vitale, and was comfortable in and familiar with the home.

As explained in the Motion for DNA Testing:

> For example, there was no evidence of forced entry, and the perpetrator possibly used a key to re-enter the home mid-attack; no evidence of theft; there was apparent blood in the bathroom shower, suggesting its use by the perpetrator; a bloody bowl and mug were found next to and in the sink respectively, from which one must infer that the perpetrator spent some time tidying up; a pair of bloody glasses found neatly folded on the television evinced a degree of intimacy and care inconsistent with a stranger. The evidence indicated the killer was not in any particular hurry, although it was the weekend (Saturday). How would Mr. Dyleski or any stranger know whether someone was going to arrive at any moment?

(Exhibit 1, Motion for DNA Testing, at 6 [internal citations omitted].)

Moreover, there was no viable motive presented by the prosecution to explain why a sixteen-year-old boy with no history of violence would murder his neighbor to whom he had no connection:

> Although the prosecution mostly relied on the

> theory that Mr. Dyleski entered the home as part of a credit card fraud scheme with the intent to obtain financial information, this theory was belied by the fact that no items were taken, including a purse and a laptop computer, which were both in plain view. The prosecution spun other theories that bordered on the bizarre, including one that the murder was motivated by Mr. Dyleski's anger over the death of his dog, who had been run over by another neighbor, Karen Schneider, weeks prior. Perhaps, the prosecutor argued, Mr. Dyleski meant to kill Ms. Schneider, but got the address wrong.

(Exhibit 1, Motion for DNA Testing, at 7 [internal citations omitted].)

Other circumstances also bring the identity of the perpetrator, and thus Petitioner's guilt, into question, including that Petitioner had an alibi for the time of the killing, he never confessed to the crime, and there were no eyewitnesses. (Exhibit 1, at 7.)

Instead, the prosecution relied on circumstantial evidence and on limited forensic evidence that was weak at best. For example, none of Petitioner's fingerprints were found at the scene, and only item 3-10, which we have sought to re-test, and an alleged partial shoe print comparison, placed Mr. Dyleski at the scene of the crime. (Exhibit 1, at 7.) Moreover, the testing of item 3-10 was highly problematic, and was riddled with potential errors. (Exhibit 1, at 8-9.)

Identity was unequivocally at issue in this case, where there was no confession; no eyewitness; no relationship with the victim; no apparent motive; no history of violence; and scant, problematic physical evidence that did not place petitioner at the scene.

B. The Requested DNA Testing Is Likely to Raise a Reasonable Probability of a More Favorable Outcome Had it been Known at Trial.

The DNA testing sought is likely to raise a reasonable probability of a more favorable outcome had the results been available at trial. Although the Court grudgingly conceded materiality of the items sought for testing to the issue of identity, the Court found that there was not a reasonable probability of a more favorable outcome, as "[t]here is no DNA test that can counter the overwhelming evidence of Petitioner's guilt." (Exhibit 10, Decision/Order, at 15.) However, as will be discussed further below, the Court failed to apply the presumption of favorable results, and thus did not apply the proper legal standard required under applicable case law. When appropriately considered, the testing sought would result in a more favorable outcome.

Assessing reasonable probability requires the Court to evaluate "the weight of trial evidence in relation to DNA testing presumably favorable to petitioner." *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047. In other words, the court must assume that the results of the DNA testing would be favorable to the petitioner, and then assess whether, in light of the trial evidence, it is reasonably probable that the favorable DNA testing would have resulted in a better outcome for the accused.

> [T]he moving defendant is required only to demonstrate that the DNA testing he or she seeks would be relevant to the issue of identity, rather than dispositive of it. That is, the defendant is not required to show a favorable test would conclusively establish his or her innocence. It would be sufficient for the defendant to show that the identity of the

> perpetrator of, or accomplice to, the crime was a controverted issue as to which the results of DNA testing would be relevant evidence.

Id. at 1049.

"[A] 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*." *People v. Soojian* (5th Dist. 2010) 190 Cal.App.4th 491, *citing People v. Watson* (1956) 46 Cal.2d 818, 837.

Petitioner seeks to retest item 3-10, the only forensic evidence that purportedly placed him at the crime scene, according to the prosecution's argument, and to have tested - for the first time - bloody paper products found in the kitchen trash, that would provide critical evidence tending to identify the actual perpetrator.

i. Item 3-10: Swab from Ms. Vitale's Right Foot

Item 3-10 was the only forensic evidence allegedly linking Mr. Dyleski himself to the crime scene. This evidence, as presented, was extremely prejudicial, because the most that could be said is that Mr. Dyleski could not be excluded as a male contributor, yet, the prosecutor misrepresented this evidence by telling the jurors that it contained Mr. Dyleski's DNA. When a sample of this item was provided to an outside laboratory to conduct a more sophisticated analysis than that available to the Sheriff (Y-STR), Mr. Harmor obtained a different result in determining how much DNA was available to test. Also, there was evidence of contamination in the initial testing of this item by Mr. Stockwell. Accordingly, independent review of item 3-10, as recommended by Dr.

Edward Blake, petitioner's expert, would be reasonably probable to result in a more positive outcome. At a minimum, assuming a favorable result, the integrity and reliability of this physical evidence would be properly challenged for the first time. (See Exhibit 1, Motion for DNA Testing, at 8-14.)

Leaving aside Petitioner's dispute as to the reliability and significance of item 3-10, the evidence against Mr. Dyleski was entirely circumstantial. On direct appeal, this Court summarized the evidence presented at trial in affirming the judgment and conviction in an unpublished opinion (A115725) as follows: opportunity to commit the crime, because he had left home that morning and may not have returned until approximately thirty minutes after the possible time of death; when he returned there were recent scratches and "gouge marks" on his face, and his right hand and wrist were swollen; his involvement in a credit card scheme using information stolen from neighbors; a piece of paper was found in his desk months after his arrest that included the words "knock out" and "kill;" his unusual statements in the days following the murder and concern that his DNA might be found on the body; a duffle bag that had belonged to him was found in an abandoned van near his home, containing items on which Ms. Vitale's DNA was present; a pair of his shoes were found to have Ms. Vitale's DNA on them and the pattern matched a print found at the crime scene.

Although the evidence, when considered together, may seem persuasive, there is nothing that directly ties Mr. Dyleski to the scene of the

crime, other than item 3-10 as presented. Indeed, the prosecutor repeatedly emphasized item 3-10 in closing argument, going so far as to argue that item 3-10 "is in fact the DNA of Pamela's killer." (Exhibit 1, Motion for DNA Testing, at 12.)

Thus, the importance of item 3-10 is obvious. If it were found that the evidence presented was false, there would not be a single piece of direct evidence arguably linking Mr. Dyleski to the crime scene. Moreover, item 3-10 is the very item of evidence that the prosecution claimed identified the actual killer, so if it was found to not identify Petitioner, logic indicates that another individual must have killed Ms. Vitale. In light of the circumstantial nature of the case against Mr. Dyleski, independent analysis of this mysterious and controversial item of physical evidence would establish a reasonable probability of a more favorable outcome.

ii. Items 1-113: Paper Towels and Bloody Tissues

Stained tissues and paper towels, labeled as items 1-113 and 1-113a, were collected from the top of the garbage can in the kitchen of the Vitale/ Horowitz household, including two tissues that reacted positively when chemically screened for blood (presumptively positive for blood). (Exhibit 1, Motion for DNA Testing, at 13.) These items have never been tested for DNA evidence.

Bloody tissues found on the top of the garbage can at a crime scene such as this would be expected to contain the DNA of the perpetrator. Based on the apparent presence of blood, it is highly likely that those tissues were used by the perpetrator. The only other possibility is that Ms. Vitale

used and disposed the tissues. However, considering the nature of the attack, it seems unlikely that such an opportunity would arise.[1]

If those paper towels were found to contain the DNA of someone other than Ms. Vitale and Mr. Dyleski, it would be highly probative of the identity of the actual killer. Indeed, due to the way these paper products are packaged, an unused tissue or paper towel is unlikely to contain the DNA of another person, until it is removed for use. Tissues and paper towels are typically rubbed against a person's skin, and therefore are good sources to examine for DNA evidence. Thus, forensic analysis will likely reveal the presence of DNA foreign to Petitioner, which would be highly probative and material to his exoneration.

Thus, in light of all the evidence, the anticipated results from the requested DNA testing would raise a reasonable probability that the outcome would have been more favorable had those results been available at the time of conviction.

II.

THE COURT ABUSED ITS DISCRETION BY IGNORING THE PRESUMPTION OF A FAVORABLE OUTCOME OF THE DNA TESTING SOUGHT, AND CONSEQUENTLY ERRED IN ITS ASSESSMENT OF REASONABLE PROBABILITY.

The Court failed to apply the presumption that the results of the DNA testing would be favorable to the Petitioner, contrary to *Richardson v. Superior Court* (2008) 43 Cal. 4th 1040, 1047. Assessing reasonable

[1] Indeed, even if the tissues were found to only contain Ms. Vitale's DNA, this would also strengthen petitioner's argument that the perpetrator was no stranger.

probability requires the Court to evaluate "the weight of trial evidence in relation to DNA testing presumably favorable to petitioner." *Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047. In other words, the court must assume that the results of the DNA testing would be favorable to the petitioner, and then assess whether, in light of the trial evidence, it is reasonably probable that the favorable DNA testing would have resulted in a better outcome for the accused.

> [T]he moving defendant is required only to demonstrate that the DNA testing he or she seeks would be relevant to the issue of identity, rather than dispositive of it. That is, the defendant is not required to show a ***favorable test*** would conclusively establish his or her innocence. It would be sufficient for the defendant to show that the identity of the perpetrator of, or accomplice to, the crime was a controverted issue as to which the results of DNA testing would be relevant evidence.
>
> *Id.* at 1049 (emphasis added).

Here, the Court never addressed the relevance of the evidence sought to be tested if the testing proved favorable. In fact, the Court applied the exact opposite presumption, discussing instead that, because the Court believes the evidence of guilt is so overwhelming, it was highly unlikely that there would be such a positive result. (See Exhibit 1, Motion for DNA Testing, at 5-15.) A failure to apply the proper legal burden is an abuse of discretion. "The discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principled governing the subject of its action . . ." *People v. Jacobs* (2007) 156 Cal.App.4th 728, 737 (internal quotations omitted).

Petitioner sought testing for item 3-10, citing to numerous issues with the original testing, including contamination, inconsistent

quantification findings, possible saturation, and the use of an expired kit. (Exhibit 1, Motion for DNA Testing, at 8-9.) Instead of assuming a favorable result, as legally required (here, a successful challenge to the physical evidence, believed to be unreliable), the Court insisted that there were no issues with the testing of item 3-10. (See Exhibit 10, Decision/ Order, at 10-12.) Thus, instead of addressing the significance had such unreliability been shown at trial, the Court insisted that no such finding was possible, because the results were reliable. This directly contradicts the standard the Court is supposed to apply to Petitioner's request. "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." *Jacobs*, *supra*, 156 Cal.App.4th at 737 (internal quotations omitted). Thus, the Court's refusal to apply the presumption of a favorable outcome was an abuse of discretion.

Additionally, the Court entirely ignores the evidence presented that item 3-10 was significantly relied upon by the prosecutor at trial. Indeed, Mr. Jewett stated in closing that item 3-10 actually identified the killer: **"I think you understand now that the DNA from the bottom of her foot, the male DNA, the Y DNA, is in fact the DNA of Pamela's killer."** (Exhibit 1, Motion for DNA Testing, at 9.) This was not the only mention of item 3-10 made in the prosecution's closing argument. (See Exhibit 1, at 12.) However, the Court points to another comment by Mr. Jewett in closing that "this was not a DNA case," in order to downplay the significance of item 3-10 to Petitioner's conviction. (Exhibit 10,

Decision/Order, at 10.) Although it is true that the case against Mr. Dyleski did not entirely rest on DNA, to claim that the only item of evidence placing Mr. Dyleski at the scene of the crime, repeatedly emphasized by the prosecution in closing argument, carried no significance to the verdict is disingenuous.

However, most critically, the Court entirely failed to consider the significance of a favorable challenge to item 3-10. Given that identity was at issue, as conceded by the Court, and the extent to which the prosecution emphasized item 3-10, a reasonable probability of a more favorable result is manifest. Moreover, the significance of such an outcome is even more profound when considered in conjunction with the Petitioner's claims in his habeas corpus petition: that there was significant evidence that a third party, namely the victim's husband, Daniel Horowitz, was in fact guilty of the crime. When considered in conjunction with the additional evidence of third party culpability, the significance of a successful challenge to item 3-10 is apparent, and the Court's refusal to consider that the testing could prove favorable to the Petitioner amounts to an abuse of discretion.

Further error is shown in the Court's total failure to address Petitioner's argument that testing of the second category (the bloody tissues and paper towels), would be favorable to Petitioner. In fact, the Court makes no mention of this item in its discussion of the reasonable probability prong. The Court's utter failure to apply the standard required under *Richardson* cannot be considered a proper exercise of discretion.

III.

THE COURT ARBITRARILY ADDRESSED LIMITED PORTIONS OF PETITIONER'S CLAIMS, MISSTATED PETITIONER'S ARGUMENTS, AND RELIED HEAVILY ON ITS PREVIOUS DENIAL OF HIS HABEAS CORPUS PETITION, DESPITE DIFFERENT STANDARDS, IN DENYING THE MOTION.

The trial court's interpretation of Penal Code § 1405(f), which confers discretion to consider evidence not presented at trial, is confusing and inconsistent. At the same time, the trial court improperly conflates the methods of review used to evaluate a petition for writ of habeas corpus and that required by Penal Code § 1405, relying heavily upon its previous denial of Mr. Dyleski's Petition for Writ of Habeas Corpus to deny this motion.

Furthermore, the Court repeatedly misstates and manipulates Petitioner's arguments, thereby failing to exercise the honest analysis necessary to the proper exercise of discretion. Petitioner believes these failures by the Court stem from the cognitive bias in favor of the Petitioner's guilt that is apparent throughout the fifteen-page denial.

A. The Court Improperly Ignores the Plain Language of Penal Code § 1405(f)(5).

The Court rejects the plain language of Penal Code § 1405(f)(5), which provides that "[t]he court in its discretion may consider any evidence whether or not it was introduced at trial." The Court, instead, states that it will not consider Petitioner's ineffective assistance of counsel claims, because Petitioner has not cited any authority that the Court may consider such claims. (Exhibit 10, Decision/Order, at 3.) However, the very language of the statute itself supports this interpretation, as it states that a court "may

consider **any** evidence . . .” Penal Code § 1405(f)(5). The Court’s refusal to consider such evidence as a result of ignoring this plain and unequivocal language is an abuse of discretion. **“A refusal to exercise discretion is itself an abuse of discretion.”** *Morris v. Harper* (2001) 94 Cal.App.4th 52, 62-63 [emphasis added].

Mr. Dyleski’s ineffective assistance claim, based on evidence both in and outside the trial record, is inexorably intertwined with the materiality and reasonable probability analysis. Indeed, the request for testing cannot be adequately weighed without considering the larger context of Petitioner’s arguments of ineffective assistance. Identity was the key issue in this case. Defense counsel was ineffective in failing to investigate the plethora of information that would have amounted to a strong defense of third party culpability, and Scott Dyleski was prejudiced thereby. If any of the testing sought herein was found to not implicate Mr. Dyleski, but rather Mr. Horowitz, the significance of such a finding cannot be understated. Divorcing the present request for access to DNA testing from the substance of petitioner’s arguments as to the errors that led to his wrongful conviction deprives the court of a full understanding of the purpose of the request, and is not required under the statute or applicable case law.

B. The Court Abuses Its Discretion by Relying on Its Own Denial of Petitioner’s Writ of Habeas Corpus and by Misconstruing Petitioner’s Arguments.

Although the Court rejects the plain language of Penal Code § 1405(f)(5), it goes on to cherry pick some evidence presented by Petitioner

in support of his claim of ineffective assistance, misstates Petitioner's arguments in regards to those items of evidence, and relies on its own denial of the Petition for Writ of Habeas Corpus to reject such evidence, despite differing standards.

For example, Petitioner asserted in his motion that the evidence indicated the killer was familiar with the victim, and comfortable in her home:

> For example, there was no evidence of forced entry, and the perpetrator possibly used a key to re-enter the home mid-attack; no evidence of theft; there was apparent blood in the bathroom shower, suggesting its use by the perpetrator; a bloody bowl and mug were found next to and in the sink respectively, from which one must infer that the perpetrator spent some time tidying up; a pair of bloody glasses found neatly folded on the television evinced a degree of intimacy and care inconsistent with a stranger. The evidence indicated the killer was not in any particular hurry, although it was the weekend (Saturday).

(Exhibit 1, Motion for DNA Testing, at 6 [internal citations omitted].)

The Court seized on the argument of no forced entry, and argued that the evidence of blood on the outside of the door did not support such a theory. (Exhibit 10, Decision/Order, at 6.) Yet, the Court conflates two separate arguments: one, that there was no evidence of forced entry, which supports a theory that the perpetrator was known to the victim, and two, that there were blood smears on the outside of the door, including the dead bolt, which indicates the perpetrator may have re-entered the home mid-attack. These are two separate arguments that both support a finding that the killer was someone known to the victim (such that she let him in, or he was already inside at the time of the attack) and comfortable in the home (such

that he would have a key). Thus, the Court's claim that the blood smears on the exterior of the door "does not support Petitioner's argument . . . that there was no forced entry," is misleading, as that evidence was not proffered to support that argument.

The Court then rejects all of the other items of evidence presented in support of the claim the killer was someone familiar to Ms. Vitale by a cursory rejection of a report by Brent Turvey, a crime scene analyst whose report the Petitioner relied upon in his petition, pointing to the Court's own denial of the Petition for Writ of Habeas Corpus. "Brent Turvey's opinion . . . is based on sheer speculation and without foundation, a finding this Court previously made in the Writ proceeding. Nothing has changed." (Exhibit 10, Decision/Order, at 6 [internal citations omitted].)

However, something has changed, that is, the Petitioner's burden in the two respective proceedings. Here, Petitioner is only seeking access to specific samples of physical evidence for the purpose of analysis by his retained expert, Dr. Edward Blake. The fact that what is sought is not relief, but rather simply access to evidence, is relevant to the analysis and should be directly considered in the court's determination:

> [I]t is important for the trial court to bear in mind that ***the question before it is whether the defendant is entitled to develop potentially exculpatory evidence and not whether he or she is entitled to some form of ultimate relief such as the granting of a petition for habeas corpus based on that evidence.*** As the Ninth Circuit observed in an analogous decision, 'Obtaining post-conviction access to evidence is not habeas relief.' (*Osborne v. Dist. Atty's Office or Third Judicial* (9th Cir. 2008) 521 F.3d 1118, 1132 [defendant has limited due process right to semen and two hairs for postconviction DNA testing].) Therefore, the trial court does not, and should not, decide whether, assuming a DNA test

> result favorable to the defendant, that evidence in and of itself would ultimately require some form of relief from the conviction.

See Richardson, *supra*, 43 Cal. 4th at 1051 (emphasis added).

Thus, considering the two different standards, it was an abuse of discretion for the Court to rely on its denial of the Petitioner's habeas corpus petition to deny the petitioner's request to develop potentially exculpatory evidence.

The Court proffered a similarly misleading argument in regards to Petitioner's argument that nothing was taken from the home. (See Exhibit 1, Motion for DNA Testing, at 6; Exhibit 10, Decision/Order, at 7.) This fact was offered to support Petitioner's claims that the perpetrator was known to the victim and that the prosecution lacked a coherent theory as to Petitioner's motive, which was that Petitioner went to the home to obtain credit card information. The Court apparently incorrectly believed that Petitioner was asserting that there was no evidence of burglary: "Petitioner's argument is based on an erroneous understanding of the law regarding burglary. Nothing needs to be taken. What is crucial is the intent with which entry is made." (Exhibit 10, Decision/Order, at 7.) Petitioner in no way refutes the elements of burglary, but rather is asserting that the proffered motive, which might loosely be described as burglary, was not supported by the evidence. This manipulation of Petitioner's argument cannot be considered an honest exercise of discretion on the part of the Court.

Indeed, this repeated and blatant misstatement of Petitioner's

arguments by the Court seems to stem from the Court's apparent cognitive bias in favor of Petitioner's guilt. The Court repeatedly refers to the "overwhelming evidence" against Petitioner. (Exhibit 10, Decision/Order, at 4, 15.) In fact, the Court acknowledges how difficult it is for it to consider the evidence fairly: "Given the overwhelming evidence against Petitioner . . . it is difficult to find the requested evidence material to the issue of identity." (Exhibit 10, Decision/Order, at 4.) It is all too easy to understand why a trial judge who has overseen the conviction of a 17-year-old boy for murder, and chosen herself to sentence him to life without the possibility of parole, would have difficulty accepting that some very egregious errors may have occurred on her watch. However, this is the reality that judges all over the country must face as an increasing number of wrongful convictions are revealed. Unfortunately, here, this cognitive bias has resulted in an abuse of discretion, and erroneously denied Petitioner the simple right to access evidence, in order that he may have that evidence tested, at his own expense. It is difficult to imagine what countervailing interest may be so great that it is worth the risk that denying Mr. Dyleski access to such evidence will prevent him from proving his innocence and finally obtaining the justice that has been so long denied.

CONCLUSION

Because the Court failed to properly exercise its discretion, this Court must mandate the Court to properly review the present request for DNA testing pursuant to Penal Code § 1405, and permit Petitioner access to the sought-after evidence to allow for DNA testing.

Dated: January 14, 2013

Respectfully submitted,

KATHERINE HALLINAN
SARA ZALKIN
Attorneys for Petitioner
SCOTT EDGAR DYLESKI

CERTIFICATE OF COMPLIANCE

I hereby certify that this document, including both the Petition and the accompanying Memorandum of Points and Authorities, was word processed, is monospaced, and contains approximately 13,959 words.

SARA ZALKIN

PROOF OF SERVICE

The undersigned declares:

I am a citizen of the United States. My business address is 506 Broadway, San Francisco, California 94133. I am over the age of eighteen years and not a party to the within action.

On the date set forth below, I caused a true copy of the foregoing PETITION FOR WRIT OF MANDATE AND EXHIBITS to be served on the following parties:

Office of the Attorney General 455 Golden Gate Avenue #11000 San Francisco CA 94102 (415) 703-5500	Personal Service
Clerk, Superior Court PO Box 911 Martinez CA 94553	United States Mail
Office of the District Attorney 900 Ward St Martinez CA 94553 (925) 957-2200	United States Mail.
Scott Dyleski, F-46590 SVSP, A3-201 PO Box 1050 Soledad, CA 93960-1050	United States Mail

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on January 16, 2013, at San Francisco, California.

_____