IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ___

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| IN RE SCOTT EDGAR DYLESKI, | No. |
| Petitioner, | [Contra Costa County No. 5060254-0 ] |

on Writ of Habeas Corpus.
_____/

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**PETITION FOR WRIT OF HABEAS CORPUS**

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# PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT:

SCOTT EDGAR DYLESKI, through his counsel, KATHERINE HALLINAN and SARA ZALKIN, petitions for a Writ of Habeas Corpus, and by this verified petition, states as follows:

I.

Petitioner is unlawfully confined and restrained of his liberty due to his commitment to 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 Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, and Anthony Hedgpeth, Warden.

II.

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.

III.

Through all Superior Court proceedings including trial and sentencing Petitioner was represented by Ms. Ellen Leonida, Deputy Public

Defender, Contra Costa County. Ms. Leonida's current address is 555 12th Street, Suite 650, Oakland, California, 94607.

IV.

Petitioner was convicted on August 28, 2006 following jury trial and was sentenced on September 26, 2008. (5 CT 1729-1734; 15 RT 4300-4307.)

V.

Petitioner timely filed notice of appeal. (5 CT 1768-1769.) The First District Appellate Project assigned Mr. Philip Brooks as counsel. Mr. Brooks' current address is 1442-A Walnut Street #233, Berkeley, California, 94709.

VI.

Appellate counsel raised the following issues to this Court in case number A115725: (1) the trial court erred in denying Mr. Dyleski's motion for change of venue; (2) because the evidence was insufficient to support a conviction for burglary, the murder and burglary convictions must be reversed, and the special circumstance finding must be stricken; (3) instructional error, to wit: evidence of a prior crime may be used as proof of motive and as part of a larger continuing plan, scheme or conspiracy; (4) the denial of Petitioner's motion for a *Kelly* hearing regarding Y-STR DNA testing was error; (5) items of evidence should have been suppressed

because the search warrant was based on a recklessly inaccurate affidavit; (6) constitutional challenges to California Penal Code section 190.5; (7) the sentence of life without parole in this case is cruel and unusual punishment contrary to the Eighth Amendment to the United States Constitution.

VII.

This Court affirmed the judgment of the trial court in an unpublished opinion filed April 27, 2009 (A115725).

VIII.

Through Mr. Brooks, the Petitioner appointed sought review in the California Supreme Court arguing that (1) Penal Code section 190.5(b) is unconstitutionally vague; deprives him of his right to due process of law; his right to equal protection; and his right to be free from cruel and unusual punishment; (2) the sentence of life imprisonment without the possibility of parole violates the Eight Amendment because it constitutes cruel and unusual punishment; (3) Petitioner was denied his right to an impartial jury when his motion for change of venue was denied; (4) the Court of Appeal incorrectly applied the legal standards for a Kelly hearing regarding the statistical significance of Y-STR DNA analysis; (5) review should be granted to clarify the legal standards governing the right to a Franks hearing, which the trial court denied despite evidence that the search warrant was based on a recklessly inaccurate affidavit; (6) the evidence was

not sufficient to support a conviction for burglary, therefore the murder and burglary convictions must be reversed and the special circumstance finding stricken; and (7) instructional error, to wit: that evidence of a prior crime could be used as proof of motive and as part of a larger continuing plan, scheme or conspiracy, which violated Petitioner's Sixth Amendment right to jury trial and Fourteenth Amendment right to due process of law because the evidence had no probative value for this purpose.

IX.

The California Supreme Court denied review on August 12, 2009 (S173389). Mr. Brooks sought review in the United States Supreme Court, which denied *certiorari* on or about May 24, 2010.

X.

Petitioner then, through present counsel, filed a Petition for Writ of Habeas Corpus in the Superior Court of Contra Costa County on May 23, 2011. (05-11076-4.) (*See* Appendix, herewith.) Petitioner alleged his right to due process of law under the Fifth, Sixth and Fourteenth Amendment to the Federal Constitution, and article I, section 15 of the California Constitution; and his right to the effective assistance of counsel both at trial and on direct appeal, under the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and article I, section 15 of the California Constitution, were violated. *See*

Strickland v. Washington (1984) 466 U.S. 668, 684-687. This petition was denied without prejudice on June 16, 2011. (*See* Appendix.) However, as shown by the attached notice of service, the denial was not mailed to present counsel until July 13, 2011. (*See* Appendix.)

Petitioner filed an Amended Petition for Writ of Habeas Corpus on August 12, 2011, alleging the same grounds as in the initial petition. (*See* Appendix.) This petition was denied on October 11, 2011 by the Honorable Judge Zuniga (who presided over Petitioner's 2006 trial) in a 34-page "Decision/Order." (*See* Appendix.)

XI.

Since filing the initial petition on May 23, 2011, present counsel has diligently pursued the investigation and research of this case. (*See* Declaration of Katherine Hallinan; Declaration of Sara Zalkin.)

XII.

This petition is being filed in this court pursuant to its original habeas corpus jurisdiction. (Cal. Const., art. VI, § 10.)

XIII.

Petitioner herein relies on the record previously filed in his related direct appeal, as well as the exhibits included herewith. Petitioner accordingly requests this court to take judicial notice of the transcripts, files, briefs, motions, and records in People v. Scott Dyleski, No. A115725.

(Evid. Code § 452, subd. (d)(1), § 453, § 459.)

XIV.

Petitioner alleges herein that his right to Due Process of law under the Fifth, Sixth and Fourteenth Amendment to the Federal Constitution, and article I, section 15 of the California Constitution was violated as a result of ineffective assistance of counsel at trial and on direct appeal, pursuant to the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and article I, section 15 of the California Constitution. *See* Strickland v. Washington (1984) 466 U.S. 668, 684-687. Petitioner additionally alleges that his right to Due Process of law under the Fifth and Fourteenth Amendment to the Federal Constitution, and article I, section 15 of the California Constitution were violated by the egregious misconduct of the prosecutor that so infected the trial as to render the proceedings fundamentally unfair. *See* Donnelly v. DeChristoforo (1974) 416 U.S. 637.

XV.

All of the information presented herein was either in the possession of Ms. Leonida or was readily available to her, and was unquestionably exculpatory to Petitioner by implicating another perpetrator - who had motive, means, opportunity, and notoriety - in this crime.

XVI.

Petitioner Scott Dyleski was wrongfully convicted in the October 15, 2005 murder of Pamela Vitale, wife of prominent attorney Daniel Horowitz, at her home located at 1901 Hunsaker Canyon Road in Lafayette, California.

XVII.

The relevant facts pertaining to the murder are as follows:

Just before 6:00 p.m., on October 15, 2005, Daniel Horowitz, a prominent criminal defense attorney, reported his wife had been murdered in their home, at 1901 Hunsaker Canyon Road, in Lafayette, California.

Sergeant Hoffman testified at the preliminary hearing but not at trial. The call came in just before 6:00 p.m., and he arrived less than ten minutes later. Mr. Horowitz was talking on a cell phone and pacing in front of his home. Anxious to secure the scene, Sergeant Hoffman led Mr. Horowitz to the back of a patrol vehicle. (1 CT 31-35.)

Mr. Horowitz was "very animated, volunteered that he was an attorney and had been with 'a bunch of retired police officers that day"; that he had spilled the dogs' water in a bowl near the door, and got his shirt wet; and that he had brought home the two grocery bags located at the entrance to the residence. (1 CT 36-40.)

The front door was wide open. Ms. Vitale was on her right side in a

fetal position on the carpet inside the entryway, head closest to the door. (Exhibit A, Crime Scene Photographs (hereinafter "Photos"), at 1.) She had visible head trauma and copious blood loss, including a lot of dried blood around her head and in her hair. (1 CT 39-42.)

The residence was cluttered. (*See* Exhibit A, Photos, at 8.) There were blood droplets "all over the front room, on pieces of furniture and on the wall and on the doors." (1 CT 43.) In addition to smeared blood and spatter on the inside of the front door, there were blood swipes on the outside of the door, and blood on the external dead bolt. (Exhibit A, at 2-5.)

Next to the body were several pieces of molding and a large metal post -- probably building samples. (7 RT 1928; 8 RT 2085-2086.) A cardboard box was "caved in" as if someone fell into it. (8 RT 2054.) There was a small table between the living room and kitchen that was dislodged several inches, based on carpet indentations; yet framed photographs sat upright on the table but for one. (7 RT 1930-1931; 7 RT 1944:19-27; Exhibit A, Photos, at 8.)

In the sitting area were several small bloodstains on the couch and coffee table, and a large blood drop on a piece of paper near the love seat that seemed odd. (7 RT 1997; Exhibit A, at 23-27.) A purse sat undisturbed on the dining room table. (8 RT 2065-2066; Exhibit A, at 8.)

On top of the television was a pair of bloody eyeglasses, neatly

folded. (7 RT 1937; Exhibit A, at 6-7.) On a kitchen counter was a bloody water bottle with the cap and a paper cup of clear liquid nearby. (Exhibit A, at 9-10.) Two coffee mugs were in the sink, one with a broken handle and apparent blood, and there was a bloody bowl on the counter next to the sink. (7 RT 1998-1999; Exhibit A, at 11-15.) It appeared that the sink had not been run, as coffee grounds were undisturbed and there was no blood on the faucet handle. (15 RT 4055; Exhibit A, at 11-13.) There was apparent blood in the shower in the hallway bathroom: a bloody hand swipe, blood on the shower curtain, and blood on the hot water knob. (7 RT 1936; 7 RT 1978; Exhibit A, at 16-18.)

As Sergeant Hoffman asked Mr. Horowitz for basic information about Ms. Vitale, he starting talking about his prime suspect -- a neighbor named Joe Lynch, who was supposed to come over that day to drop off a check. (1 CT 46; 1 CT 50; Exhibit L, Report of Sergeant Hoffman Dated 10/16/05, at 422.)

> Detective Barnes arrived at the crime scene just before 8:00 p.m.: 1901 Hunsaker Canyon Road is a twelve plus acre piece of property located in a steep hilly area of rural unincorporated Contra Costa County. The property is accessed by an approximate ½ mile gated concrete driveway. At the base of the driveway is a four stall horse stable with a single apartment living space. At the top of the driveway exists two permanent residential structures, two permanent wood outbuildings and a travel trailer. One of the residential structures was a modular home ... occupied by Daniel Horowitz and Pamela Vitale. The second residential structure was a three level, six thousand plus square feet home which

> was under construction and not yet occupied. The two wood outbuildings were used as a tool storage shed and work out gym. The travel trailer was parked between the two homes and was being occupied by an employee who worked on the construction of the new home.
>
> (Exhibit O, Report of Detective Barnes, dated 10/24/05 (hereinafter "Barnes Report"), at 458.)

He continued:

> As I entered the residence and stepped over the blood soaked floor, I visually examined the victim for types of injuries. I noted the victim's head hair appeared wet and blood soaked with several deep lacerations visible on her scalp. The exposed left side of the victim's face was deeply bruised around her left eye, nose and chin. I noted her exposed left hand to have similar deep purple colored bruising, lacerations and what appeared to be a broken left finger.
>
> ...
>
> Sergeant Hoffman walked us north through the living room of the residence, where Detective Pate and I discovered and noted items of interest, including several short sections of crown molding which were blood stained and broken, pieces of shattered clay pottery and additional blood stains and splatter. ... Detective Pate located an open 'Crystal Gyser' [sic] water bottle on a counter top...covered in blood smears. Opposite that counter top was the home's kitchen sink ... On the counter top just outside the sink, I located a white colored bowl with what appeared to be blood smears on the interior and exterior. In the left portion of the equally divided kitchen sink, I located two coffee cups and one kitchen knife and what appeared to be discarded coffee grounds. I noted one of the coffee cups had a broken and severed handle and what appeared to be blood smears on the outside of the remaining unbroken portion of cup. The right portion of sink contained plates, which covered unknown items, a bowl and several pieces of eating utensil[s].
>
> Sergeant Hoffman then directed our attention toward the bathroom at the north end of the residence. Upon entering the

bathroom, I saw that it contained a wooden vanity sink, toilet and tub shower combination with a shower curtain. I noted **the shower curtain was pulled to the left, concealing the water controls and shower head. Upon closer inspection, I saw what appeared to be slightly dried blood smears on the side wall, opposite the shower curtain, and on the left water control knob.** [Emphasis added.]

Detectives L. Santiago, Pate and I then entered the two bedrooms located at the north end of the residence...packed almost floor to ceiling with boxes, items of clothing and other articles. In neither of these rooms did I note any ransack or obvious signs of evidence related to the scene which existed in the living room, kitchen and bathroom of the residence.

While walking back through the living room, toward the master bedroom, I noted another piece of potential evidence. In the center of the living room floor, I saw a **white colored plastic 'tote' lid which was sitting atop a cardboard box containing items of paperwork and large pieces of granite tile. The 'tote' lid was soaked in apparent blood smears and appeared to have been intentionally placed in this location after the homicide...** [Emphasis added.]

...

While walking through the exterior grounds of the property, Sergeant Hoffman directed my attention toward a tow-behind travel trailer, which was parked between the modular home and the large home under construction. I was told this trailer was owned by Daniel Horowitz but was being lived in by an employee at the site who was identified as Anthony Roderick. I was told Roderick was ill and was staying with relatives... Detectives Garibay and Schiro were assigned to locate and obtain a statement from Roderick.

(Exhibit O, Barnes Report, at 459-460.)

Mr. Horowitz was taken to the station where he was interviewed off and on late Saturday night and into the early hours of Sunday, October 16, 2005. A recording of Mr. Horowitz was made in a waiting room at the

station (obtained from prior counsel on videocassette, digitized and transcribed by the undersigned). (*See* Exhibits B, B1, and B2, Transcript and Digital Recordings of Interview of Daniel Horowitz (hereinafter "Horowitz Interview"). *See also* Declaration of Katherine Hallinan; Declaration of Sara Zalkin.)

The recording captures Mr. Horowitz making and receiving many phone calls. Detectives come in and out. A friend of Mr. Horowitz , Andrew Cohen, was allowed to visit. On counsel's information and belief, Mr. Cohen was a San Francisco Police Department officer at the time. (*See* Exhibits B; B1; and B2, Daniel Horowitz Interview. *See also* Declaration of Sara Zalkin.)

Mr. Horowitz told detectives that he fed his dogs that morning at 7:00 a.m. and left at 07:30 to "meet Bob Massi, for breakfast at Millie's. And I realized it was 8:30, so I left then... To get to Lafayette a little early. At about 8:10, Bob called me 'Where are you? It's 8:00 ...You can ask Bob .... Got his phone number ... here ... Now, I'm not sure if I called my wife when I left. But normally I would." (Exhibit B, at 50-51, 55-56.)

During a phone conversation, Mr. Horowitz told the other party that he "**met Bob Massi at 08:15, after shopping at Safeway.** And then I left there probably...sometime around 9:00." (Exhibit B, at 39.) However, this was the only instance Mr. Horowitz said anything about Safeway (or any

other errand) on his way to the breakfast meeting. Instead, he made sure that to point out bags of groceries to officers at the crime scene, and later provided a Safeway receipt showing purchases made at 5:39 p.m. (8 RT 2031. *See* Exhibit A, Photos, at 28.)

DH: OK. So then as of my leaving home, I was in the office after Bob Massi.
PO: Where's the office at?
DH: Lafayette.
PO: OK.
DH: So, from 09:40 to about quarter to 11:00. And Rick Mosier showed up. My investigator.
PO: Yeah.
DH: And we met from 11:00 until 2:00, 2:30. And I always call Pamela then. And she didn't respond.
PO: And where are you... [unintell]
DH: I don't remember specifically, 'cause it's sort of like random when I'd call her. And she wasn't responding. And I went to the bank, and this and that. And then about... I think it must have been [unintell] whatever time it was when I drove up to the house. And I knew she's supposed to go to the ballet but her car's outside of the house..
PO: And do you know what time she was supposed to go do that?
DH: No, but earlier. She would have been gone like 4:30, 5:00....
PO: OK.
DH: And she'll take the car. And I saw her car parked there, and I knew.

(Exhibit B, at 50-51, 55-56.)

Among his contradictory statements, Mr. Horowitz told Sergeant Hoffman that Mr. Lynch was expected to "drop off" a check, but later said that Mr. Lynch was coming to "pick up" a check. (*See* Exhibit L, Report of Sergeant Hoffman, Dated 10/16/05 at 422; Exhibit B, at 57.)

The detectives told Mr. Horowitz that they did not "want to get

fixated on Joe" who was "being extremely cooperative." (Exhibit B2, at 131.)

Mr. Horowitz spoke of Mr. Lynch at least twenty times in the hours after the murder. (*See, e.g.*, Exhibit B, at 38-42, 47, 49, 54, 57-58, 61, 67, 73-76, 78-79, and 94; Exhibit B1, at 97, 100-101, 103, 106-07, 109, 111-12; Exhibit B2, at 118, 121, 129, 149.) "But here's the problem: If he didn't do it, who ... who would come to my door early in the morning, and kill my wife?" (Exhibit B1, at 113.)

The recording begins at approximately 9:00 p.m. on Saturday, October 15, 2005, with Mr. Horowitz talking on the phone: "I've pretty much figured out the time and manner and everything else. I just don't know who." (Exhibit B, at 31.) He was "analyzing the time of death." (Exhibit B, at 35.) **"I wish [detectives] would take the information from me though, so they could get a little more focused. They're doing crime scene shit, and I'm the one who knows the facts."** (Exhibit B, at 40.) [Emphasis added.]

Although Mr. Horowitz insisted that he had pieced it all together, he seemed confused by some questions. For example, he had trouble answering the detectives' question whether his wife was up that morning when he left: "I swear, it was like I was trying to remember. I don't think so. I think I left ... I don't remember ... But I don't think she was though.

Tell you why with my logic..." (Exhibit B, at 51, 55.)

When the detectives depart, Mr. Horowitz spontaneously shares his thoughts with his friend, Andrew Cohen: "It was such a sharp blow to the head. Did someone just come by a random person? ... But the guy showered ... He only touched one knob .... He could have showered in the house after he killed. It wasn't planned." (Exhibit B2, at 145, 154.)

Mr. Horowitz also said: "I was pretty good at not fucking with the crime scene. I was very good about it. I was very good." (Exhibit B2, at 147. *See also* Exhibit B, at 85.)

Early Sunday morning, October 16, 2005, detectives return to the crime scene. "At 0730 hours Sheriff's K-9 Deputy Roberts and his K-9 'Freddy' arrived on scene. The Sheriff's K-9 was presented a potential piece of evidence from this case which resulted in a track which led to the home occupied by Gerald Wheeler, at 1571 Hunsaker Canyon Road." (Exhibit O, Barnes Report, at 463.)

Later that morning detectives contact Mr. Horowitz to arrange a walk through with him "to identify items not belonging to him or to identify any loss of property." (Exhibit O, Barnes Report, at 463.)

Mr. Horowitz met detectives around 2:00 p.m. "and was allowed to walk to the residence from the front security gate." (Exhibit O, at 463.)

. . . Mr. Horowitz saw a one gallon milk container on the kitchen counter top. This seemed to spark Mr. Horowitz's interest as he began walking briskly through what he described as being Pamela's normal morning routine. Mr. Horowitz ... [re-enacted] the removal of the milk from the refrigerator and pointed out a missing box of cereal from the top of the refrigerator. Mr. Horowitz then pointed out a bowl and spoon which was stacked atop several other dishes in the right portion of the equally divided kitchen sink.

Mr. Horowitz then walked directly to the master bedroom where he pointed out that the bed had not been made. Mr. Horowitz told us Pamela's normal routine [was] to wake up, turn on the lap-top computer which had been on top of the coffee table and eat her breakfast. ... [B]ased on the fact the milk had been left on the counter ... and ... the bed was not made, he believed Pamela had been assaulted shortly after waking up Saturday morning. Mr. Horowitz then checked ... the master bedroom and indicated it appeared as it was when he left on 15 Oct 2005. We then followed Mr. Horowitz to the north end of the home where he entered the hall bathroom. **Mr. Horowitz then became visibly upset upon seeing the blood stains present in the shower. Mr. Horowitz commented on the fact that he believed the suspect had showered prior to leaving the residence after the homicide. ...** [Emphasis added.]

Prior to leaving I asked Mr. Horowitz to walk us through the sequence of events which took place when he discovered Pamela on the previous evening. Mr. Horowitz walked out the front door and began physically walking through how he discovered Pamela. Mr. Horowitz walked across the front porch, approaching the front door. While doing this he described that he had seen smears which [he] recognized as being blood on the front door. Mr. Horowitz the[n] reenacted how he opened the door, discovered Pamela lying on the floor and dropped the bags of groceries and his brief case. He then knelt down and appeared as though he was feeling for a pulse with his right hand. After a few seconds, Mr. Horowitz rose to his feet and walked through the living room to the telephone which was on the couch. Mr. Horowitz told us he called 911 from this telephone and then dropped the receiver,

> knowing Police would respond to the open line. Mr. Horowitz then walked back to the front door. ...
>
> Mr. Horowitz again knelt in the area where Pamela had been discovered and again reenacted how he attempted to find a pulse on Pamela. Mr. Horowitz again rose to his feet and said, 'at this point I knew she was dead.' Mr. Horowitz walked out the front door of the residence and turned facing the front door, where he knelt to both knees and motioned as though he was making a telephone call. Mr. Horowitz told us, from this location, he used his cellular telephone to call Sheriff's Dispatch on a direct line. Mr. Horowitz the[n] rose to his feet and told us he never re-entered the home after making the second call.
>
> Mr. Horowitz then gathered several items of clothing from the master bedroom and placed them in a sport duffle bag....
>
> (Exhibit O, Barnes Report, at 464-465.)

XVIII.

The facts pertaining to the arrest of Mr. Dyleski are as follows:

On Thursday, October 13, 2005, two days prior to the murder, local resident Karen Schneider noticed an unauthorized credit card purchase and contacted the vendor, who provided a copy of the online order. Ms. Schneider's name was on the "bill to" section; the billing address was 1901 Hunsaker Canyon Road, and the recipient was Esther Fielding, 1050 Hunsaker Canyon Road. (9 RT 2498-2504.)

Ms. Schneider's husband was away, and she did not feel safe alone. A nephew came to stay with her, but she changed her mind and left to join her husband. At approximately 5:56 pm. on October 15, 2005, Mr.

Horowitz called the police to report the murder. Later that night the Schneider's daughter called with the news. (9 RT 2506.)

When Ms. Schneider came home on Sunday, October 16th, she convened an afternoon neighborhood meeting. At the meeting, speculation was rampant, and the safety of the community was up in the air. Ms. Schneider noted by way of example that there were unknown persons in the neighborhood, since the Curiels moved in, who were not yet known to the residents in this historically tightly-knit community. (9 RT 2507-2509.)

Esther Fielding and her 16-year old son, Scott Dyleski, were long-term permanent guests of Fred and Kim Curiel at 1050 Hunsaker Canyon Road (and not the only guests at that time). Esther went with Fred to this meeting. Before it ended, Karen said she wanted to bring up an issue between her and Esther. Esther got emotional, thinking Karen was referring to a recent event where Karen accidentally hit Esther's dog, Jazz, with her car. Esther accused Karen of not taking responsibility when the dog had to be put down. Karen wanted to know why Esther's name and address appeared on the fraudulent credit card order. (9 RT 2510-2511.)

That night, at 2 a.m., Esther woke her son, Scott. She and the Curiels confronted him about the credit card fraud, but he denied involvement. (10 RT 2883.) Scott had never been in any sort of trouble before. (10 RT 2670.) Esther was worried that if he had done something

wrong, Fred might evict them. (11 RT 3096-3097.) In the following days, the Curiels confronted Scott again, and told him that the fact that Ms. Vitale's address and unlisted phone number were on the fraudulent purchase order might implicate him in her murder. (10 RT 2886-2887.)

Scott had gone for a walk on the morning of October 15th. When he returned from his walk, he had scratches on his nose. He told everyone that the scratches were from falling and getting scraped by a bush on his walk. (10 RT 2735, 10 RT 2851-2852; 11 RT 3083.)

Kim Curiel asked him if anyone had seen him and could therefore corroborate his story that he had been on a walk. (10 RT 2887.) Scott told her that while he was walking, a woman in a car who matched the description of Ms. Vitale stopped to speak with him. He said she told him "You've got to believe," and she grabbed his arm and scratched him. (10 RT 2887.) Scott repeated this story to everyone, including his friend, Robin Croen (9 RT 2389); his mother, Esther (11 RT 3122); his girlfriend, Jena Reddy (9 RT 2588); and Hazel McClure and Michael Sikkema, who also lived with the Curiels. (10 RT 2757-2758.) Knowing that he had not committed the murder, Scott made up this story in order to implicate himself in the murder, believing he would be easily cleared of any involvement, and thereby deflect attention away from the credit card scheme. (*See* Exhibit H, Declaration of Scott Dyleski, at 390-391.)

On Monday, October 17th, Scott called his friend Robin Croen, with whom he had planned the credit card scheme, wanting to meet and talk about it, but Robin was busy. On Tuesday, October 18th, Fred Curiel and Robin's father, Tom Croen, found emails on the boys' computers implicating them in the credit card fraud. Fred expressed his concern at the thought of any connection with the murder. (9 RT 2467-2468; 9 RT 2471.) Mr. Croen immediately obtained legal counsel who contacted law enforcement. (13 RT 3581.) On Wednesday, October 19th, Robin testified about the credit card scheme, the strange story that Scott had told about running into a woman on the road, and the scratches on Scott's face. (*See* Exhibit BB, Transcript of Skelton Hearing (hereinafter "Skelton Hearing"), at 556-570, 573.) At the end, Robin added:

> The witness: I would like to say one thing. On Tuesday, I forgot to say this before, but when he was talking to me, and he said that if this – if this murder hadn't happened and if all this attention wasn't around there, then the [credit card] plan would have continued working and there wouldn't have been any attention drawn to it. So I don't know, at least that one little nugget gives an impression that he wasn't involved with that.
>
> Judge Kolin: With what?
>
> The witness: With the killing.
>
> Judge Kolin: Why would you say that?
>
> The witness: Well, if you're trying to lay low, you don't go kill somebody to draw attention to yourself.

(Exhibit BB, Skelton Hearing, at 597.)

After learning of the credit card scam from the Croens, law enforcement obtained warrants and arrested Scott in the early on October 20, 2005, while simultaneously conducting a search at the Curiel residence. (13 RT 3581.)

XIX.

The following statement of facts pertains to evidence presented at trial:

Mr. Horowitz testified that he woke up around 6:00 a.m. on October 15, 2005. (8 RT 2103.) **He had coffee and placed the coffee cup in the sink.** (8 RT 2120.) Pamela was still asleep when he left before 8:00 a.m. (8 RT 2106-2107.) After a breakfast meeting in Lafayette, he went to his office in Oakland, ran errands, went to the gym, then went home. Pamela's car was still there, but he knew she had plans that evening with a friend. There were "smears" on the front door. When he opened the door, it was like "a photograph of a crime scene." She was clearly dead, but he touched her neck anyway to make sure. He called 911 from the home phone, spoke with them briefly then left the line open. He knelt down again and touched her neck one more time "just to make sure" before going outside with his cell phone. (8 RT 2109-2117.)

Dr. Brian L. Peterson of the Forensic Medical Group conducted the

autopsy on October 17, 2005. Ms. Vitale was 5'9" inches tall and weighed 178 pounds. The cause of death was blunt force head injury. (14 RT 3825.)

Ms. Vitale suffered a numerous injuries, top to bottom, including a wound on her stomach. On her back was "a series of three intersecting superficial incisions" that "represented a shape." Dr. Peterson described it as an "H-shaped incision with an extension." (8 RT 2055-2056; 14 RT 3776; 14 RT 3790; 14 RT 3794-3796.)

The stomach injury was either post-mortem or in the "agonal period" - "when the dying process has begun or physiologically death is going to occur" but hasn't yet. The agonal period can last for seconds or years, depending on cause of death. (14 RT 3790-3791.)

> Q. Do you have any sense of that with respect to the injuries that you observed to the body of Ms. Vitale?
>
> A. My time interval for all of those injuries was minutes. And I would think of that from the time the injuries began to be inflicted until the time she passed away, minutes.
>
> Q. Okay. Thank you. Did you notice any injuries to her left shoulder?
>
> A. Okay. On the left, yeah, there's a large number of injuries here. There were injuries that extended from the shoulder to the hand. And the injuries on the upper arm were around the elbow, on the shoulder. There were scratches and bruises around the elbow - - or rather, an L-shaped pattern of abrasion. Some scratches on the left wrist. There were - - there was laceration on the left palm. There was compound fracture of the middle joint on the third finger, compound fracture of the closest joint on the index finger....bone that comes from through skin.

***

Q. Hypothetically, at the time Ms. Vitale was being beaten about the head with whatever this object was, at some point she put her hands on her head in an effort to protect herself and then the beating conduct continued. Would that be the kind of position that her hand at least could have been in to cause the compound fracture of those left fingers that you...described?

A. That would work just fine. And the reason is in the case Mr. Jewett just described, you have a firm surface, namely the skull, supporting those fingers. Presumably there's a firm surface, whatever the object was, striking those fingers; and in between there are the fingers. So that would be a good potential for both fracture and laceration, which would characterize a compound fracture.

Q. Thank you.

(14 RT 3790-3792.)

In February of 2006, Mr. Stockwell analyzed samples of select items collected from the crime scene: a water bottle; a "Lance Burton mug"; and an "Art Institute" mug. (13 RT 3657-3661.)

Ms. Vitale was the major genetic contributor to the water bottle. (13 RT 3658.) There was also at least one minor contributor "at a trace level." Assuming the same contributor was responsible, "to cross both samples," only Petitioner had the three alleles that Mr. Stockwell was looking for. (13 RT 3658.) The profiles would be common to "1 in 14 African-Americans, 1 in 7 Caucasians, and 1 in 5 Hispanics." Mr. Horowitz was not a potential donor. (13 RT 3659.) There was no DNA testing on the paper cup found next to the water bottle.

Mr. Horowitz was the major contributor to the DNA found on the "Lance Burton mug" (that was found broken and bloody in the kitchen sink). The trace minor component would be common to "1 in 2 African-Americans, 1 in 5 Caucasians, or 1 in 9 Hispanics." Ms. Vitale was a potential contributor. (13 RT 3659-3660.)

The "Art Institute" mug presented a degraded mixture, primarily female, and a trace minor profile from one or more males. Ms. Vitale's profile matched for the 9 STR loci examined, with an estimated random match probability in the billions. Mr. Horowitz could not be excluded. Mr Dyleski was excluded. (13 RT 3661.)

There was no foreign DNA present in fingernail clippings collected from Ms. Vitale. (13 RT 3663.)

XX.

The following evidence was presented against Petitioner at trial, although much of it was problematic:

A. Opportunity

Petitioner possibly had the opportunity to commit the crime, because he took a walk the morning of the murder, October 15, 2005.

However, the issue of the timing was contested. As set forth in detail below, there was no medical investigation into time of death. (Exhibit G, Declaration of Michael Laufer, M.D. (hereinafter "Laufer Declaration"), at

369.) Instead, the prosecutor used evidence that activity on Ms. Vitale's computer stopped after 10:12 a.m. (8 RT 2245.)

Kyle Ritter was asked by the prosecution to examine two laptops (the "Horowitz computer" and the "Vitale computer") in order to establish a time line. ( 8 RT 2234-37.) The time on the Horowitz computer was accurate; on October 15 it was powered on at 6:10 a.m. and shut down at 7: 50 a.m. (8 RT 2237-2239.)

The Vitale computer was shut down at 12:27 a.m. on October 15, 2005 and powered on at 7:49 a.m., going immediately into Quicken (a financial program) and was then used intermittently until 10:12 a.m.

However, the internal clock was password protected. The only way for Mr. Ritter to determine its accuracy was by comparison of time on the servers of websites accessed. Thus, Mr. Ritter concluded that the time on the Vitale computer was accurate within four minutes (plus or minus). (8 RT 2240-2242.)

The password protected internal clock on the laptop attributed to Ms. Vitale was the heart of the prosecution's theory that she was alive until at least 10:12 a.m. (15 RT 4041-4042.) Defense counsel did not ask Mr. Ritter any questions. (8 RT 2248.)

On October 20, 2005, Fred Curiel told investigators that he saw Mr. Dyleski at 1050 Hunsaker Canyon Road at 9:26 a.m. on October 15, 2005,

sitting next to his wife, Kim, on their couch. (11 RT 3010, 3017. *See* Exhibit M, Report of Deputy Santiago, dated 11/15/05 (hereinafter "Santiago Report"), at 433.) This would have made it impossible for Scott to have committed the murder. Mr. Curiel reported that he always remembers times, and he checked the time on his pager when he saw Scott. (Exhibit M at 434. *See also* 11 RT 3017.) It was undisputed that Petitioner had an alibi for the rest of that day.

Later on, at approximately 10:20, Mr. Curiel and his family left for the Spirit Store for Halloween shopping. (11 RT 3020.) Mr. Curiel's preliminary hearing testimony was consistent with his initial statements. (2 CT 390-391.)

However, at trial, Mr. Curiel could not recall if he had seen Scott at all that day. Ms. Curiel testified that Scott came home around 10:45 that morning and sat down next to her on the couch. She helped treat a cut on his nose, then left with her family soon after. (10 RT 2854, 2865-2867.) **Thus, even disregarding Mr. Curiel's original statement (that Mr. Dyleski returned at 9:26 a.m.), Mr. Dyleski would have had about 33 minutes - at most - to commit the crime, get home, change, and dispose of his bloody clothing, which was what the prosecution argued at trial.**

As discussed further herein and in the accompanying Memorandum of Points and Authorities (Argument I(A)(2)) *infra*), the crime scene

evidence indicated that the perpetrator spent quite a bit of time inside - time that would not have been available to Mr. Dyleski to have accomplished everything.

B. Injuries on Petitioner

There was testimony that Mr. Dyleski returned home on the morning of October 15, 2005 with recent scratches and "gouge marks" on his face, and his right hand and wrist were swollen. According to Mr. Dyleski, he fell and scratched his face on a bush. (10 RT 2735; 10 RT 2851-2852; 11 RT 3083.)

C. Other Statements

Scott told a story in the days following the murder that while he was out walking the morning of the murder, a woman in a car that matched the description of Ms. Vitale had stopped and spoken with him. He said she told him "You've got to believe," and she grabbed his arm and scratched him. (10 RT 2887.) Knowing that he had not committed the murder, Scott made up this story, thinking that if he were a suspect he would be cleared, and that would somehow deflect attention away from the credit card scheme. (*See* Exhibit H, Declaration of Scott Dyleski, at 390-91.)

D. Petitioner's Artwork, Writings, and Symbols

As discussed further below, in section XXIII(E), *infra*, and in the attached Memorandum of Points and Authorities (argument I(E), *infra*), the

prosecution presented the Petitioner's artwork and writings as evidence of his character for violence, and to argue that a symbol found in his writings was similar to the marks on Ms. Vitale's back. (*See* 7 RT 1743; 14 RT 3795; 15 RT 4004. *See* Exhibit Y, Example of Symbol Drawn by Mr. Dyleski.)

However, Scott's high school art teacher, Susan Lane, testified that this art was similar to works she had seen by other high school students, and was fairly typical of teen artwork. (14 RT 3874-75.) Moreover, the presentation of this artwork was highly inflammatory and prejudicial, as it contained themes of mass murderers, swastikas, anti-Christian and/or Satanic beliefs, vivisection, Absinthe use, violence and hate. (13 RT 3512-27. *See also* 9 RT 2454-47; 10 RT 2685; 11 RT 3075-77.) Trial counsel never objected to this highly prejudicial evidence.

E. To-Do List

On January 29, 2006, the day after a party at the Curiel household (and several months after Petitioner's arrest), pieces of paper were found in a dresser drawer in the room Scott had occupied before his arrest. (10 RT 2790.) This list consisted of the words: "Knockout/kidnap;" "Question;" "Keep captive to confirm opinions;" "Dirty Work;" and finally, "Dispose of evidence and cut up and bury." (10 RT 2797.) Although the dresser drawers had been thoroughly searched by law enforcement and later cleaned by the

residents, these notes reportedly just appeared in the top dresser drawer sitting on a pile of gloves. (10 RT 2809-10.) David Curiel, Fred's brother, claimed he could recognize the handwriting as Scott's. (10 RT 2797.) However, none of the latent fingerprints developed from this paper matched Scott. (12 RT 3317-18.)

F. Duffel Bag

A duffel bag that had belonged to Scott was found in an old van near his home, allegedly containing a jacket, a balaclava, a glove, and a shirt. Ms. Vitale's DNA was reportedly present on the balaclava, glove, and bag. However, as discussed further herein, and in the attached Memorandum of Points and Authorities (argument I(C), *infra*,) this item had a questionable chain of custody, and there is evidence of potential contamination.

During the search of 1050 Hunasker Canyon Road, before dawn, Reserve Deputy Kovar located an abandoned van that looked like it had been there a long time. (9 RT 2316-2318.) He wrote down the license plate on the latex glove he had on. (9 RT 2337.)

Using a flashlight he saw a duffel bag behind the driver's seat. He opened the driver's side door and removed the duffel bag, which was partially unzipped and appeared to contain dark clothing. (9 RT 2319-2321.) After moving the items of clothing around in the bag, Mr. Kovar took the duffel bag to the residence and showed it to the detectives. He then

set it down on the porch and stood by until the criminalist (Mr. Collins) arrived. (9 RT 2322-2323; 9 RT 2335.)

Mr. Kovar documented chain of custody on the duffel bag, but not for the individual items within the bag. (9 RT 2327; 9 RT 2331-2332.) At the scene, no one reported having seen a glove, and a picture of the bag and its contents was taken with the items haphazardly laid out on the porch of 1050 Hunsaker. However, this image only shows two items of clothing, not the four items as later reported. (Exhibit A, Photos, at 30.) Esther Fielding testified that she saw the bag on Monday, October 17, and pulled out a trench coat, but did not see any other items inside. (11 RT 3106.)

Thus, the chain of custody was not sufficiently established, such that the origin of the items reportedly found in the bag was not reliably determined. Morever, there were questions of potential contamination. Mr. Kovar moved the items around in the bag, and the bag and its contents were haphazardly laid out on the porch without being protected from contamination.

When Mr. Collins took possession of the duffel bag found by Mr. Kovar, it was unzipped and had some "reddish stains." At the lab, he noted that inside were a glove; a balaclava (ski mask); a black shirt; and a raincoat. Attached to the duffel bag was an airline tag bearing the name "Scott Dyleski." (13 RT 3480-3481.)

Mr. Collins performed presumptive chemical screening for blood on areas of apparent staining. He obtained positive results on the carrying handle; and a weak positive from the zipper pull on the side of the bag and both zipper pulls from the main compartment. (12 RT 3406-3408.)

The glove was inside-out and had "red stains on the fingers" that tested presumptively positive for blood. The balaclava was also inside out; Mr. Collins observed some "dark staining" when he turned it right side out that tested presumptively positive. The raincoat had apparent staining but presumptive tests had negative results. (12 RT 3408-3413.)

The duffel bag evidence was unusual for several reasons. The nature of the evidence, and the way it was presented by the prosecution, would lead one to believe that these items of clothing were worn during the perpetration of the crime. However, it is clear that even if some of these items were in fact worn in the course of the crime, there must have been additional items that were hidden elsewhere, as there were missing items, such as the other glove. Moreover, some of the items found – including the trench coat – did not react to the presumptive screening for the presence of blood whatsoever, and therefore could not have been worn during this very bloody murder. Indeed, none of the items had the amount of blood as would be expected if they had been used in the murder. Furthermore, the DNA results of the testing of the items found in the bag were not of the definitive

nature that one would expect had any of these items been worn by the perpetrator of this crime.

**I. Item 13-9: Black Duffel Bag**

Two apparent blood stains (items 13-9-1 and 13-9-2) found on the exterior of the black duffel bag reportedly located in the Toyota van were tested. Both revealed a DNA mixture that consisted of a predominant female component and a trace male component. (Exhibit CC, Laboratory Report by D. Stockwell, 05-12813-38, Dated 2/7/06, (hereinafter "Stockwell Report") at 617.)

13-9-1 contained sufficient DNA to determine that Ms. Vitale was the likely source of the female DNA with odds of 1 in 13 quadrillion. (Exhibit CC, Stockwell Report, at 620-22.) 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 in the minor component." (Exhibit CC, at 620.) The probability associated with this minor profile was 1 out of 560 Caucasians.

Item 13-9-2 provided a "weak and degraded profile." Ms. Vitale was included as a potential contributor, but the strength of the inclusion was minimal. (Exhibit CC, at 620.) The statistical probability of an individual having such a profile was estimated as 1 in 98 Caucasians. (Exhibit CC, at 623.) No conclusion was reached as to whether Mr. Dyleski's profile was

present; however, at least one allele was foreign to both Vitale and Dyleski. (Exhibit CC, at 620.)

ii. Item 13-9B: Glove

A black glove reportedly found in the duffel bag was swabbed at four locations (two exterior and two interior – items 13-9B1 and 13-9B2; items 13-9B3 and 13-9B4, respectively). (Exhibit CC, at 617, 619-20.)

Ms. Vitale was the likely contributor of the DNA found in items 13-9B1, 2, and 3. The underlying statistical probability was 1 in 13 quadrillion. (Exhibit CC, at 620-22.)

13-9B4 was a mixed sample, in which Ms. Vitale was the likely female contributor, with a statistical probability of 1 in 100 billion. Mr. Dyleski was not a potential contributor. (Exhibit CC, at 620-22.)

Thus, although Ms. Vitale's DNA was found on the glove, Mr. Dyleski's DNA was not.

iii. Item 13-9C: Balaclava

The ski mask ("balaclava") found in the duffel bag was tested in six areas, including four "bloodstains" and two "background DNA cuttings" (Items 13-9C1-6). (Exhibit CC, at 618.)

Ms. Vitale was the likely source of the four bloodstains (13-9C1, 13-9C3, 13-9C4, 13-9C5), with a probability of 1 in 13 quadrillion. (Exhibit CC, at 621-22.)

Mr. Dyleski was the likely source of item 13-9C2, a "background" DNA sample taken from the mouth area, with a statistical probability of 1 in 780 trillion. (Exhibit CC, at 621-22.)

The final item (13-9C6) was a degraded DNA mixture. Neither Ms. Vitale nor Petitioner could be excluded as potential contributors, but there were alleles that neither shared. (Exhibit CC, at 621.)

iv. Item 13-9D: Black Long-Sleeve Shirt

Of the five stains collected from the black shirt, only one provided DNA results. Petitioner was the likely source, with a probability of 1 in 780 trillion. (Exhibit CC, at 621-22.)

G. Land's End Shoes

Ms. Vitale's DNA was reportedly found a pair of shoes that may have belonged to Petitioner; said to match a tread pattern found at the crime scene.

However, the chain of custody for these shoes was questionable. On Sunday night, October 16th, Petitioner had put a pair of shoes in a bag, and left them at the home of his girlfriend, Jena Reddy. (9 RT 2585-88.) When Scott was arrested, Jena collected some of his belongings, including a pair of shoes, and gave them to Esther, Scott's mother. (9 RT 2585.) Esther left those shoes and other items of Scott's with her sister. (11 RT 3139, 3149-50.) They were later given to an attorney who had his investigator deliver

them to the District Attorney. The inside of the shoes was never tested to establish whether they had even been worn by Mr. Dyleski.

Mr. Collins testified about a pair of Land's End shoes, Item 22-1. Samples 22-1H and 22-1P yielded a full profile from a single female source that matched Ms. Vitale, with probabilities in the quadrillions/quintillions. The other results came from 22-1I, a "degraded DNA mixture" from "at least three separate donors." (13 RT 3654-3656.) The profile would be expected also with "1 in 13 African-Americans, 1 in 6 Caucasians, and 1 in 9 Hispanics." Neither Ms. Vitale nor Petitioner could be excluded. (13 RT 3656; 14 RT 3695)

Mr. Collins said that "the pattern of the design of the sole elements of these shoes were very similar to the print [he] observed in the photograph original from the original crime scene [sic]." (12 RT 3431.)

H. Foot Swab (Item 3-10)

A swab taken from Ms. Vitale's right foot, item 3-10, revealed a mixed sample. Petitioner could not be excluded as a potential contributor to the minor male profile, developed through Y-STR (male-specific) DNA analysis. This profile was insufficient to upload to the CODIS national database. (14 RT 3691-3692.)

Approximately 1 in 81,000 African-Americans; 1 in 43,000 Caucasians; or 1 in 23,000 Hispanics would share the genetic profile of the

minor component. Item 12-1, a swab from Petitioner, matched at all loci examined. (13 RT 3634.)

**There were problems in the analysis of item 3-10 with contamination and other irregularities**. This was not the first instance of contamination at the county crime lab. Evidence at trial established more than one instance of contamination in the testing of item 3-10. Mr. Stockwell made no effort to determine the source of the contaminant (although he admitted it was male DNA). (14 RT 3707-3709.)

There were also inconsistent results as to the quantity of DNA in these samples noticed by Gary Harmor (the analyst at the independent lab that conducted the Y-STR analysis), and an issue with the interpretation of data. (14 RT 3707-3709; 14 RT 3736.)

Trial counsel asked for an evidentiary hearing regarding the Y-STR DNA analysis. Specifically: (1) was it generally accepted in the scientific community; (2) had proper procedure been followed in collection, storage and testing; and (3) was the statistical analysis of Y-STRs generally accepted within the relevant scientific community, and if so, could it reliably be applied in this case. (3 CT 740-754.)

Y-STR analysis had not been reviewed by any California Court of Appeal. (3 CT 747.) The defense tried to keep it out because the probability analysis consisted solely of the fact that the Y-STR profile developed was

not observed in a database of 3,561 male profiles:

> Absent any explanation of the statistical significance of the fact that the Y-STR profile at issue in this case did not appear in Mr. Harmor's database, the fact of its nonappearance is meaningless, though it may be potentially - and prejudicially - compelling to lay jurors. 3,561 is 'a big number' but ... could well be statistically insignificant. Interpretation of such a result requires a measure of the likelihood of that result. Furthermore, such likelihood with respect to the database population can be meaningfully extrapolated to the general population only if proper random sampling techniques were employed in generating the database population.
>
> (3 CT 753-754.)

Mr. Jewett sought to "introduce evidence that Defendant's Y-STR profile is the same as the minor component of an evidence sample collected from the bottom of Pamela Vitale's foot" and that Scott's Y-STR profile was not observed in the database. (3 CT 887-888.)

Yet, evidence of a DNA "match" is irrelevant absent reliable scientific evidence of the statistical significance. The prosecutor was trying to introduce the absence of a particular profile in a Y-STR database. Such evidence:

> [I]s not only incomplete, it is affirmatively misleading. ... [Pizarro] was concerned that the bare fact of a match without statistical explanation would lead jurors to the unjustified, yet 'irresistible' conclusion that the profile is unique. Allowing evidence that the profile was not seen in a group of 3,561 people presents even greater potential for jurors to reach irresistible - and scientific[ally] invalid - conclusions.
>
> (3 CT 896-898.)

Granting a hearing, the trial court noted that jurors place a lot of significance on DNA evidence: "I have a great deal of difficulty with the manner in which you wish to put on this evidence without doing some statistical analysis as to what it means, because you are leaving it up to the jury to determine what it means." (1 RT 35-36.)

The prosecution called Dr. Megan Shaffer, director of Reliagene, which began Y-STR testing in 2003. With autosomal STRs the loci are independent of all the others so one can "multiply each particular location and the frequency of that allele to all the other frequencies," which can provide statistical probabilities that an unrelated person would have the same profile in the millions, billions, or quintillions. However, Y–STR analysis only looks at the Y chromosome, which is inherited, unchanged, from father to son. Every marker is "linked" so the product rule cannot be used. (1 RT 68-69, 72, 104.)

Instead, the analyst refers to a database and counts how many times (if any) that profile appears among the others. The database is comprised of profiles classified as: 1600 Caucasian; 1200 African-American; 430 Hispanic; and 100 Native American. (1 RT 89-93.)

Dr. Jason Eshleman, molecular anthropologist, testified as an expert in population genetics. (3 RT 816-822.) He explained that genetic classification can be unreliably oversimplified. For example, Caucasians

from New York do not show the same traits as Caucasians sampled from other parts of the United States. (3 RT 842-845.) A figure that combines all of the people in a database - regardless of ethnicity - is "meaningless." (3 RT 848.) There was no consensus among population geneticists as to the reliability of determining frequencies of Y-STR profiles. (3 RT 876.)

Y-STR analysis can be helpful with samples that contain male and female DNA. "The particular markers that only occur on 'Y' chromosomes are copied ... only the male DNA is detected. So it doesn't matter how much female DNA is there. You can still detect male DNA in very small amounts." (14 RT 3751.) Y-STR analysis is a better tool for exclusion than inclusion. (14 RT 3764.) Although the relevance of Y-STR testing to this case was questionable, the prosecutor was allowed to present it to the jury.

XXI.

Petitioner's defense at trial was as follows:

Several character witnesses spoke of Mr. Dyleski's peaceful character. That was the entire defense case.

Before trial, defense counsel moved to exclude the 911 recording in which Mr. Horowitz reported his wife's murder. (3 CT 756-762) Mr. Jewett, anticipating a defense of "I didn't do it," argued that:

> [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. [Para] The question of whether or not it's possible that Mr. Horowitz had anything to do with his wife's death is going to be implicated in the minds of the jurors....

(1 RT 9; 3 CT 872-878.)

... Mr. Horowitz, despite his best recollection now, was in there for some period of time, and we can hear him moving around...I think it's a 12 minute tape and then it's done. [Para] Well, 12 minutes is a long time...He could have done a number of things that he may or may not remember now... .[Para] This tape also tends to show there are things going on in there that Mr. Horowitz - - they may well be, in one sense, innocuous things. Moving, for instance, a pair of glasses might be one of them or...the coffee cup, although the DNA on the coffee cup could well be from him having had coffee that morning before he left for work...

(1 RT 10-11.)

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If Mr. Horowitz gets up here and says, 'I just went in, I checked Pamela, I called 911, I checked Pamela again, then I went outside and I remained outside thereafter on the cell phone,' that suggests - - people have no doubt for a moment, if assuming he says that, that he is going to, in his own mind, be telling the truth. [Para] But time may have done some interesting things in Mr. Horowitz's mind and those moments before six o'clock on October 15th of last year...
(1 RT 11-12.)

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We are talking about her husband, the last person to see her alive. A person who was at the scene, who had blood on his clothing.
(1 RT 17.)

***

> It is not possible, in the People's judgment, for this case to be tried without, at some level, some suggestion being made that there was some effort [to explore] a number of different avenues with respect to who was responsible for the death of Pamela Vitale. [Para] It absolutely defies credibility to even suggest that Ms. Vitale's husband is not going to logically be a person who is going to pop into a fact finder's mind.... Absolutely, positively without question, one person who - - at least one person who is absolutely going to pop in people's minds if Mr. Dyleski says, 'I wasn't there, I don't know anything about it. ..." Mr. Horowitz is going to be one of those people .... [I]n many people's minds, he is at the top of the list....
>
> (1 RT 19-20.)

There were actually three separate 911 calls. In the short interlude between the first and second calls, Mr. Horowitz remarkably regained his composure; he was trying to "logic this out." The court excluded the recording as requested by defense counsel, finding it was more prejudicial than probative. (1 RT 23-26.)

Petitioner contends that Ms. Leonida did not investigate Mr. Horowitz as a potential suspect because of his "notoriety" and also in order to prevent the 911 recording from being presented at trial. (*See* Exhibit H, Declaration of Scott Dyleski, at 392.)

Petitioner further contends that if true, such strategy fell below professional standards and constituted ineffective assistance of counsel, as the accompanying memorandum of law sets forth. Based on the mountain of information at her fingertips that would have presented a compelling case

of innocence -- specifically pointing to a perpetrator other than Petitioner -- this "strategy" was error of the highest constitutional magnitude.

XXII.

The judgment rendered against petitioner is invalid, and his consequent imprisonment is unlawful, because he was denied effective assistance of counsel at trial and on appeal, in violation of the rights guaranteed to him by the Fifth Amendment, Fourteenth Amendment and Sixth Amendment to the United States Constitution and by Article I, Section 15 of the California Constitution, and was further denied his constitutional right to due process of the law under the Fifth and Fourteenth Amendments to the United States Constitution as a result of prosecutorial misconduct.

XXIII.

Petitioner was denied effective assistance of counsel as a result of trial counsel's failure to adequately investigate and present compelling defenses available; to wit, that much of the evidence was not only inconsistent with Petitioner's guilt, but in fact pointed to another perpetrator. Trial counsel failed to present facts necessary to Petitioner's alibi, and failed to rebut the prosecution's convoluted and speculative theories. Nor did trial counsel challenge the scientific evidence, including chain of custody and contamination, or call any expert witnesses. Trial counsel failed

to object to irrelevant and inflammatory evidence, and to damaging expert opinion that lacked foundation. Furthermore, the trial was infected by egregious prosecutorial misconduct prior to and throughout the proceedings. Whether considered independently or cumulatively, counsel's performance fell below the standard of care, and prejudice ensued.

### A. Trial Counsel Failed to Develop Exculpatory Inconsistencies in the Prosecution's Theory of the Case.

Trial counsel failed to investigate or present troubling inconsistencies in the prosecution's case that spoke to Mr. Dyleski's innocence. The crime scene evidence indicated that the perpetrator was someone known to Ms. Vitale, comfortable in and familiar with the home, who did not feel rushed for time. This evidence stands in direct contrast to the uncontested facts that Petitioner was unacquainted with Ms. Vitale, had never been inside their home, and would have had a narrow window of time to commit this attack.

#### 1. Crime Scene Evidence Indicated the Perpetrator Was Acquainted with Ms. Vitale, and Comfortable in and Familiar with the Home.

The crime scene evidence possessed by trial counsel indicated that the perpetrator was familiar with and comfortable inside 1901 Hunsaker Canyon Road. Petitioner was hardly acquainted with Ms. Vitale and had never been inside her home. (15 RT 4155.) However, he had seen her around the neighborhood and was familiar with her appearance. (*See*

Exhibit H, Declaration of Scott Dyleski, at 391-392.)

Several things indicated the perpetrator's familiarity with and comfort in the home. Bloody eyeglasses were found neatly folded on top of the television. (7 RT 1937; Exhibit A, Photos, at 6-7.) Someone with bloody hands tidied up, coming into contact with a broken mug in the kitchen sink (Exhibit A, at 14); and placing an empty bowl on the kitchen counter next to the sink. (7 RT 1934, 1947. *See* Exhibit A, at 11-13, 15.) Bloody hands touched a bottle of water. (Exhibit A, at 9-10.)

There is also evidence that the perpetrator took a shower or at least used it to clean up after the crime. According to the prosecutor, the perpetrator did not take a shower but rather rinsed off a knife or something else. (8 RT 2058-59; 15 RT 4055.) "[T]he cast-off from your body, if you are taking a shower, it's going to start to drip and you are going to get drips of blood; but that shower was never run." (15 RT 4055.)

As to the broken mug with blood in the sink, Mr. Taflya had explained what would be expected if water was run over blood:

> Q. . . . [S]uppose they did turn it on, would you expect to see any evidence of that with respect to any wet blood that might be adhering to any item that's in the sink, assuming it was struck by water?
> A. I was going to say if the bloody area was struck with water I would expect that to happen, yes.
> Q. And what would you expect to happen?
> A. That there would be some diluted blood.
> Q. And how would you discern the existence of diluted blood?
> A. It wouldn't be the same color as the whole blood stain and

you might see some wet dripping as well.

(8 RT 2057.)

Of the shower specifically:

Q. Did you see any dilution or drips or anything to indicate that anybody turned the shower on, as opposed to the bathtub faucet, after those smears had been left there?
A. No, I did not.
Q. Do you have an opinion as to whether or not anybody operated the shower or took a shower after those smears were left there?
A. Yes, I do.
Q. And what is that opinion?
A. That the shower was not used.

(8 RT 2058-2059.)

Defense counsel asked no questions about the shower. However, physical evidence in trial counsel's possession showed a bloody handprint dripping diluted blood down the shower wall. (Exhibit A, Photos, at 16-18.) Thus, by the prosecution's own logic, the perpetrator did in fact take a shower, as evidenced by the "wet dripping" in the photos. (Exhibit A, at 16-18.) Defense counsel was presumably unaware of this evidence, as she failed to raise it at trial.

Other evidence showing the perpetrator's comfort and familiarity included blood on the exterior of the front door, which would result from someone with blood on their hands leaving the home and then re-entering (possibly with a key). (*See* 7 RT 1927; Exhibit A, Photos, at 2-4; Exhibit F1, Supplemental Forensic Examination Report (hereinafter "Turvey

Supplemental"), at 353.)

The fact that the perpetrator spent time at the sink based on the bloody bowl and broken coffee mug, coupled with the absence of blood on the faucet and the undisturbed coffee grounds, supports the inference that the perpetrator did not turn on the water there, but rather used the bathroom shower. (Exhibit A, Photos, at 11-15; 15 RT 4055 ("That sink was not run.").)

The significance of this fact is notable because there was no working hot water at the kitchen sink. (8 RT 2092.) It seems illogical that a stranger-perpetrator would place breakfast items in and near the kitchen sink yet not turn on the water. The more reasonable inference is that the perpetrator knew the hot water did not work and therefore went directly to the bath-room. This contention is bolstered by the fact that only the hot water knob in the shower had blood transfer. (7 RT 1978.) Only someone intimately familiar with the Horowitz/Vitale household would have this knowledge, and there was no evidence that Petitioner could have.

Evidence that the perpetrator spent time around the living room couch is based on blood in that area. (Exhibit A, Photos, at 23-27. *See also* Exhibit F, Forensic Examination Report, by Brent Turvey, MS (hereinafter "Turvey Report"), at 348.) Why would a stranger-perpetrator rifle through papers on the couch but not take any of the valuable items in plain view?

(15 RT 4140-41.)

All of the evidence discussed above indicating the perpetrator's comfort in the home was apparent from the crime scene photos. The conflict between this evidence and the facts pertaining to Mr. Dyleski should have alerted counsel that further investigation into the crime scene could result in exculpatory evidence. Yet, trial counsel asked no questions about the bloody bowl or mug, the kitchen sink, or the shower, nor argued how this evidence was inconsistent with Petitioner's guilt. The inescapable conclusion is that defense counsel was unaware of photographic evidence at hand that would have directly impeached criminalist Taflya and revealed that the prosecutor actively concealed or distorted the evidence of the perpetrator's comfort and familiarity. This cannot be justified as trial strategy.

Defense counsel argued briefly in closing that some evidence was inconsistent with the theory that Mr. Dyleski intended to commit a burglary - not that it showed his innocence:

> You also have a lot of evidence that the person who did kill Pamela Vitale was not interested in credit card information or money or PIN numbers. You have the crime scene, the photographs that you do have to look at because those photographs speak to a motive that's much more personal than credit card fraud.
>
> And more importantly you have the fact that the killer who was again not interrupted, who had plenty of time in Mr. Jewett's theory to get a glass of water, wash a knife, the

> person that killed Pamela Vitale just didn't take anything, but didn't go through anything her purse is sitting there unrifled through, no indication that anybody has touched it...There's no money missing...nothing missing at all, nothing consistent with the burglary.
>
> (15 RT 4140-41.)

This argument ignored the prosecution's alternative theory of guilt: that Mr. Dyleski may have gone to the residence not to burglarize, but rather to avenge the death of his dog, in the mistaken belief it was the home of Karen Schneider. (15 RT 4026-27)

Trial counsel failed to sufficiently investigate crime scene evidence, and consequently failed to grasp how the evidence conflicted with the prosecution's theory of the case. The prosecution's theory went unchallenged, and Petitioner was thereby prejudiced.

2. The Crime Scene Evidence Indicated the Perpetrator Was Not Rushed for Time, Which Indicates the Perpetrator Acquaintance with Ms. Vitale and Is Inconsistent with Mr. Dyleski's Alibi.

Physical evidence at the crime scene indicated that the perpetrator did not feel rushed for time. This evidence is exculpatory, as Petitioner could not have known when Mr. Horowitz was to return or whether anyone else might appear on Saturday, October 15, 2005. The detectives were obviously aware of this conundrum:

> PO: Is... is there anybody else besides you or your wife, who feels comfortable like... or at home, in your trailer?
> DH: My friend Mike McKeirnan he'd feel comfortable.

PO2: When he says comfortable, comfortable knowing that nobody is going to come back. That he has time in that house. Who would know that they have time there.
DH: Oh, everybody would know... I mean Joe would know. Mike would know. Everyone who knows me would know.
PO: But I mean, are you gone every Saturday?
DH: No.
PO: Throughout the day?
DH: That's a good point, no. And this was uh... this was unusual. And I work a lot, but I don't usually work Saturday mornings. I'm usually at home. That's what we were just talking about. I think...

...

PO2: It didn't appear to be any rush to leave.

(Exhibit B2, Horowitz Interview, at 140.)

However, once Mr. Dyleski was arrested, these observations seemed to have been forgotten or ignored.

Evidence of comfort and lack of concern about time was directly relevant to Petitioner's alibi, but went unnoticed by trial counsel and therefore was never provided to the jury.

All of the evidence discussed above indicating the perpetrator's comfort in the home also shows that the perpetrator did not feel rushed for time. Someone neatly folded and placed a pair of bloody on top of the television (7 RT 1937. *See also* Exhibit A, Photos, 6-7); someone with bloody hands straightened up items by placing items in and around the sink, including an empty bowl (7 RT 1934, 1947; Exhibit A, at 11-15); the perpetrator apparently drank water (Exhibit A, at 9-10); likely showered (*See* discussion XXI(A)(1) *supra*; Exhibit A, at 16-18); used tissues and

paper towels (Exhibit A, at 29); exited and re-entered, possibly with a key (7 RT 1927; Exhibit A, at 2-4. *See also* Exhibit F1, Turvey Supplemental, at 353); and rifled through papers near the living room couch (Exhibit A, at 23-27; Exhibit F, Turvey Report, at 348.) This behavior is inconsistent with anyone other than Mr. Horowitz, who would have been concerned about being discovered.

The issue of time was critical in this case. Evidence that the perpetrator spent more time in the home would have contradicted the prosecution's timeline and strengthened Petitioner's alibi. The prosecution's theory that Ms. Vitale was murdered sometime after 10:12 a.m. was based on computer activity. (8 RT 2245.) Fred Curiel told the police on October 20, 2005, that he had seen Mr. Dyleski at home at 9:26 a.m., sitting on the couch with Mrs. Curiel, and Petitioner's whereabouts were accounted for the rest of the day, in which case it would have been impossible for Mr. Dyleski to have committed the crime. (11 RT 3010; 11 RT 3017. *See also* Exhibit M, Santiago Report, at 433.) However, at trial, Mr. Curiel was unable to state whether he had seen Scott that day. Mrs. Curiel said Scott came in at approximately 10:45 a.m. (10 RT 2854, 2865-67.) Even accepting this reference point, that would leave about 33 minutes to commit the crime, get home, change, and dispose of bloody clothing.

In order for the prosecutor to make sense of the timing in closing

argument, he downplayed the amount of time the perpetrator spent in the home. (15 RT 4050 - 4058.) Thus, he alleged that no shower was taken, as he likely recognized that this fact would be difficult to reconcile with the already strained timeframe. (15 RT 4055.) Mr. Jewett recognized what defense counsel did not: "That's why I am spending some time with this scene, because to understand the timing element you have to understand the scene."(15 RT 4058.)

Although Ms. Leonida attempted to argue an alibi defense by arguing that 9:26 was the true time Mr. Dyleski returned home, she failed to contest key assumptions underlying the prosecution's chronology. She failed to challenge the ostensible time of death, foregoing cross-examination of computer examiner Kyle Ritter. (8 RT 2248.) Nor did she explore the forensic pathologist's failure to establish time of death. (14 RT 3827-29.)

Moreover, she failed to argue that even if Scott returned at 10:45, he did not have sufficient time to complete the crime, as the evidence shows the perpetrator remained in the home for a significant length of time, and left unchallenged the prosecution's claim that it took only ten minutes to walk from 1901 Hunsaker Canyon Road to 1050 Hunsaker Canyon Road. (15 RT 4058.)

The undersigned are informed and believe that 10 minutes is not

sufficient to walk or run this distance. (*See* Exhibit I, Declaration of Esther Fielding.) However, Mr. Horowitz sent a letter to predecessor counsel forbidding him or his agents "from coming on my property" which we have honored. (Exhibit U, Letter from Daniel Horowitz to Philip Brooks, Dated 3/15/08.)

3. Trial Counsel Should Have Hired a Crime Scene Expert to Rebut the Prosecution's Analysis of the Crime Scene Evidence.

A crime scene analyst could have provided highly exculpatory testimony that the evidence was simply inconsistent with Mr. Dyleski being the perpetrator. Post-conviction, Petitioner's family engaged Brent Turvey, MS, a crime scene analyst and forensic science expert. (*See* Exhibit F2, *Curriculum Vitae* of Brent Turvey.) After reviewing crime scene photos, investigative reports, and other materials, Mr. Turvey concluded:

1. Many key items of potentially exculpatory physical evidence were not properly examined.
2. The available evidence is not consistent with a profit motivation.
3. The available evidence is most consistent with an anger / revenge motivation.
4. The offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide.
5. The DNA results used to associate Scott Dyleski to this crime are problematic at best, and require an independent DNA Analyst.
6. The defense failed to adequately investigate or examine the physical evidence in this case.

(Exhibit F, Turvey Report, at 343-44.)

The conclusion that "the offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide" was based on: bloody eyeglasses neatly folded on the TV; the mug in the sink and cereal bowl on the kitchen counter, the bloody bottle of water, blood near the couch; and moist hairs in the shower drain. (Exhibit F, at 347-48.)

"These are not the actions of a stranger offender concerned about being discovered at a violent crime scene with a murder victim lying just inside the front door. These actions suggest a degree of concern for, familiarity with, and comfortableness moving around within the residence that is beyond that of a stranger with a profit motivation." (Exhibit F, at 348.)

In a supplemental report, Mr. Turvey found it likely that the perpetrator used a key to re-gain entry into the home mid-attack:

> In multiple crime scene photos, bloodstain evidence consistent with hand and finger contact patterns may be observed on both the inside of the front door, and the outside of the front door. There are also bloodstains on both the interior and exterior doorknob and dead bolt. **This indicates that at some point during the altercation, after blood had started flowing, the victim was able to lock the offender outside of the residence.** Were the victim able to get free of the residence during the attack, fleeing from the offender, it is unreasonable to suggest that she would seek re-entry. Rather, it is most reasonable to infer that she would have run in the opposite direction, away from the residence. Consequently, the bloody hand and finger contact patterns on the interior of the door are most reasonably associated with the victim; and

those on the exterior are most reasonably associated with the offender.

**However, the offender was able to regain entry to the residence without force (e.g., breaking down or through the door). Specifically, the contact blood smears on the exterior of the door on and around the deadbolt are significant, as the deadbolt requires key. The only reason to have contact with the exterior deadbolt would be to insert a key. The only way to regain entry without force is by using a key.**

(Exhibit F1, Turvey Supplemental, at 353-54 (emphasis added).)

This finding is highly exculpatory, as there is no indication that Petitioner had a key to the residence. Mr. Taflya testified about a blood swipe on the exterior of the door, but was never asked about blood on the exterior deadbolt. (7 RT 1927; 8 RT 2060-68.)

Present counsel also engaged Michael Laufer, M.D. (Exhibit G1, *Curriculum Vitae* of Michael Laufer, M.D.) Upon reviewing the medical evidence, Dr. Laufer wrote "Ms. Vitale was engaged in a protracted struggle with her assailant but did not run away, which suggests that she knew the assailant and may have tried to "negotiate" an end to the altercation." (Exhibit G, Laufer Declaration, at 369.)

Parenthetically, the forensic pathologist in this case, Dr. Brian L. Peterson, was part of the Forensic Medical Group, which has been subject to criticism as presented, for example, in an episode of "Frontline" that aired in 2011, titled "Post-Mortem." Whether to call an expert is normally

considered trial strategy. People v. Bolin (1998) 18 Cal. 4th 297 [rejecting a claim of ineffective assistance, because there was no showing how obtaining an expert would have helped.] However, such a showing has been made here, and the expert's testimony would have refuted the prosecution's basic theory of the case.

4. These Failures to Adequately Investigate Crime Scene Evidence Prejudiced Petitioner.

Petitioner was prejudiced by defense counsel's failure to investigate the crime scene. Here, the evidence against the defendant was largely circumstantial, and the prosecution lacked any coherent theory as to Mr. Dyleski's motive. (*See* 15 RT 4026-27.) Thus, evidence that the crime scene evidence was inconsistent with the Petitioner's guilt would have been highly persuasive.

Defense counsel's only argument about the crime scene was that it was inconsistent with a burglary. (15 RT 4140-41.) This argument is not one of innocence; it relates to the special circumstance. Had trial counsel adequately investigated the crime scene or consulted with an expert, she would have understood that the physical evidence at the scene was far more exculpatory than merely the absence of evidence of burglary. Rather, the physical evidence provided critical exculpatory clues into the relationship between the perpetrator and victim.

This exculpatory evidence, which counsel unreasonably failed to

investigate, could have provided the reasonable doubt otherwise lacking in Petitioner's defense by raising troubling questions. Could Petitioner have obtained a key to the home? If so, why would he re-enter? How could he know how long Mr. Horowitz would be gone? Why would he put dishes in the sink or shower? How does the finding of a protracted struggle fit with the small window of time for Petitioner to have committed the crime?

### B. Trial Counsel Failed to Investigate or Present Critical Evidence Implicating Another Individual as the Perpetrator.

Because Petitioner's counsel ostensibly argued his innocence, and because there was compelling evidence available that implicated another individual, specifically Mr. Horowitz, it was ineffective not to present this information to the jury.

#### 1. Evidence that the Perpetrator Was Known to Ms. Vitale and Was Comfortable in the Home Implicates Her Husband, Mr. Horowitz.

Much of the crime scene evidence that is inconsistent with Mr. Dyleski's guilt implicates Mr. Horowitz. "The offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide. . . . These are not the actions of a stranger offender concerned [with being] discovered . . ." (Exhibit F, Turvey Report, at 347.)

The facts suggesting the perpetrator took his time in the home, including possibly taking a shower, troubled Ms. Hill, Pamela's sister.

[Mr. Horowitz said] 'they must have been watching the house,

because he knew that I was going to be gone for a while.' How would that person know that? . . . How would somebody not know he just didn't go down and get some milk and come back?

(Exhibit C, Transcript of Interview of Tamara Hill (hereinafter "Hill Interview"), at 211.)

The detectives were also troubled by this precise question:

PO: Is... is there anybody else besides you or your wife, who feels comfortable like... or at home, in your trailer?
DH: My friend Mike McKeirnan he'd feel comfortable.
PO2: When he says comfortable, comfortable knowing that nobody is going to come back. That he has time in that house. Who would know that they have time there.
DH: Oh, everybody would know... I mean Joe would know. Mike would know. Everyone who knows me would know.
PO: But I mean, are you gone every Saturday?
DH: No.
PO: Throughout the day?
DH: That's a good point, no. And this was uh... this was unusual. And I work a lot, but I don't usually work Saturday mornings. I'm usually at home. That's what we were just talking about. I think...

...

PO2: It didn't appear to be any rush to leave.

(Exhibit B2, Horowitz Interview, at 140.)

Furthermore, the mug placed in the kitchen sink, which contributed to Mr. Turvey's findings that the perpetrator was comfortable in the home, had saliva that matched Mr. Horowitz's DNA. (Exhibit F, at 347.) Additionally, the evidence that the perpetrator did not turn on the water in the kitchen, but rather went to the bathroom shower is circumstantial evidence implicating Mr. Horowitz; he was the only suspect who knew the hot water in the kitchen did not work . (*See* 7 RT 1936; 8 RT 2058-59; 15

RT 4055; Exhibit A, Photos, at 11-13; Exhibit F, at 348.) Most compelling is Mr. Turvey's finding that the perpetrator likely used a key to re-enter the home mid-attack. (Exhibit F1, Turvey Supplemental, at 353-54.)

> The contact blood smears on the exterior of the door on and around the deadbolt are significant, as the deadbolt requires key. The only reason to have contact with the exterior deadbolt would be to insert a key. The only way to regain entry without force is by using a key.
>
> (Exhibit F1, at 353.)

Dr. Laufer determined that the superficial injuries on Ms. Vitale's back may have been done with the straight side of a key. (Exhibit G, Laufer Declaration, at 370.)

2. Evidence that Mr. Horowitz Had a Violent Temper and Abused Ms. Vitale Is Particularly Relevant - and Exculpatory - in Light of the Expert Opinions that this Was a Anger Killing.

Evidence provided to defense counsel indicated a rocky relationship between Mr. Horowitz and Ms.Vitale, that Mr. Horowitz was prone to fits of rage and violence, and that she had suffered prior domestic abuse during their marriage. Marital problems intensified as building costs mounted, and he prepared for the high-publicity homicide trial of Susan Polk.

Ms. Vitale's sister and brother-in-law suspected that Mr. Horowitz may have been involved in her murder. (Exhibit C, Hill Interview, at 172.) Mr. Hill contacted law enforcement. (Exhibit N, Report of Detective Goldberg, Dated 11/3/05.) Ms. Hill was very close with her sister. Of her

sister's marriage, she said "either they're passionately in love, or it's a passionate rage. It's...one or the other." (Exhibit C, at 190-95.)

"[U]sually in these incidents, he would come back ... very remorseful .... probably say sorry. He might even start crying. ..."I didn't mean to hurt you," and ... you know. He had a kind of a pattern of explosion..." (Exhibit C, at 196.)

Ms. Hill said Mr. Horowitz came with a lot of "baggage":

> Daniel, I think, came into the marriage with a lot of issues from childhood. A lot of issues from a previous wife who slept with his best friend, and ran off together. ... He also had a lot of issues with, uh, childhood with a very abusive father. ... So, he had had a history of dealing with his feelings, and reactions to things that trigger ... Pam inadvertently – or on purpose, maybe to make her point – would get into situations where she had suddenly triggered some deep emotion in him.
>
> (Exhibit C, at 191-92.)

Ms. Hill described past incidents of rage that escalated to physical abuse: "It would go completely out of proportion, and he would be in this rage and screaming, and [one time] he threw a telephone at her." (Exhibit C, at 194.) Another time:

> [T[he toilet had overflowed or something. ... And he had come in and there was water all over the floor. And he just lost it. She was asleep, and he started screaming at her from the bathroom ... at the top of his lungs....She wakes up and he's throwing the [unintell] the pail and sponge and everything at her. At the bed.
>
> (Exhibit C, at 194.)

Mr. Horowitz once told Ms. Vitale: "'I just wish ... you would die.' And then [he] left." (Exhibit C, at 192-93.)

A man named Richard Sellers contacted the Contra Costa Sheriff's Department a few days after the murder with information that approximately four months prior, Pamela came to his home to view tile work by the contractor she might want to use (who listed Mr. Sellers as a reference). Ms. Vitale arrived with a man she introduced as her husband, but upon seeing the news coverage associated with her murder, he realized that the man was not Mr. Horowitz. Mr. Sellers described this man as a tall (6'3" or 6'4") Caucasian who appeared well groomed and affluent. (Exhibit Q, Report of Detective Martin, Dated 10/20/05.)

Another witness, Araceli Solis, worked for Ms. Vitale as a housekeeper every other Thursday. (Exhibit E, Transcript of Interview with Araceli Solis (hereinafter "Solis Interview"), at 328. *See also* Exhibit R, Report of G. Schiro, Dated 10/20/05 (hereinafter "Schiro Report"), at 503-04). Ms. Solis recalled how three or four months prior, Ms. Vitale called to tell her not to come that day; she had been in an accident. The next week Ms. Vitale had a black eye that "looked very, very bad." (Exhibit E, at 338-39.) Ms. Solis's account was independently corroborated by Ms. Hill's statement that Ms. Vitale told her she had an accident where she had to go to the emergency room for an injury to her eye caused by walking into the

handle of a treadmill. (Exhibit C, at 213-15.)

Years ago Mr. Horowitz represented Ms. Hill in a lawsuit against a physician involving allegations of sexual assault. She was offered a settlement, but decided she did not care about the money, she wanted the doctor to have to answer in court for what he had done to her. Mr. Horowitz pressured her to settle, then exploded in a rage when she did not take his advice:

> [T]he moment ... I said that, I was the recipient of the hateful rage. Over the phone, I wasn't in person. And he said, "You are the most selfish ... selfish person I have ever known in my life." And I don't know if he called me a bitch. He might have said "selfish bitch." And I'm like in tears. This was my lawyer... "And I can't believe that you don't care about anybody but yourself." You know? And saying, "Dan, I just want to go to court." ... he had me in total tears. I hung up on him at that point. I was sobbing for a day. ... [H]e snapped the second I said ... I wanted to go to court ... it was just this barrage of "You are the most worthless human being that I've ever met." And I'm in tears. I ended up settling 'cause I didn't want to deal with him anymore.
>
> (Exhibit C, Hill Interview, at 229-35.)

Another potential witness never interviewed nor subpoenaed by Ms. Leonida, Donna Powers, contacted police with information that Mr. Horowitz may have been having an affair at the time of Ms. Vitale's murder. (Exhibit T, Report of Detective Simmons, Dated 11/1/05, at 509-10.)

Ms. Powers had a close friend, Dr. Brenda Abbley. (*See* Exhibit D,

Transcript of Interview of Donna Powers (hereinafter "Powers Interview") at 265.) Dr. Abbley knew Mr. Horowitz and Ms. Vitale through her parents, the Lehmans. (Exhibit D, at 298.) Ms. Powers thought Mr. Horowitz and Dr. Abbley were having an affair. (Exhibit D, at 290.) Ms. Powers believed Mr. Horowitz and Dr. Abbley were having an affair because of the way Dr. Abbley spoke about Mr. Horowitz, saying she loved him; he was the only man she ever heard Dr. Abbley speak of other than her ex-husband; she saw them kiss on the lips; when Mr. Horowitz came to visit and they sequestered themselves in her bedroom. (Exhibit D, at 266, 280, 290, 295.)

Ms. Powers was concerned that Dr. Abbley was abusing drugs and alcohol. In May, 2005 she heard Brenda call in a refillable prescription for Valium and Vicodin to a pharmacy in Lafayette for Mr. Horowitz and Ms. Vitale. Knowing that they were Brenda's patients, Donna Powers confronted Brenda, who said Horowitz was under a lot of stress because of the Michael Jackson trial, and she would not let a friend of hers be in pain. (Exhibit D, at 271-72, 275.)

Mr. Horowitz acted as a legal commentator during the Michael Jackson trial. According to Mr. Ortiz, becoming a legal commentator was part of a "media plan" to make Mr. Horowitz a celebrity attorney and thereby increase his earning potential. (*See* Exhibit K, Declaration of Rick Ortiz (hereinafter "Ortiz Declaration"), at 415.)

Two months later, Mr. Horowitz called Ms. Powers. (Exhibit D, at 267.) "He said 'I told Brenda she's not allowed to talk to you ever again, and I don't want you to ever talk to her again. And if you [do] ... I'll make sure you lose custody of your daughter.'" (Exhibit D, at 265.) Ms. Powers explained she was concerned about Brenda. (Exhibit D, at 271.) When she mentioned Brenda calling in the prescriptions, he "got extremely angry," and threatened to take away her daughter. (Exhibit D, at 274.) "He didn't know me from Adam. You know? ... I wasn't a friend of him. And he called me up...And he showed me a side of a human being, that... I mean he threatened me with my child. Who does that?" (Exhibit D, at 294.)

Parenthetically, on October 15, 2005, Mr. Horowitz called Barbara Lehman at approximately 6:00 p.m., *before* notifying the police: "Lehman said she asked Horowitz if he had called the police yet and Horowitz said, 'No, why should I? She's dead.'" (Exhibit M, Santiago Report, at 431.)

Two days after Ms. Vitale's death, Mr. Horowitz was collecting clothing items at 1901 Hunsaker Canyon Road when Ms. Abbley and Ms. Lehman drove past the security gate. "Abbley described herself as Daniel Horowitz's physician and the daughter of Lehman. Lehman described herself as a close family friend of both Pamela and Daniel." (Exhibit O, Barnes Report, at 465.)

Thus, there was evidence provided to trial counsel that indicated Mr.

Horowitz had a problem with anger and abusive behavior (directed to Ms. Vitale and others). This evidence is particularly compelling in light of the experts' findings that Ms. Vitale's murder was the result of rage or anger. "The injuries are atypical of a burglary or robbery gone bad, and are far more commonly associated with anger or rage." (Exhibit G, Laufer Declaration, at 369.) "The available evidence is ... most consistent with an anger/revenge motivation...a primary goal of offense behavior is to service cumulative rage and aggression." (Exhibit F, Turvey Report, at 345-46.)

This evidence particularly exculpates Petitioner given the evidence of his peaceful, non-violent demeanor. (*See* 15 RT 4106-07.) If counsel had presented this evidence that Mr. Horowitz was prone to fits of rage and violence, and that this conformed to the physical evidence at the scene, but was contradicted by the evidence of Mr. Dyleski's peaceful character, it may have established the reasonable doubt otherwise lacking in this case.

3. Evidence of Mounting Marital Tension as a Result of the Home Construction and Related Financial Pressures.

The marital tension between Ms. Vitale and Mr. Horowitz was exacerbated by problems surrounding the construction of their home. (Exhibit C, Hill Interview, at 197.) For several years, the couple was in the process of building a large new home. (8 RT 2084.) The project was difficult from the start. Rick Ortiz was hired as the contractor by Mr.

Horowitz in March of 2002. The original plans were incomplete, which caused significant delays and increased the final construction costs. The very first check from Mr. Horowitz bounced. (Exhibit K, Ortiz Declaration, at 413.)

Many of the construction problems sprang from Ms. Vitale's indecisiveness. "She had difficulty making decisions, she altered elevations frequently after already being built ... changed materials, added custom features...made hundreds of smaller changes, [and] ordered materials that took months to acquire." This resulted in hundreds of thousands of dollars in lost time, and increased labor and materials. (Exhibit K, at 413-14.) On June 1, 2004, Mr. Ortiz compiled a list of the increased costs that had resulted from Ms. Vitale's indecision totaling over $214,000. (Exhibit K1, Change Orders to Date.)

Mr. Ortiz became close with the couple and was able to observe how the construction problems strained their relationship. (Exhibit K, at 413-14.) Mr. Horowitz withdrew from the process but Ms. Vitale grew more obsessed. Her health began to suffer. She developed severe allergies and couldn't leave her home. When she did leave, she wore a mask, gloves, and covered her head. (Exhibit K, at 414.) (Petitioner notes that the reluctance to leave home is interesting in light of statements by Mr. Horowitz that his wife had plans to attend the ballet that evening with a friend. (Exhibit P,

Report of Detective Pate, Dated 11/1/05 (hereinafter "Pate Report"), at 473.) The identity of this companion was never determined.

Mr. Horowitz represented Pavlo Lazarenko, former Ukrainian Prime Minister, in a criminal case in the United States District Court, Northern District of California. Mr. Horowitz told Mr. Ortiz that he was expecting a one million dollar bonus upon acquittal. However, Mr. Lazarenko was convicted in May of 2004. Mr. Horowitz "came home to Lafayette angrier than I had ever seen. We spent nearly two hours discussing his anger and where to go from there. We spoke of money issues and how Dan was going to have to rein Pamela in and put some controls in place. I remember watching Dan on TV bashing his briefcase against the columns of the court house thinking this is not good." (Exhibit K, at 415.) Because Mr. Horowitz had largely foregone his legal practice to pursue his career as a legal commentator, he had less income, and without the anticipated bonus, there were no funds for the construction, and he already owed Mr. Ortiz more than $200,000. (Exhibit K, at 415.)

Mr. Horowitz dealt with this stress by turning on Mr. Ortiz:

> Dan threatened my family. He showed me pictures of my wife and kids outside our new home in Shreveport, Louisiana. He said his family had sent someone down to take pictures and that he (Dan) could not guarantee their safety. Dan said his family had ties with...the "mob" and they don't "play."
>
> (Exhibit K, at 415.)

Mr. Horowitz used these threats to get Mr. Ortiz to sign a new modified contract, with Mr. Ortiz's vacation home as collateral. Mr. Horowitz recorded a fraudulent deed of trust and then seized Mr. Ortiz's home. (Exhibit K, at 416.)

Thus, on October 15, 2005, Mr. Horowitz and Ms. Vitale were under a great deal of financial pressure and experiencing significant marital strife, confirmed by Ms. Hill:

> So, several arguments over the last year and a half to two years have been just exclusive house issues ... the last argument they had about this which I would say was within the last two months – maybe three months – was them just talking about the fact that he ... this wasn't his house ... he accused Pam of just ... that she didn't love him, and ... was just using him to make all the money so that she could build her house.
>
> (Exhibit C, Hill Interview, at 199.)

Mr. Ortiz was never contacted by anyone before the undersigned. (Exhibit K, at 416.) However, trial counsel and law enforcement should have known of Mr. Ortiz's existence as several people indicated he may be a potential suspect who law enforcement should investigate, including Tammy Hill. (Exhibit C, at 187.)

There was a new crisis that Ms. Vitale confided to her sister in one of their last conversations before her murder. The workers had started to install flooring in the new home, but because it sat in the basement for three years due to the many delays, the finish was ruined. (Exhibit C, at 199-200.)

> [S]he was afraid to tell Daniel about that because it was just one more thing, and he was starting the Polk case ... I don't know if she meant afraid 'cause now there's going to be this huge blow up, or just didn't want to put that extra stress on him at that time. Uh, but I know there was this house thing recently, this week, that was a big issue. I mean it's three floors of flooring that might have to be replaced.
>
> And you never know if she actually told him about this or not?
>
> I do not know. On Tuesday uh, I'm pretty sure she had not.
>
> (Exhibit C, at 200.)

This is compelling evidence of potential motive for Mr. Horowitz.

4. Mr. Horowitz's Behavior Following Ms. Vitale's Death Seemed Inconsistent with that of a Grieving Husband and Indicated a Consciousness of Guilt.

Sergeant Hoffman, first on scene, testified at preliminary hearing that when he first arrived, he placed Mr. Horowitz in a patrol vehicle, and Horowitz immediately said he was an attorney and had been with "a bunch of retired police officers that day." (1 CT 36.)

Mr. Horowitz produced a Safeway receipt, his last "errand" before arriving home. Only a few items were purchased, including packaged salad and salad dressing. (Exhibit A, Photos, at 28.) However, a police inventory of the refrigerator and cabinets indicates that there were seven bags of packaged salad in the fridge, and twenty-five bottles of salad dressing. (*See* Exhibit R, Schiro Report, at 499-501.)

While being interviewed by the police, Mr. Horowitz showed few

signs of shock or grief. (*See* Exhibit B, B1, and B2, Digital Recordings of Horowitz Interview.) He made numerous phone calls, and similar to Sergeant Hoffman's description, appears animated as he lays out his theory of the case: "I've pretty much figured out the time and manner and everything else. I just don't know who." (Exhibit B, at 31)

When Mr. Horowitz explained his story to Ms. Hill: "He wasn't enraged ... haven't seen him be angry over the death." (Exhibit C, Hill Interview, at 219.)

While speaking with detectives, Mr. Horowitz answers a phone call from Bob Massi with whom he had breakfast that morning, and says matter-of-factly: "Bob, I'm here with two homicide guys. My wife was murdered." (Exhibit B, Horowitz Interview, at 61-62.)

Although Mr. Horowitz made approximately fifty phone calls in the hours following his reported discovery of his wife's body, he did not personally notify her sister but instead had his sister Carol call Ms. Hill around 7:45, nearly two hours later. (Exhibit C, at 208, 250. *See also* Declaration of Sara Zalkin.)

Mr. Horowitz immediately tried to steer the investigation. At the scene, Sergeant Hoffman tried to obtain basic personal information about Ms. Vitale from Mr. Horowitz. Instead, he provided details about a man named Joseph Lynch who was supposed to come over that day for a check.

(1 CT 46; 1 CT 50.)

At the station Mr. Horowitz brought up Mr. Lynch at least twenty times. (*See, e.g.*, Exhibit B, at 38-42, 47, 49, 54, 57-58, 61, 67, 73-76, 78-79, and 94; Exhibit B1, at 97, 100-101, 103, 106-07, 109, 111-12; Exhibit B2, at 118, 121, 129, 149; Exhibit C, at 220.)

Two days after Ms. Vitale's death, Mr. Horowitz pulled Ms. Hill aside to tell her why he was angry with Pamela and how she had hurt him, which is inconsistent with a grieving spouse and implies consciousness of guilt:

> TH: And he said, "I was talking to Jan, and she said that Pam uh... had had some calls with Neal, and ... and even went out to dinner with him. What do you think about that?" And he ... or ... or, "Do you know anything about that?" And I was like, "Why are you asking me this?"
>
> ***
>
> TH: And that uh... And I said, "Well, I think that maybe he did have some telephone conversations with her. I had no idea about any dinners."
> PO2: Uhuh.
> TH: And he goes, "What do you know about that neighbor [unintell]" And goes, "I know, he knows," You know? That was her house, and he just kept going back to "This is her house. And I was just the money person. And, you know. That really hurt me." And uh...
> PO2: This is... When was this?
> TH: This was yesterday. And "I guess she loved me."
> PO2: Uhuh.
> TH: And I'm like, "What bizarre thing to tell me, then is asking me about at this juncture. And to tell me that really hurt him....How am I supposed to react to that?

(Exhibit C, Hill Interview, at 243-245.)

5. Mr. Horowitz Possessed Information that He Should Not Have Known if He Was Being Truthful as to the Events Surrounding Ms. Vitale's Death.

Mr. Horowitz made statements in the hours after the murder that contained certain information that he would not have had access to if he was being truthful. First, he made a statement that Mr. Lynch, who he insisted was the guilty party, was supposed to collect a check from Ms. Vitale that day. Second, he made statements implying knowledge about the knife wound on his wife's stomach.

At the scene, Mr. Horowitz told Sergeant Hoffman that Mr. Lynch "was supposed to come by and **drop off** a check for $188.00. For water." (Exhibit L, Report of Sergeant Hoffman, Dated 10/16/05, at 422.) In his interview at the police station the night of the murder, Mr. Horowitz claims Ms. Vitale told him that **they owed** Joe a check for $180 for water. (Exhibit B, Horowitz Interview, at 57, emphasis added.)

However, as detectives took turns questioning Mr. Lynch and Mr. Horowitz (explaining their periodic appearance in the room with Mr. Horowitz), Mr. Lynch was adamant that he had just called that day, October 15th, and left a message on the Vitale/ Horowitz answering machine, between 11 a.m. and 2 p.m., about needing the $180 check for the water. (*See* Exhibit P, Pate Report, at 481.)

Detectives confronted Mr. Lynch, stating that Mr. Horowitz told

them that Pamela had said the day before that Joe needed a check for $180. Mr. Lynch was adamant that there was no way for Mr. Horowitz to have had that information previously, as he did not know when the water was to be delivered, and he had only left the message that day. Moreover, Mr. Lynch stated that normally he did not go up to the house to pick up a check, but rather Ms. Vitale would bring it to him; implying that Mr. Horowitz had fabricated the story that Joe would be coming up to the house. (*See* Declaration of Katherine Hallinan.)

Mr. Horowitz told detectives that he left his residence at 7:30 a.m. and did not return until almost 6 p.m., when he reported the murder. (Exhibit P, 472-73.) Aside from touching her neck and calling 911, he claimed he did not touch or access any other areas or items within the residence. (Exhibit P, at 474.) Thus, based on Mr. Horowitz's account, he had no way to know Mr. Lynch was owed $180. Ms. Leonida did not cross-examine on this inconsistency.

Mr. Horowitz also made statements implying awareness of a wound that was not visible from Ms. Vitale's position when discovered. "There could have been other wounds too. There could have been a second one on the other side. I don't know." (Exhibit B1, Horowitz Interview, at 116.)

6. With Tragic Irony, the Prosecution Accurately Anticipated the Obvious Defense that Defense Counsel Egregiously Failed to Pursue.

Prosecutor Jewett anticipated many of the obvious defenses that defense counsel failed to present. Defense counsel moved to exclude the recording of Mr. Horowitz's 911 call. Counsel alleged the call was prejudicial because of the emotion one can hear in Mr. Horowitz's voice during the call. Ms. Leonida stated in her motion "The dispatch ... is not relevant to any issue at trial. Mr. Dyleski is not suggesting that Mr. Horowitz was responsible for his wife's death." (3 CT 758.)

However, in response, the prosecution notes that Mr. Horowitz's potential guilt is so obvious, that whether or not the defense pursues a defense of third party culpability, the jury will naturally wonder whether he may be the true guilty party:

> [Mr. Dyleski] has suggested ... (through counsel) that he will be denying any responsibility for this crime at trial. In doing so, he clearly raises the inference that someone other than himself murdered Ms. Vitale. ... [T]he jury's attention would naturally gravitate toward Ms. Vitale's husband whether or not defense counsel chooses to point the accusatory finger at him. (3 CT 873.)

The prosecutor recited some of the obvious evidence implicating Mr. Horowitz:

> 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.)

He continues:

> [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.)

### 7. Evidence Available to Defense Counsel Implicating Mr. Horowitz in the Death of His Wife Was Sufficiently Compelling that Counsel's Failure to Investigate and Develop Constitutes Ineffective Assistance of Counsel.

Evidence of third party culpability need only be capable of raising a reasonable doubt as to the defendant's guilt. People v. Cudjo (1993) 6 Cal.4th 585, 609; People v. Hall (1986) 41 Cal.3d 826, 833. Here, evidence linking Mr. Horowitz to the crime was capable of creating reasonable doubt. The physical evidence used to link Petitioner to the crime was "problematic at best," (Exhibit F, Turvey Report, at 344); the prosecution failed to develop a rational motive; Petitioner had a potential alibi; and Petitioner had no history of violence. In light of the weakness of the evidence against the Petitioner, if the jury had evidence of Mr. Horowitz's abusive conduct, the issues in the marriage, the physical evidence implicating him, and statements implying guilt and knowledge, it would likely have raised a reasonable doubt otherwise lacking.

Trial counsel made little effort to investigate evidence of third party culpability in general and Mr. Horowitz in particular. Ms. Leonida claimed that she investigated "everything," watched all interviews, and had her investigator Ed Stein interview the Hills and Ms. Powers. However, Mr. Stein did not recall interviewing the Hills, and had no idea who Ms. Powers was. (*See* Declaration of Katherine Hallinan.) There are no notes in trial counsel's file about the Hill or Powers interviews, although there are notes on other witness interviews. (*See* Declaration of Katherine Hallinan.) This implies that even if Ms. Leonida did watch those interviews, she failed to recognize their worth.

Further evidence that Ms. Leonida failed to investigate evidence of third party culpability is the fact that she never contacted Mr. Ortiz, although several members of Ms. Vitale's family suggested his possible involvement. (*See* Exhibit K, Ortiz Declaration, at 416.)

Perhaps most compelling is Ms. Leonida's apparent lack of awareness of a crime scene photo, in her possession, which directly refuted the prosecution's denial that the perpetrator had showered.

By way of declaration, Mr. Dyleski relates that Ms. Leonida:

> [I]nformed me that no evidence or interview existed that implicated Daniel Horowitz in the murder of his wife ... besides the Declaration of Susan Polk. I found out recently from my habeas counsel that Ms. Leonida had in her possession ... multiple interviews that were exculpatory . . . Ms. Leonida further stated that investigating Mr. Horowitz

> and presenting him as a suspect at trial would not be wise because of his notoriety.
>
> (Exhibit H, Declaration of Scott Dyleski, at 392.)

Susan Polk (a client of Mr. Horowitz at the time) provided a declaration stating that Mr. Horowitz told her that he framed Mr. Dyleski. (Exhibit J, Declaration of Susan Polk, at 409. *See also* Exhibit S, Report of Deputy Wilhelm, Dated 1/13/06, at 507) Ms. Leonida's decision to not investigate compelling evidence of third party culpability because of Mr. Horowitz's "notoriety" cannot be considered sound trial strategy.

Counsel's failure prejudiced Petitioner, since the prosecution's case went largely unchallenged. Among the files in the undersigned's possession was a transcript from a Court TV chat room interview of a juror from Mr. Dyleski's trial, a Mr. Peter De Cristofaro. (Exhibit X, Transcript of Chat with Peter De Cristofaro.) Mr. De Cristofaro called the defense "weak":

> It was 'almost all character witnesses and even the number of character witnesses was not that much. I personally would have like to have seen more, or an alternate theory as to who might have done it. If Scott Dyleski didn't do it, I would have liked to have seen Ellen Leonida give us an alternate theory to the crime. She never did.
>
> (Exhibit X, at 538-39.)

Although Ms. Leonida had ample grounds to present an "alternate theory", she did not do so.

### C. Trial Counsel Failed to Present Evidence of Crime Scene Contamination that She Actually Possessed.

Trial counsel was ineffective for failing to investigate or present evidence of contamination in her possession. Specifically, crime scene photos showed faulty practices on the part of the investigators that may have led to contamination. This evidence was sufficient to challenge the integrity of the entire investigation. Trial counsel did not recognize its exculpatory value, and thus failed to investigate, present or cross-examine on this crucial issue.

Four images taken by law enforcement personnel in processing the crime scene show the same ruler being used in different locations, with identical apparent blood transfer in each image. (Exhibit A, Photos, at 19-22.) These images show how evidence can be easily and inadvertently contaminated, which likely occurred here.

Trial counsel additionally failed to question the chain of custody and potential contamination of critical inculpatory evidence: the duffel bag. Reserve Deputy Kovar, who located the duffel bag in the van, testified that when he found the bag, he moved items around inside of it. (9 RT 2338.) This could have potentially cross-contaminated items. A photo taken at 1050 Hunsaker Canyon Road of the bag sitting on the porch, with some of its contents displayed on top, shows the sloppy handling of important evidence. (Exhibit A, Photos, at 30. *See also* 9 RT 2323.)

Additionally, trial counsel failed to challenge gaping holes in the chain of custody for the contents of the bag. Mr. Kovar testified that he signed the forensic property tag for the duffel bag, before handing it over to a crime lab technician (identified elsewhere as Eric Collins). (9 RT 2327.) However, Mr. Kovar did not sign a forensic property tag for its contents. (9 RT 2331-2332.) No one testified to having signed any forensic property tag or chain of custody for the individual items within the bag. Mr. Collins testified that he took possession of the bag from Mr. Kovar but did not document the contents until later, at the lab. (12 RT 3397-98.)

The unestablished chain of custody for the items within the bag is interesting in light of the single photo of the bag and its contents on the porch of 1050 Hunsaker, which only shows two items of clothing, the pullover and the balaclava, but not the coat or glove that were allegedly found. (Exhibit A, at 30. *See also* 9 RT 2323.) It is perplexing that the investigators would photograph some items but ignore the remainder, including the all-important glove. In fact, nobody mentioned a glove. Mr. Collins' handwritten field notes state: "Kovar reported finding a black duffel bag, containing dark clothing, a ski mask, and a clump of loose reddish hairs ..." (*See* Exhibit AA, Field Services Information, at 545.)

Although Mr. Kovar did not report finding a glove, he was permitted to authenticate the glove at trial. (9 RT 2332-2333.) However, the veracity

of this testimony is questionable at best as he directly contradicts himself during his testimony, both at trial and preliminary hearing, as to whether or not he actually saw the glove at the scene:

> Q. And what did you see?
> A. I saw what appeared to be a dark, either lightweight sweater of pullover.
> Q. What else?
> A. Underneath that was a dark colored balaclava, a head mask?
> Q. A balaclava. Okay.
> Did you explore the bag further?
> A. At that time, I called in to my supervisor and said I had an "item of interest" ...
> Q. And so what did you do?
> A. I took the duffel bag with the contents still inside it down to the residence where the detectives were.
>
> (9 RT 2322.)

Still on direct, Kovar later testifies:

> Q. When you looked in the bag, did you see a glove?
> A. Yes.
> Q. At what point was that?
> A. As I shown my light in there, I saw a glove. I didn't touch it, at that point.
> Q. And so you are saying you saw the glove back when the you [sic] saw it by the van?
> A. Yes.
>
> (9 RT 2332-33.)

Mr. Kovar was then permitted to authenticate the glove.

At the preliminary hearing, Mr. Kovar had similarly contradicted himself:

> Q. Did you search the bag?
> A. I did not completely search the bag.

Q. What do you mean 'completely'?
A. I didn't take all the contents out and see what was inside.
Q. You just – you looked into it.
A. I looked into it. I believe I picked up the – there was a hood – some sort of balaclava-type thing, put that back in and then called my supervisor.
Q. So, the thing that was on top that you saw first was the balaclava?
A. No. I – I couldn't tell you exactly what was on top. There was dark clothing like a jacket of some kind, the balaclava, I believe a glove, again I saw – without pulling it out, this is what I saw.

(CT 1 151-152.)

On cross-examination Mr. Kovar gave more contradictory statements that further support the fact that he had not seen the glove at the scene:

Q. Did you move around the contents of the bag?
A. When I pulled the initial piece of clothing out, yes.
Q. And then you put the items back in the bag?
A. I put that – yeah, the balaclava right back in.
Q. Okay. And you don't remember, as you sit here, what was on top or what you saw other than dark clothing?
A. I believe it was would be the balaclava if that is what I pulled out.
...
Q. Do you remember what else was near it or what order the things were placed in the bag in?
A. I don't, and I – the only reason I know there was a jacket in there is at the time it was taken to the front porch is when some of the contents were pulled out to be examined by the detective.
Q. Okay. So you don't know where anything was in relation to anything else inside the bag?
A. No.

(1 CT 154.)

Ms. Leonida did not ask any questions about these inconsistencies or

chain of custody. This evidence would have been particularly meaningful in light of the strange nature of the duffel bag evidence. Logically, in order for such items to have Ms. Vitale's DNA on them, they must have been worn by the perpetrator during the crime. However, DNA analysis of the glove excluded Mr. Dyleski entirely. Moreover, the bag only contained a single glove, a mask, and a shirt and coat that had no blood on it whatsoever. Thus, if the mask and glove were worn by the killer, what happened to the other glove and the rest of the clothes? Why were the rest of the items disposed of so well, and a few random pieces were left in a bag with Mr. Dyleski's name on it, mere yards from his home? In light of the damaging, but puzzling, nature of the duffel bag evidence, it was essential for defense counsel to provide an alternative explanation for the manner in which Ms. Vitale's DNA could have made it onto the bag (to wit, contamination). Defense counsel failed to do so, and this failure fell below an objectively reasonable standard of competence, and prejudiced Petitioner.

D. Failure to Object to Unfounded Expert Testimony that Gloves Found in the Duffel Bag Explained why Petitioner's Fingerprints were not Found at the Scene and to Elicit Favorable Results of Laboratory Testing.

At the time of trial, Kathryn Novaes had been a latent fingerprint examiner with the Contra Costa County Sheriff's Department laboratory for four years. She testified as an expert "in the composition and identification

of latent fingerprints." (12 RT 3298-3299.)

Certain surfaces are better than others; for instance, paper, "because we have amino acids that actually absorb into the fibers of the paper and it's a very conducive place to find latent fingerprints." (12 RT 3301-3302.)

Ms. Novaes explained that in certain cases, black powder is used to get exemplars from known individuals to get as much of the hand as possible. In this case she obtained copies of "major case prints" taken from Mr. Dyleski. (12 RT 3306-3308.)

Ms. Novaes processed five pieces of note-sized paper and obtained 16 prints for comparison, 7 of which matched Mr. Dyleski. (12 RT 3308-3309.)

Mr. Jewett later asked:

Q. Were any fingerprints, identified as Scott Dyleski's, found anyplace at 1901 Hunsaker Canyon Road, as far as you know?
A. No.
Q. Okay. Did you...specifically examine possible latent fingerprints and blood on several cardboard boxes that were seized from that scene?
A. Yes.

***

Q. Did you closely examine in the laboratory some of those prints on some of those boxes?
A. Yes.
Q. And when doing that, did you form any opinions as to what did make at least some of those prints?
A. Yes.
Q. What?
A. It was a fabric.

Q. And can you be at all more specific about what kind of fabric or item it was?
A. In my opinion, because of the shape of the fabric or apparent fabric impression, it was most likely that of a fabric type glove.
Q. Now, did you engage at least in some preliminary efforts to try to locate any gloves that might make an impression similar to the ones that you saw on some of these boxes?
A. Yes.
Q. While you were still in the process of doing that, did you become aware of a glove that was found in a duffel bag in a van, at 1050 Hunsaker Canyon Road?
A. Yes.
Q. And did you personally look at that glove?
A. Yes.

(12 RT 3312-3314)

People's Exhibit 18B looked "similar" to the glove she was told came from a duffel bag inside a van:

Q. When you looked at the glove, was there a specific sheriff's office crime lab number and item number associated with the item that you looked at?
A. It was actually not packaged when I looked at it.
Q. Where was it?
A. It was in a fume hood.
Q. And who was...processing the glove at the time that was being done?
A. Criminalist Eric Collins.
Q. And was Mr. Collins a person who, to your knowledge, collected a number of items of evidence associated with this investigation?
A. Yes.

(12 RT 3314)

Q. At the time that you saw this glove in the fume hood, were there other items of evidence that were also present in the laboratory that Mr. Collins was work working [sic] on?
A. I'm not sure.

Q. Okay. So was it Mr. Collins who directed your attention to this glove in the fume hood?
A. Yes.
Q. All right. Let me - - I'll ask you a hypothetical. Okay. Assuming that this is the glove that Mr. - - and by this, I mean People's Exhibit 18B - - was the glove that you saw Mr. Collins working on....Did you have an opportunity to look at...specifically the fabric of this glove, in and effort to determine whether or not it could have made, the pattern that you characterized as a fabric pattern on the boxes?
A. Yes.
Q. And you have an opinion with respect to that?
A. It looked similar in my opinion.

***

Q. Is the pattern of the fabric that you observed this on, this glove that was in the fuming hood, consistent with the pattern of the fabric that apparently left these fabric patterns and blood at 1901 Hunsaker Canyon Road?
A. In my opinion, yes.

(12 RT 3315-3316.)

On cross-examination, as to Mr. Dyleski, Ms. Leonida asked Ms. Novaes:

Q. What exactly did you compare his fingerprints to, which objects?
A. There were some boxes that I processed and compared to him and there were areas of the house that were processed with black powder and then tape lifted that I compared.
Q. What other objects?
A. I have a lot of objects that I processed. Would you like me to tell you all of them?
Q. Yes, if it would refresh your recollection to look at your notes.

***

A. I processed eyeglasses, a duct taped box, two boxes, another box, a front gate box, another front gate box, a white box, a tile, paperwork, molding and keys marked, more paperwork, a broken pottery piece...

(12 RT 3320.)

Aware that it was problematic that there were no fingerprints found anywhere at 1901 Hunsaker that were identified as Mr. Dyleski's, Mr. Jewett skillfully leads the witness, on redirect inquiring:

> Q. Well, let me ask you this: Suppose, for instance, that I were to touch this area in front of you and I were just to drag my hand on it across like that. Would you expect to find a usable latent fingerprint if I do that?
> A. Maybe not.
> Q. Why not?
> A. Because you haven't actually put the right amount of pressure on the object. Instead, it's a smear.
> Q. Okay. It's a smear. Okay. So if a person's hand is in motion at the time it touches something, does that sometimes obscure ridge detail?
> A. Yes.
> Q. And if that happens, can you have occasions where you know or suspect that somebody has touched something because you have a smear, but you don't have enough ridge detail to be able to identify it as a usable latent fingerprint?
> A. Yes.
> Q. Is that common or not common?
> A. It can happen. People move - - skin is fragile....
> Q. Is it uncommon to find when you are posting [sic] either an item or a scene to **find smears that you believe are left by somebody's hand**, but it doesn't give you enough information to make a comparison?
> A. No.

(12 RT 3325-3325 (emphasis added).)

Trial counsel's only objection was lack of foundation for the fingerprint exemplars on the basis "that Mr. Dyleski's fingerprints were taken, that those are actually his." This objection was overruled. (12 RT 3328.)

Ms. Leonida had this witness read from one of the cards with Mr. Dyleski's fingerprints, which had the name, address, phone number, and date of birth of John Halpin, who lived at 1701 Hunsaker Canyon Road. (12 RT 3317.) Mr. Halpin's credit card had also been used by Petitioner to order items pertaining to marijuana. (9 RT 2509-2554.) Mail for Hunsaker Canyon residents was delivered to a group of mailboxes at the bottom of the road. (9 RT 2548.)

This is yet another instance where Petitioner's right to confront witnesses against him was violated. Ms. Leonida's cross-examination accomplished nothing except reminding the jurors about Mr. Halpin, who had already told them how Mr. Dyleski used his information to order marijuana-related items as well.

Ms. Novaes had indeed processed "a lot of objects" from the crime scene. (12 RT 3320.) She identified fourteen latent fingerprints of Mr. Horowitz on the bottom of a box (lab #22); and on a folder and "witness list" collected along with other paperwork from the sofa (lab #26); and other paperwork in front of the sofa (lab #25). (*See* Exhibit W, Report of K. Novaes, dated 4/25/06, at 518-529.) Ms. Novaes also noted that item #26 "has unusual impression that appears 3 times same as on folder [sic]." (Exhibit W, at 525.)

Additional information that could have been elicited from this

witness included her identification of four latent prints made by Mr. Horowitz: "lifted from 'open whiskey bottle in drawer next to bed' - right thumb, right middle and ring fingers" and "lifted from 'Grant's Scotch beside bed' - right palm." (Exhibit W1, Report of K. Novaes, Dated 2/24/06, at 530.)

### E. Trial Counsel Failed to Seek Exclusion of Patently Irrelevant, Misleading and Prejudicial Evidence.

Trial counsel was ineffective in not moving to exclude irrelevant, prejudicial, and misleading evidence, specifically Mr. Dyleski's artwork and writings and a bumper sticker from his room. This evidence was irrelevant to any matter of consequence, and was so prejudicial and misleading that any probative value was significantly outweighed by the risk of prejudice and should have been excluded from trial. (Evidence Code § 352.) Trial counsel's failure to so move fell below an objectively reasonable standard of conduct, and Mr. Dyleski was prejudiced thereby.

#### 1. Artwork and Writings

Petitioner's artwork and writings were a central topic at trial, and symbols appearing in the artwork were compared to incisions observed on Ms. Vitale's back. However, the subject matter of the artwork and writings often depicted violent themes, which were highly prejudicial to Mr. Dyleski. (*See* 15 RT 4000-4005.) Moreover, the prosecution used the

symbols on the artwork to mislead the jury by arguing that they were similar to the marks found on Ms. Vitale's back, when in fact there were no similarities. This resulted in prejudice to Mr. Dyleski, and trial counsel's failure to move to exclude this "evidence" fell below an objectively reasonable standard of conduct.

Mr. Jewett argued extensively that "the content of that artwork and those writings may give you something of a window into the heart and mind of Scott Dyleski." (7 RT 1743; 15 RT 4004.) "Mr. Dyleski was big into symbols." (7 RT 1743.) Mr. Jewett used the symbols with which Mr. Dyleski often signed his artwork (described variously as a three-pronged propeller, a star in a circle, and various other ways), to argue that three scratches on Ms. Vitale's back in the shape of a "H"with an elongated horizontal line were in fact a symbolic signature. (14 RT 3795. *See* Exhibit Y, Example of Symbol Drawn by Mr. Dyleski.) "It was the etching. It was the brand on her back ... Something else is going on here that's beyond simply trying to cause her pain or kill her. There is some other element there that you do not ordinarily see in a homicide that is at least circum-stantially reflective of the mind, the heart, the soul of the person who inflicts that kind of injury." (15 RT 4004.)

Mr. Jewett extensively examined witnesses about the symbols in Mr. Dyleski's artwork. He elicited testimony from Detective Moore about art in

Petitioner's room that utilized a variety of symbols, none of which were the same as the incision on the victim's back. However, this artwork was highly inflammatory as it contained themes of mass murderers, swastikas, anti-Christian and/or Satanic beliefs, vivisection, Absinthe use, violence and hate. (13 RT 3512-27; *see also* 9 RT 2454-47; 10 RT 2685; 11 RT 3075-77.)

The introduction of Petitioner's artwork and writings portraying violent themes likely prejudiced the jury.

Since Petitioner's trial, there have been at least two cases resulting in wrongful convictions, recently overturned, in which the prosecution used artwork and writings of the accused as proof of guilt. *See* Echols v. State (Ark. 1996) 326 Ark. 917 (affirming conviction); Echols v. State, 2010 Ark. 417 (reversing judgment); Masters v. People (Colo. 2003) 58 P.3d 979 (affirming conviction); Masters v. Gilmore (Dist. Colo. 2009) 663 F.Supp. 2d 1027 (post-exoneration civil lawsuit filed alleging malicious prosecution). In both cases, as here, the prosecution relied on the defendant's interest in dark subject matter to paint an image of them as violent; in both cases, as here, the individuals were teenagers when the crimes occurred. And in both cases, the individuals were exonerated after spending more than ten years in prison for crimes they did not commit.

Trial counsel's failure to object to the admission of Mr. Dyleski's

artwork, either in limine or at trial, although it was patently irrelevant, misleading, and prejudicial, fell below an objectively reasonable standard of counsel and prejudiced Petitioner.

2. Bumper Sticker

Mr. Jewett argued in closing about a bumper sticker from Petitioner's bedroom (Exhibit Z, Bumper Sticker):

> 'I'm for the separation of church and hate,' kind of a play on the church and state separation. The interesting thing...is that the word 'hate' is kind of stylized in the letter 'H' and the letter 'A' ... have an extended crossbar ... that seems relevant to the People.

(15 RT 4002.)

Defense counsel did not object although it was patently irrelevant and, as used by the prosecutor, highly prejudicial, because it contained the word "hate" and an anti-Christian theme. In addition to prosecutorial misconduct, defense counsel's failure to object further supports Petitioner's claim of ineffective assistance.

E. Trial Counsel Did Not Challenge the Information Pursuant to Penal Code 995.

To provide effective assistance of counsel, an attorney must investigate the merits of a 995 motion, and make a reasonable tactical decision on that basis of that investigation. People v. Maguire (1998) 67 Cal.App.4th 1022, 1032.

Petitioner was initially charged by complaint with murder ( Penal

Code § 187); a deadly weapon enhancement; and a special allegation that he was at least 16 at the time of the offense. Mr. Dyleski was held to answer as charged. On March 1, 2006, the information filed added a special circumstance of felony murder, residential burglary (Penal Code § 190.2(a)(17) which provides for life imprisonment without the possibility of parole. (3 CT 683.) Although there was insufficient evidence of burglary provided at the preliminary hearing, counsel failed to challenge this lack of evidence through a pretrial motion to dismiss.

F. Counsel's Failure to Provide Effective Assistance of Counsel Prejudiced the Petitioner and Resulted in a Deprivation of His Fifth and Sixth Amendment Rights.

Petitioner was fatally prejudiced by the ineffective assistance of his counsel. Evidence that sounded damning, at closer inspection, turned out to be inflammatory and irrelevant, and the physical evidence contained potential weaknesses in both the collection and processing.

Trial counsel's failure to adequately investigate the evidence left her unable to effectively challenge the physical evidence presented by the prosecution, and her puzzling decision to ignore the most compelling exculpatory evidence available left the jury without an alternative theory, necessary to effectively question the prosecution's interpretation of the evidence. Her failure to challenge the admission of irrelevant and inflammatory evidence allowed the prosecution to paint Petitioner as a

violent sadist, thus infecting the entire trial with prejudice. The Petitioner was prejudiced thereby.

XXIV.

The prosecutor engaged in misconduct so egregious that it resulted in a violation of the Petitioner's Fifth and Fourteenth Amendment Rights under the United States Constitution. Mr. Jewett knowingly presented false evidence; manipulated and misstated the scientific evidence; made improper comments on the Petitioner's decision not to testify; improperly appealed to passion by harping on irrelevant and inflammatory information; and violated the so-called "golden rule." These intentional acts of misconduct so infected the trial with unfairness that it resulted in a deprivation of due process to the Petitioner. Each of these errors individually may be sufficient to render Petitioner's trial fundamentally unfair, and clearly when considered cumulatively resulted in overwhelming prejudice. Scott Dyleski's trial was fundamentally unfair.

A. Mr. Jewett Knowingly Presented False Evidence.

As discussed above, the prosecution alleged that the perpetrator could not have taken a shower because the blood had not started to drip. (8 RT 2058-59; 15 RT 4055.) "[T]he cast-off from your body, if you are taking a shower, it's going to start to drip and you are going to get drips of blood; but that shower was never run." (15 RT 4055; 8 RT 2057-59.) This was a

critical argument, as Mr. Dyleski would not have had sufficient time to take a shower, and thus it would have strengthened his alibi defense.

However, scene photographs clearly showed "wet dripping" from the handprint in the shower, in direct contravention of the prosecution's arguments. (Exhibit A, Photos, at 16-18). "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." People v. Hill (1998) 17 Cal.4th 800, 823. Moreover, it appears from Mr. Jewett's questioning of Mr. Kovar (*see* argument I(c), *supra*) that Mr. Jewett knew of a problem with the glove's chain of custody and may have elicited perjurious testimony or improperly coached the witness.

B. Mr. Jewett Knowingly Manipulated the "Scientific Evidence".

Throughout trial, the prosecutor referred to "presumptive" tests for blood results in a misleading fashion in his effort to secure a conviction. (*See, e.g.*, 13 RT 3649, 3665.) This misrepresentation violates due process and constitutes prosecutorial misconduct. Miller v. Pate (1967) 386 U.S. 1.

C. Improper Comment on Petitioner's Decision to Not Testify.

The prosecutor improperly commented on Mr. Dyleski's decision not to testify. This violates the defendant's Fifth Amendment right against self-incrimination. Griffin v. California (1965) 380 U.S. 609, 611. In closing, the prosecutor repeatedly asked rhetorical questions: "What exactly, what

time is it that you, Scott Dyleski, think you have an alibi for?" (15 RT 4089; 15 RT 4087.) In this manner, the prosecutor signaled to the jurors that there were unanswered questions that only the defendant could answer, but did not, and is therefore misconduct.

D. The Prosecutor Intentionally Misled the Jury with Irrelevant, Inflammatory, and Misleading Evidence.

The prosecutor throughout trial spent time on evidence that was not only irrelevant, but tended to inflame the passions of the jury and mislead them as to the true facts. Specifically, the prosecutor spent a great deal of time presenting evidence of the Petitioner's artwork and writings, and argued the subject matter of his art showed that he was capable of committing a violent murder.

Petitioner submits that Mr. Jewett intentionally harped on this irrelevant evidence, knowing he lacked motive, opportunity, solid physical evidence, etc.

E. The Prosecutor Violated the "Golden Rule".

Mr. Jewett violated the "golden rule" by asking the jury to see the crime through the eyes of Ms. Vitale, as the led the jury through his scenario in closing argument:

> Imagine the vision presented to the senses of Pamela Vitale when a masked person ... there can be no question whatsoever that this person was wearing a mask and gloves at the time he entered this house and that is what Pamela is confronted with as she is in a completely different world, looking into her

family tree.

> There's a few things she knows that her assailant doesn't know. Perhaps the most notable, the back door is not accessible ... That was not a means of escape and she knew that not only consciously, but she knew probably knew it intuitively ...
>
> So what does Pamela do? I submit to you she gets up, she tries to move sideways, she's confronted with her assailant's hand ...
>
> That's probably when she starts to bleed. And what is she doing at that point? She's thinking about a way to get out of there. And the only way out of that house is through the front door and so that's where she heads.

(15 RT 4041-43.)

The cumulative effect of Mr. Jewett's misconduct so infected the Petitioner's trial with unfairness that the trial was rendered a violation of due process.

XXV.

Petitioner's Fifth Amendment right to due process of the law and his Sixth Amendment right to effective assistance of counsel under the United States and California Constitutions were violated by the failure of appellate counsel to present meritorious defenses available to the petitioner, and to properly advise him as to his rights and the law. The two-prong test for ineffective assistance of counsel articulated in Strickland applies to claims of ineffective assistance of appellate counsel. *See* Smith v. Robbins (2000) 528 U.S. 259, 285. Had Mr. Brooks raised ineffective assistance of trial

counsel, based on the abundance of evidence of such ineffectiveness in his possession, Petitioner could have prevailed on appeal.

Appellate counsel was aware of Mr. Turvey's report, indicating there may be meritorious grounds for a habeas petition, and thus he had an ethical obligation to advise Mr. Dyleski as to how to pursue such claims. *See* In re Clark (1993) 5 Cal.4th 750, 783, n. 20. Instead, Mr. Brooks provided erroneous legal advice and discouraged Mr. Dyleski from contacting a habeas attorney. (*See* Exhibit V, Letter from Philip Brooks to Scott Dyleski, Dated 5/26/10; Exhibit V1, Letter from Philip Brooks to Scott Dyleski, Dated 6/27/10; Exhibit V2, Letter from Philip Brooks to Scott Dyleski, Dated 2/5/11.)

Mr. Brooks' failure to properly advise Mr. Dyleski constituted ineffective assistance of counsel and resulted in delays: on the part of Mr. Dyleski in seeking habeas counsel and therefore significantly reduced the amount of time available to habeas counsel to investigate potentially meritorious grounds for post-conviction relief. (*See* Declaration of Katherine Hallinan.) Appellate counsel also failed Petitioner.

XXVI.

The cumulative effect of the foregoing errors resulted in a fundamental miscarriage of justice that fatally prejudiced the Petitioner, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United

States' Constitution. The fundamental constitutional errors of ineffective assistance of counsel and prosecutorial misconduct worked together to deprive Petitioner of his Constitutional right to Due Process under the Fifth, Sixth, and Fourteenth Amendments. While the prosecution presented false evidence and used improper evidence and argument to inflame the passions of the jury, defense counsel failed to adequately investigate the case, such that she was unable to counter the prosecution's improper tactics.

Moreover, trial counsel's failure to present the most persuasive exculpatory evidence in her possession left the prosecution's case unchallenged, and the jury with no alternative but to accept the prosecution's theory. This fatally prejudiced Mr. Dyleski, and resulted in his erroneous conviction for a crime he did not commit.

## PRAYER

WHEREFORE, Petitioner respectfully requests that this Court:

1. Issue its order to show cause to the Director of the California Department of Corrections and Rehabilitation to inquire into the legality of Petitioner's present incarceration;

2. After a full hearing, issue the writ vacating the judgment of conviction with instructions to grant Petitioner a new trial; and

3. Grant Petitioner whatsoever further relief is appropriate and in the interest of justice.

Executed on December 23, 2011, at San Francisco, California.

Respectfully submitted,

_____
KATHERINE HALLINAN
SARA ZALKIN
Attorneys for Petitioner
SCOTT EDGAR DYLESKI

VERIFICATION

I am an attorney admitted to practice before the courts of the State of California and have my office in San Francisco County. I am one of the attorneys for petitioner herein and am authorized to file this Petition.

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 habeas corpus on petitioner's behalf. Because petitioner is in custody out of the county and because the petition relies in part on citations to the record in People v. Scott Dyleski, Court of Appeal Case Number A115725, which is not in his possession, petitioner is not in a position to verify this petition himself. 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 December 23, 2011, at San Francisco, California.

SARA ZALKIN
Attorney for Petitioner
SCOTT EDGAR DYLESKI

## ARGUMENT

I.

PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY TRIAL COUNSEL'S FAILURE TO INVESTIGATE THE FACTS OF THE CASE AND PRESENT AVAILABLE MERITORIOUS DEFENSES.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence." *See also* California Constitution, art. I, § 15.

The right to counsel is critical to ensure the fundamental right to a fair trial. *See* Powell v. Alabama (1932) 287 U.S. 45; Johnson v. Zerbst (1938) 304 U.S. 458; Gideon v. Wainright (1963) 372 U.S. 335. The right to counsel does not merely provide for the presence of an attorney, but rather the effective assistance of counsel. *See* Strickland v. Washington (1984) 466 U.S. 668, 685.

Counsel is ineffective where his or her performance falls below an "objective standard of reasonableness" and that deficient performance prejudiced the defense. *Id.* at 687-88. Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* at 694.

Judicial review is highly deferential to trial strategy; however:

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances....
>
> Strickland, *supra*, at 690-91.

Failure to investigate "cannot be construed as a trial tactic." Evans v. Lewis (9th Cir. 1988) 855 F.2d 631, 637.

The accompanying petition sets forth the factual grounds for ineffective assistance claim. As a direct result of trial counsel's failure to investigate the facts and to recognize the import of evidence in her possession, crucial, exculpatory evidence was not presented to the jury. But for counsel's failures, a more favorable outcome would have likely resulted. Any confidence in the verdict is thereby undermined, and reversal is warranted.

Petitioner was denied effective assistance of counsel as a result of trial counsel's failure to adequately investigate and present compelling defenses available; to wit, that much of the evidence was not only inconsistent with Petitioner's guilt, but in fact pointed to another

perpetrator. Trial counsel did not present facts necessary to Petitioner's alibi, and failed to rebut the prosecution's theories. Nor did trial counsel challenge the scientific evidence, including chain of custody and contamination, or call any expert witnesses. Trial counsel did not object to irrelevant and inflammatory evidence or to unfounded and damaging expert testimony. Whether considered independently or cumulatively, counsel's performance fell below the standard of care, and prejudice ensued.

### A. Trial Counsel Failed to Develop Exculpatory Inconsistencies in the Prosecution's Theory of the Case.

Trial counsel failed to investigate or present troubling inconsistencies in the prosecution's case that spoke to Mr. Dyleski's innocence. A decision not to present a particular defense is unreasonable unless counsel has sufficiently investigated the potential defense to discover the facts that would be relevant to his making an informed decision. Wiggins v. Smith (2003) 539 U.S. 510, 522-23. The duty to "reasonably investigate the evidence supporting each potentially meritorious defense before making a tactical choice among them exists regardless of the defense ultimately relied on at trial." In re Cordero (1988) 46 Cal.3d 161, 181, n. 8. However, it must be shown that counsel knew or should have known further investigation was necessary. *See* People v. Williams (1988) 44 Cal. 3d 883, 937. Failure to investigate is "especially egregious when a defense attorney fails to consider potentially exculpatory evidence." Rios v. Rocha (9th Cir. 2002)

299 F.3d 796, 805.

This crime scene indicated that the perpetrator was someone known to Ms. Vitale, comfortable in and familiar with the home, who did not feel rushed for time. This evidence stands in direct contrast to the uncontested facts that Petitioner was unacquainted with Ms. Vitale, had never been inside their home, and would have had a narrow window of time to commit the murder.

*1. Crime Scene Evidence Indicates the Perpetrator Was Someone Acquainted with Ms. Vitale, and Comfortable and Familiar with the Home.*

The crime scene evidence possessed by trial counsel indicated that the perpetrator was familiar with and comfortable in the Horowitz/Vitale home. Petitioner was unacquainted with Ms. Vitale[1] and had never been inside her home. (15 RT 4155; *See also* Exhibit H, Declaration of Scott Dyleski (hereinafter "Dyleski Declaration") at 391-92.)

Several things indicated that the perpetrator exercised a degree of familiarity and comfort in the home. Bloody eyeglasses were found neatly folded on top of the television. 7 RT 1937. (*See* Exhibit A, Crime Scene Photographs (hereinafter "Photos"), at 6-7.)

Someone with bloody hands straightened up the home; touched a broken mug in the kitchen sink (*See* Exhibit A, Photos, at 13, 14); and

[1] Petitioner had seen Ms. Vitale around the neighborhood and was familiar with her appearance. (Exhibit H, Dyleski Declaration, at 391-92.)

picked up an empty bowl, placing it on the kitchen counter next to the sink. (7 RT 1934; 7 RT 1947. *See* Exhibit A, at 11, 12, 15) Bloody hands touched a bottle of water. (Exhibit A, at 9, 10).

There is also evidence that the perpetrator took a shower or at least used it to clean up after the crime.[2] Furthermore, someone with bloody

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[2] Despite strong evidence that the shower had been used, the prosecution alleged that the perpetrator just rinsed off a knife, and could not have taken a shower, because the blood had not started to drip. 8 RT 2058-59; 15 RT 4055. "[T]he cast-off from your body, if you are taking a shower, it's going to start to drip and you are going to get drips of blood; but that shower was never run." 15 RT 4055. As to the broken mug with blood in the sink, Taflya explained what you would expect to see if water was run over blood:

> Q . . . [S]uppose they did turn it on, would you expect to see any evidence of that with respect to any wet blood that might be adhering to any item that's in the sink, assuming it was struck by water?
> A. I was going to say if the bloody area was struck with water I would expect that to happen, yes.
> Q. And what would you expect to happen?
> A. That there would be some diluted blood.
> Q. And how would you discern the existence of diluted blood?
> A. It wouldn't be the same color as the whole blood stain and you might see some wet dripping as well.
> 8 RT 2057.

Of the shower specifically:

> Q. Did you see any dilution or drips or anything to indicate that anybody turned the shower on, as opposed to the bathtub faucet, after those smears had been left there?
> A. No, I did not.
> Q. Do you have an opinion as to whether or not anybody operated the shower or took a shower after those smears were left there?
> A. Yes, I do.
> Q. And what is that opinion?
> A. That the shower was not used.
> 8 RT 2058-59.

hands left the home and then re-entered, possibly with the use of a key. (7 RT 1927. *See also* Exhibit F1, Forensic Examination Report, by Brent Turvey, MS (hereinafter "Turvey Supplemental"), at 353; Exhibit A, Photos, at 2-4.)

Although the perpetrator apparently spent time at the sink based on the bloody bowl and broken coffee mug, there is evidence that the perpetrator did not turn on the water in the kitchen, but rather used the bathroom shower. Coffee grounds in the sink were found undisturbed. There was no blood on the water faucet. (Exhibit A, Photos, at 11-13. 15 RT 4055 ("That sink was not run.").) However, there is evidence that the shower in the bathroom was used by the perpetrator. (See Footnote 2, *supra*.)

The fact that the perpetrator did not attempt to turn on the kitchen sink is notable because the hot water in the kitchen sink did not work. (8 RT 2092.) It seems unlikely that a stranger perpetrator would go over to the kitchen sink and place dishes in and around it, yet not turn on the water. The more reasonable inference is that the perpetrator knew the hot water did not work and therefore went directly to the bathroom. This contention is

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Defense counsel asked no questions about the shower and did not attempt to refute the prosecution's claim that the perpetrator had not showered. However, physical evidence in trial counsel's possession showed a bloody handprint dripping diluted blood down the shower wall. (Exhibit A, Photos, at 16-18.) Thus, by the prosecution's own logic, the perpetrator did take a shower, as evidenced by the "wet dripping" in the photos. (Exhibit A, at 16-18.) Defense counsel was presumably unaware of this evidence.

bolstered by the fact that only the hot water knob in the shower had blood transfer. (7 RT 1978.) Only someone intimately familiar with the Horowitz/Vitale household would have this knowledge that Petitioner lacked.

There is also evidence that the perpetrator spent time around the living room couch based on blood in that area. (Exhibit A, Photos, at 23-27. *See also* Exhibit F, Forensic Examination Report, by Brent Turvey, MS (hereinafter "Turvey Report"), at 348.) Why would a stranger-perpetrator spend time by the couch, rifling through papers, but not take any valuable items in plain view? (15 RT 4140-41) .

All of the evidence discussed above indicating the perpetrator's comfort in the home was apparent from the crime scene photos. The conflict between this evidence and the facts pertaining to Mr. Dyleski should have alerted counsel that further investigation into the crime scene could result in exculpatory evidence. Yet, trial counsel asked no questions about the bloody bowl or mug, the kitchen sink, or the shower, nor argued how this evidence was inconsistent with Mr. Dyleski. The inescapable conclusion is that defense counsel was unaware of photographic evidence at hand that would have directly impeached criminalist Taflya and thwarted the prosecution's misinformation campaign (to conceal evidence of the true perpetrator's comfort and familiarity at the crime scene). This failure

cannot be justified as strategy.

Defense counsel argued briefly in closing that some evidence was inconsistent with the theory that Mr. Dyleski intended to commit a burglary at Ms. Vitale's home - not that it showed his innocence:

> You also have a lot of evidence that the person who did kill Pamela Vitale was not interested in credit card information or money or PIN numbers. You have the crime scene, the photographs that you do have to look at because those photographs speak to a motive that's much more personal than credit card fraud.
>
> And more importantly you have the fact that the killer who was again not interrupted, who had plenty of time in Mr. Jewett's theory to get a glass of water, wash a knife, the person that killed Pamela Vitale...didn't take anything...didn't go through anything her purse is sitting there...no indication that anybody ... touched it ... There's no money missing ... nothing missing at all, nothing consistent with the burglary.
>
> (15 RT 4140-41.)

This argument ignored the prosecution's alternative theory of guilt: that Mr. Dyleski may have gone to the residence to avenge the death of his dog, not to burglarize, in the mistaken belief it was the home of Karen Schneider, who had injured his dog. (15 RT 4026-27)

In Alcala v. Woodford (9th Cir. 2003) 334 F.3d 862, 890-91, the Ninth Circuit found trial counsel's failure to investigate the crime scene was ineffective and reversed the conviction. Proper investigation would have revealed evidence contradicting the prosecution's theory the victim died from knife wounds. *Id.* at 891. This investigative failure rendered counsel

ineffective in countering the prosecution's case. *Id.* Similarly, here, trial counsel did not investigate the crime scene, and consequently failed to grasp how the evidence conflicted with the prosecution's theory of the case. This failure to investigate left the prosecution's theory essentially unchallenged, and Petitioner was thereby prejudiced.

*2. The Crime Scene Evidence Indicated the Perpetrator Was Not Rushed for Time, Which Indicates the Perpetrator Was Acquainted with Ms. Vitale and Is Inconsistent with Mr. Dyleski's Alibi.*

Physical evidence at the crime scene indicated that the perpetrator did not feel rushed for time. This evidence is exculpatory, as Petitioner could not have known when Mr. Horowitz was to return or whether anyone else might appear on Saturday, October 15, 2005.[3] This evidence also

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[3] The detectives apparently perceived this right away based on their interview of Mr. Horowitz:

PO: Is... is there anybody else besides you or your wife, who feels comfortable like...or at home, in your trailer?

DH: My friend Mike McKeirnan he'd feel comfortable.

PO2: When he says comfortable, comfortable knowing that nobody is going to come back. That he has time in that house. Who would know that they have time there.

DH: Oh, everybody would know... I mean Joe would know. Mike would know. Everyone who knows me would know.

PO: But I mean, are you gone every Saturday?

DH: No.

PO: Throughout the day?

DH: That's a good point, no. And this was uh... this was unusual. And I work a lot, but I don't usually work Saturday mornings. I'm usually at home. That's what we were just talking about. I think...

...

PO2: It didn't appear to be any rush to leave.

supports Petitioner's alibi. Trial counsel failed to develop this evidence or argue its relevance to the jury.

All of the evidence discussed above indicating the perpetrator was comfortable in the home also shows that the perpetrator did not feel rushed for time. Someone neatly folded a pair of bloody eyeglasses found on top of the television (7 RT 1937; *see also* Exhibit A, Photos, at 6-7); someone with bloody hands straightened up, putting a mug in the sink and an empty bowl found next to the sink (7 RT 1934, 1947; *see also* Exhibit A, at 11-15)); the perpetrator apparently drank water (Exhibit A, at 9-10); likely showered (footnote 2, *supra*); used and disposed of tissues and paper towels (Exhibit A, at 29); exited and re-entered, possibly with a key (7 RT 1927; Exhibit A, at 2-4. *See also* Exhibit F1, Turvey Supplemental); and spent time near the living room couch (Exhibit F, Turvey Report, at 348. Exhibit A, at 23-27.) This behavior is inconsistent with a stranger, who would be concerned that the longer he was in the home, the more likely he would be discovered.

The issue of time was critical in this case. Evidence of more time spent in the home would have contradicted the prosecution's timeline and strengthened Petitioner's alibi. The prosecution's theory that Ms. Vitale

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(Exhibit B2, Horowitz Interview, at 140.)

However, once Mr. Dyleski was arrested, these observations seemed to have been forgotten or ignored.

was murdered sometime after 10:12 a.m. was based on computer activity. (8 RT 2245.)

Fred Curiel told the police on October 20, 2005, that he had seen Mr. Dyleski at home at 9:26 a.m., sitting on the couch with Mrs. Curiel, and Petitioner's whereabouts were accounted for the rest of the day, in which case it would have been impossible for Mr. Dyleski to have committed the crime. (11 RT 3010, 3017. *See also* Exhibit M, Report of Deputy Santiago, Dated 11/15/05, at 433.) However, at trial, Mr. Curiel was unable to state whether he had seen Scott that day. Mrs. Curiel said Scott came in at approximately 10:45 a.m. (10 RT 2854, 2865-67.) Even accepting her account, that leaves about 33 minutes to commit the crime, get home, change, and dispose of bloody clothing.

In order for the prosecutor to make sense of the timing he had to downplay the amount of time the perpetrator spent in the home. (15 RT 4050 - 4058.) Thus, he claimed that the perpetrator did not shower. (15 RT 4055.) Mr. Jewett recognized what defense counsel did not: "That's why I am spending some time with this scene, because to understand the timing element, you have to understand the scene."(15 RT 4058.)

Although Ms. Leonida attempted to argue an alibi defense by arguing that Mr. Dyleski returned home at 9:26, she failed to contest inherent prosecutorial assumptions. She failed to challenge the evidence

used to determine time of death, foregoing any cross-examination of Kyle Ritter, who testified about the computer activity. (8 RT 2248.) Nor did she explore the forensic pathologist's failure to address time of death. (14 RT 3827-29.)

Nor did she argue that even if Scott returned at 10:45, he still would not have enough time to do everything based on the crime scene evidence. Ms. Leonida never challenged the prosecution's claim that it only took ten minutes to walk from 1901 Hunsaker Canyon Road to 1050 Hunsaker Canyon Road.[4] (15 RT 4058.)

In Alcala v. Woodford, *supra*, 334 F.3d at 870-72, the Ninth Circuit found trial counsel ineffective for failing to adequately present an alibi defense, by not calling the only witness capable of placing the defendant elsewhere at the time alleged. *Id.* at 870. Here, counsel alluded to an alibi defense, but without rebutting the prosecutor's theories her attempt was ineffective.

*3. Trial Counsel Should Have Hired a Crime Scene Expert to Rebut the Prosecution's Analysis of the Crime Scene Evidence.*

A crime scene analyst could have provided highly exculpatory

[4] The undersigned are informed and believe that 10 minutes is not sufficient to walk or run this distance. (*See* Exhibit I, Declaration of Esther Fielding.) However, the undersigned have honored Mr. Horowitz's admonishment to predecessor counsel forbidding him or his agents "from coming on my property." (Exhibit U, Letter from Daniel Horowitz to Philip Brooks, Dated 3/15/08.)

testimony that the evidence was simply inconsistent with Mr. Dyleski being the perpetrator. Post-conviction, Petitioner's family engaged Brent Turvey, MS, a crime scene analyst and forensic science expert. (*See* Exhibit F2, *Curriculum Vitae* of Brent Turvey.) After reviewing crime scene photos, investigative reports, and other materials, Mr. Turvey concluded:

1. Many key items of potentially exculpatory physical evidence were not properly examined.

2. The available evidence is not consistent with a profit motivation.

3. The available evidence is most consistent with an anger / revenge motivation.

4. The offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide.

5. The DNA results used to associate Scott Dyleski to this crime are problematic at best, and require an independent DNA Analyst.

6. The defense failed to adequately investigate or examine the physical evidence in this case.

(Exhibit F, Turvey Report, at 343-44.)

The conclusion that "the offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide" was based on: the neatly folded bloody eyeglasses found on the TV; the blood on the coffee mug in the sink, cereal bowl on the kitchen counter, the blood on the bottle of water, and around the couch; and the use of the

shower based on hairs in the shower drain that "were still moist." (Exhibit F, at 347-48.)

"These are not the actions of a stranger offender concerned about being discovered at a violent crime scene with a murder victim lying just inside the front door. These actions suggest a degree of concern for, familiarity with, and comfortableness moving around within the residence that is beyond that of a stranger with a profit motivation." (Exhibit F, at 348.) Each conclusion is exculpatory in nature, indicating a perpetrator with intimate familiarity and comfort at the scene, unlike Petitioner.

Mr. Turvey further determined that the perpetrator likely used a key to re-enter the home mid-attack:

> In multiple crime scene photos, bloodstain evidence consistent with hand and finger contact patterns may be observed on both the inside of the front door, and the outside of the front door. There are also bloodstains on both the interior and exterior doorknob and dead bolt. **This indicates that at some point during the altercation, after blood had started flowing, the victim was able to lock the offender outside of the residence.** Were the victim able to get free of the residence during the attack, fleeing from the offender, it is unreasonable to suggest that she would seek re-entry. Rather, it is most reasonable to infer that she would have run...away from the residence. Consequently, the bloody hand and finger contact patterns on the interior of the door are most reasonably associated with the victim; and those on the exterior are most reasonably associated with the offender.
>
> **However, the offender was able to regain entry to the residence without force (e.g., breaking down or through the door). Specifically, the contact blood smears on the exterior of the door on and around the deadbolt are**

> **significant, as the deadbolt requires key**. **The only reason to have contact with the exterior deadbolt would be to insert a key. The only way to regain entry without force is by using a key.** (Exhibit F1, Turvey Supplemental, at 353-4 (emphasis added).)

This finding is highly exculpatory, as there is no indication that Petitioner had a key to the residence. Mr. Taflya testified about a blood swipe on the exterior of the door, but was never asked about blood on the exterior deadbolt. (7 RT 1927; 8 RT 2060-68.)

Present counsel also engaged Michael Laufer, M.D. (See Exhibit G1, *Curriculum Vitae*) Based on his review of the medical evidence, Dr. Laufer wrote "Ms. Vitale was engaged in a protracted struggle with her assailant but did not run away, which suggests that she knew the assailant and may have tried to 'negotiate' an end to the altercation." (Exhibit G, Declaration of Michael Laufer, M.D. (hereinafter "Laufer Declaration"), at 369.)

The decision to call an expert is normally considered trial strategy. People v. Bolin (1998) 18 Cal. 4th 297 [rejecting a claim of ineffective assistance absent any showing how an expert would have been helpful.] However, Petitioner has shown how expert testimony would have substantially weakened many elements of the prosecution's case (by calling into question unfounded assumptions also relevant to third-party culpability).

*4. Failure to Adequately Investigate the Crime Scene Prejudiced Petitioner.*

Petitioner was prejudiced by defense counsel's failure to investigate the crime scene. The evidence against Petitioner was mostly circumstantial, and the prosecution lacked a coherent theory as to motive. (*See* 15 RT 4026-27.) Thus, evidence that the crime scene evidence was inconsistent with the Petitioner's guilt would have been highly persuasive.

Defense counsel's only argument about the crime scene was that it was inconsistent with a burglary. (15 RT 4140-41.) This argument is not one of innocence; it relates to the special circumstance. Had trial counsel adequately investigated the crime scene or consulted with experts, she would have understood that the physical evidence at the scene was more relevant to innocence than merely insufficient evidence of burglary. The physical evidence provided critical clues into the relationship between the perpetrator and victim.

This exculpatory evidence could have provided the reasonable doubt otherwise lacking in Petitioner's defense by raising troubling questions. Could Petitioner have obtained a key to the home? If so, why would he re-enter? How could he know when Mr. Horowitz would return on a Saturday? Why would he put dishes in the sink or take a shower? How does the finding of a protracted struggle fit with the small window of time Petitioner had to commit this crime?

"A lawyer who fails to investigate, and to introduce into evidence,

information that demonstrates his client's factual innocence, **or that raises sufficient doubts as to that question to undermine confidence in the verdict**, renders deficient performance." Lord v. Wood (9th Cir. 1999) 184 F.3d 1083, 1093 [emphasis added].

### B. Trial Counsel Failed to Investigate or Present Critical Evidence Implicating Another Individual as the Perpetrator.

The failure to present persuasive evidence of third party culpability may constitute ineffective assistance of counsel. *See* In re Valdez (2010) 49 Cal.4th 715, 733 [counsel not ineffective where significant evidence ruled out third party culpability and the defendant confessed to counsel]; Sanders v. Ratelle (9th Cir. 1994) 21 F.3d 1446, 1457 [failure to investigate evidence of third party culpability constituted deficient performance]. This is especially true when the evidence not presented is the most compelling defense available. *See* Belmontes v. Ayers (9th Cir. 2008) 529 F.3d 834, 864-66.

Evidence of third party culpability must be relevant and its probative value must not be "substantially outweighed by the risk of undue delay, prejudice, or confusion." *See* California Evidence Code sections 350 and 352; People v. Hall (1986) 41 Cal.3d 826, 833. However, "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt:

there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." *Id.* at 833.

In Lisker v. Knowles (C.D. Cal. 2009) 651 F. Supp.2d 1097, the district court found trial counsel was ineffective in not raising third party culpability:

> Counsel's defense strategy was to show that Petitioner did not commit the murder. Therefore, introducing compelling evidence that another person did commit the murder should have been Petitioner's strongest potential defense, but counsel did not proffer the evidence he possessed in support of this defense. Counsel's performance, given every benefit of the doubt, was objectively unreasonable and thus constitutionally deficient.
>
> *Id.* at 1121.

Because Petitioner's counsel ostensibly argued his innocence, and because there was compelling evidence available implicating another individual (Mr. Horowitz), and no plausible strategic reason not to present this information at trial, counsel was patently ineffective.

*1. Evidence that the Perpetrator Was Known to Ms. Vitale and Was Comfortable in the Home Implicates Her Husband, Mr. Horowitz.*

Much of the crime scene evidence that is inconsistent with Mr. Dyleski's guilt implicates Mr. Horowitz. "The offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide." "These are not the actions of a stranger offender

concerned [with being] discovered ..." (Exhibit F, Turvey Report, at 347.)[5]

Furthermore, the mug placed in the kitchen sink, which contributed to Mr. Turvey's findings that the perpetrator was comfortable in the home, had saliva that matched Mr. Horowitz's DNA. (Exhibit F, at 347.) The evidence that the perpetrator did not turn on the water in the kitchen, but rather went to the shower implicates Mr. Horowitz; only he could have known that the hot water in the kitchen did not work . (*See* Exhibit A, Photos, 11-13. Exhibit F, at 348. 7 RT 1936; 8 RT 2058-59; 15 RT 4055.) Most compelling is Mr. Turvey's finding of re-entry:

> The contact blood smears on the exterior of the door on and around the deadbolt are significant, as the deadbolt requires key. The only reason to have contact with the exterior deadbolt would be to insert a key. The only way to regain entry without force is by using a key.
>
> (Exhibit F1, at 353-54.)

Dr. Laufer determined that the superficial injuries on Ms. Vitale's back were consistent with the straight side of a key. (Exhibit G, Laufer Declaration, at 370.)

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[5] The facts suggesting the perpetrator took his time in the home, including possibly taking a shower, troubled Ms. Hill, Pamela's sister. Mr. Horowitz said the perpetrator must have been watching the house:

"[Mr. Horowitz said] 'they must have been watching the house, because he knew that I was going to be gone for a while.'

How would that person know that? . . . How would somebody not know he just didn't go down and get some milk and come back?"

(Exhibit C, Transcript of Interview of Tamara Hill (hereinafter "Hill Interview"), at 211.)

Thus, the crime scene evidence largely implicates Mr. Horowitz.

*2. Evidence that Mr. Horowitz Had a Violent Temper and Abused Ms. Vitale Is Particularly Relevant - and Exculpatory - in Light of the Expert Opinions that this Was a Anger Killing.*

Evidence provided to defense counsel indicated a rocky relationship between Mr. Horowitz and Ms.Vitale, that Mr. Horowitz was prone to fits of rage and violence, and that she had suffered prior domestic abuse during their marriage. Marital problems intensified as building costs mounted, and he prepared for the high-publicity homicide trial of Susan Polk.

Ms. Vitale's sister and brother-in-law suspected that Mr. Horowitz may have been involved in her murder. (Exhibit C, Hill Interview, at 172.) Mr. Hill contacted law enforcement to express his suspicions. (Exhibit N, Report by Det. Goldberg, Dated 11/3/05.) Ms. Hill was very close with her sister. (Exhibit C, at 190-95.) Describing her sister's marriage, she said "either they're passionately in love, or it's a passionate rage. It's...one or the other."[6] (Exhibit C, at 194.)

Ms. Hill said Mr. Horowitz came with a lot of "baggage" and acted out in angry and abusive ways:

Daniel, I think, came into the marriage with a lot of issues

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[6] "[U]sually in these incidents, he would come back...very remorseful .... probably say sorry. He might even start crying...."I didn't mean to hurt you," and... you know. He had a kind of a pattern of explosion..." (Exhibit C, at 196.) This behavior is typical of abusive relationships. *See* People v. Brown (2004) 33 Cal. 4th 892, 907.

> from childhood. A lot of issues from a previous wife who slept with his best friend, and ran off together. ... He also had a lot of issues with uh, childhood with a very abusive father. ... So, he had had a history of dealing with his feelings, and reactions to things that trigger ... Pam inadvertently – or on purpose, maybe to make her point – would get into situations where she had suddenly triggered some deep emotion in him.
>
> (Exhibit C, at 191-92.)

Ms. Hill described past incidents of rage directed against her sister, which would escalate to physical abuse: "It would go completely out of proportion, and he would be in this rage and screaming, and [one time] he threw a telephone at her." (Exhibit C, at 194.) Another time:

> [T[he toilet had overflowed or something. ... And he had come in and there was water all over the floor. And he just lost it. She was asleep, and he started screaming at her from the bathroom ... at the top of his lungs. ... She wakes up and he's throwing the [unintell] the pail and sponge and everything at her. At the bed.
>
> (Exhibit C, at 194.)

Mr. Horowitz once told Ms. Vitale: "I just wish... you would die.' And then [he] left." (Exhibit C, at 192-93.)

Another witness, Araceli Solis, worked for Ms. Vitale as a housekeeper every other Thursday. (Exhibit E, Transcript of Interview with Araceli Solis (hereinafter "Solis Interview"), at 328. *See also* Exhibit R, Report of Deputy Schiro, Dated 10/20/05, at 503-04.) When interviewed on October 20, 2005, Ms. Solis recalled that three or four months prior, Ms. Vitale called and told her not to come that day; she had been in an accident.

The next week Ms. Vitale had a black eye that "looked very, very bad." (Exhibit E, at 338-39.) Ms. Solis's account was independently corroborated by Ms. Hill's statement that Ms. Vitale told her that she had to go to the emergency room after walking into a treadmill and injuring her eye. (Exhibit C, Hill Interview, at 3030-305.)

Years ago Mr. Horowitz represented Ms. Hill in a lawsuit against a physician alleging sexual assault. A settlement was offered, but decided she did not care about money, she wanted the doctor to answer in court for what he had done. Mr. Horowitz pressured her to settle and exploded in a rage when she did not take his advice:

> [T]he moment ... I said that, I was the recipient of the hateful rage. Over the phone, I wasn't in person. And he said, "You are the most selfish... selfish person I have ever known in my life." And I don't know if he called me a bitch. He might have said "selfish bitch." And I'm like in tears. This was my lawyer. . . "And I can't believe that you don't care about anybody but yourself." You know? And saying, "Dan, I just want to go to court." ... he had me in total tears. I hung up on him at that point. I was sobbing for a day. ... [H]he snapped the second I said ... I wanted to go to court. ... it was just this barrage of "You are the most worthless human being that I've ever met." And I'm in tears. I ended up settling 'cause I didn't want to deal with him anymore.
>
> (Exhibit C, Hill Interview, at 229-235.)

Another potential witness, Donna Powers, contacted police with information that Mr. Horowitz may have been involved in an affair around the time of the murder. (Exhibit T, Report of Detective Simmons, Dated

11/1/05, at 509-10.) In this interview - possessed by trial counsel - she recounted an incident where Mr. Horowitz directed his rage against her. (*See* Exhibit D, Transcript of Interview with Donna Powers (hereinafter "Powers Interview"), at 265.)

Ms. Powers was close friends with a doctor named Brenda Abbley. (*See* Exhibit D, at 265.) Dr. Abbley knew Mr. Horowitz and Ms. Vitale through her parents, the Lehmans.[7] (Exhibit D, at 289.) Ms. Powers thought Mr. Horowitz and Dr. Abbley were having an affair.[8] (Exhibit D, at 290.)

Ms. Powers was concerned that Dr. Abbley was abusing drugs and alcohol. In May, 2005 she heard Brenda call in a refillable prescription for Valium and Vicodin to a pharmacy in Lafayette for Mr. Horowitz and Ms. Vitale. Knowing that they were not Brenda's patients, Donna confronted

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[7] Ms. Lehman told officers on October 15, 2005, that Mr. Horowitz called her that day at approximately 6 p.m., *before* notifying the police. "Lehman said she asked Horowitz if he had called the police yet and Horowitz said, 'No, why should I? She's dead.'" (Exhibit M, Report of Deputy Santiago, Dated 11/15/05, at 431.)

Two days after Ms. Vitale's death "two subjects identifying themselves as Brenda Abbley and Barbara Lehman arrived . . after driving past the ... security gate ... Abbley described herself as Daniel Horowitz's physician and [Lehman's] daughter." Lehman said she was close friends of both Pamela and Daniel. (Exhibit O, Report of Detective Barnes, Dated 10/24/05 at 465.)

[8]s. Powers believed Mr. Horowitz and Brenda were having an affair because Brenda said she loved him; he was the only man she spoke of other than her ex-husband; they kissed on the lips; and when Mr. Horowitz visited, they sequestered themselves in Brenda's bedroom. (Exhibit D, at 266, 280, 290, 295.)

her. Brenda said Horowitz was under a lot of stress because of the Michael Jackson trial,[9] and she would not let a friend of hers be in pain. (Exhibit D, at 271-72, 275.)

Two months later, Mr. Horowitz called Ms. Powers. (Exhibit D, at 267.) "He said 'I told Brenda she's not allowed to talk to you ever again, and I don't want you to ever talk to her again. And if you [do]...I'll make sure you lose custody of your daughter.'" (Exhibit D, at 265.) Ms. Powers expressed her concern about Brenda. (Exhibit D, at 271.) When she mentioned Brenda calling in the prescriptions, he "got extremely angry," and threatened to take away her daughter. (Exhibit D, at 274.) "He didn't know me from Adam. You know? ... I wasn't a friend of his...he threatened me with my child. Who does that?" (Exhibit D, at 298.)

Thus, evidence in trial counsel's possession indicated that Mr. Horowitz had an anger problem and was physically abusive to Ms. Vitale. This evidence is particularly compelling in light of the experts' findings that Ms. Vitale's murder was the result of rage or anger. "The injuries are atypical of a burglary or robbery gone bad, and are far more commonly associated with anger or rage." (Exhibit G, Laufer Declaration, at 369.)

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[9]r. Horowitz acted as a legal commentator during the Michael Jackson trial. As Mr. Ortiz reports, becoming a legal commentator was part of a "media plan" to make Mr. Horowitz a celebrity attorney and thereby increase his earning potential. (*See* Exhibit K, Declaration of Rick Ortiz (hereinafter "Ortiz Declaration"), at 415.)

"The available evidence is ... most consistent with an anger/revenge motivation...." (Exhibit F, Turvey Report, at 345-46.)

This evidence was particularly exculpatory in light of the evidence of Petitioner's peaceful, non-violent demeanor. (*See* 15 RT 4106-07.) Had counsel had presented evidence that Mr. Horowitz was prone to fits of rage and violence, and that this was consistent with physical evidence at the scene, and inconsistent with Mr. Dyleski's peaceful character, it may have established the reasonable doubt otherwise lacking in this case.

*3. Evidence of Mounting Marital Tension as a Result of the Home Construction and Related Financial Pressures.*

Marital tension between Ms. Vitale and Mr. Horowitz was exacerbated by problems with the construction of their new home. (Exhibit C, Hill Interview, at 197.) For several years, the couple was in the process of building a large new home. (8 RT 2084.) The project was difficult from the start. Mr. Horowitz hired contractor Rick Ortiz in March of 2002.[10] The original plans were incomplete, which caused significant delays and increased the final construction costs. The very first check from Mr. Horowitz bounced. (Exhibit K, Ortiz Declaration, at 413.)

Ms. Vitale's extreme indecisiveness caused a lot of these problems.

[10] Mr. Ortiz was never contacted by anyone before the undersigned. (Exhibit K, Ortiz Declaration, at 416.) However, trial counsel should have known of Mr. Ortiz since several people mentioned him a potential suspect, including Tammy Hill. (Exhibit C, Hill Interview, at 187.)

"She had difficulty making decisions, she altered elevations frequently after already being built ... changed materials, added custom features ... made hundreds of smaller changes, [and] ordered materials that took months to acquire." This resulted in hundreds of thousands of dollars in lost time, and increased labor and material costs. (Exhibit K, at 413-14.) As of June 2004, Mr. Ortiz calculated the cost of this indecision was more than $214,000. (Exhibit K1, Change Orders to Date.)

Mr. Ortiz became close with the couple and witnessed how the construction problems affected them. (Exhibit K, at 413-14.) Mr. Horowitz withdrew from the process while Ms. Vitale grew more obsessed. Her health suffered; she developed severe allergies and would not leave her home without wearing a mask and gloves and covering her head.[11] (Exhibit K, at 414.)

During this time, Mr. Horowitz represented Pavlo Lazarenko, former Ukrainian Prime Minister, in a criminal case in the United States District Court, Northern District of California. Mr. Horowitz told Mr. Ortiz that he was expecting a one million dollar bonus upon acquittal. However, Mr. Lazarenko was convicted in May of 2004. Mr. Horowitz "came home to Lafayette angrier than I had ever seen. We spent nearly two hours

[11] This is interesting because Mr. Horowitz said that his wife had plans to attend the ballet that evening with a friend. (Exhibit P, Report of Detective Pate, Dated 11/1/05, at 473.) This friend was never identified.

discussing his anger and where to go from there. We spoke of money issues and how Dan was going to have to rein Pamela in and put some controls in place. I remember watching Dan on TV bashing his briefcase against the columns of the court house thinking this is not good." (Exhibit K, at 415.) Mr. Horowitz had taken time away from his legal practice to pursue his career as a legal commentator, so he had less income, and without the anticipated bonus, was short on funds; he already owed Mr. Ortiz over $200,000. (Exhibit K, at 415.)

Mr. Horowitz dealt with the dire financial situation by turning on Mr. Ortiz:

> Dan threatened my family. He showed me pictures of my wife and kids outside our new home in Shreveport, Louisiana. He said his family had sent someone down to take pictures and that he (Dan) could not guarantee their safety. Dan said his family had ties with ... the "mob" and they don't "play."
>
> (Exhibit K, at 415.)

Mr. Horowitz used these threats to get Mr. Ortiz to sign a new modified contract, with Mr. Ortiz's vacation home as collateral. Mr. Horowitz recorded a fraudulent deed of trust and then seized Mr. Ortiz's home. (Exhibit K, at 416.)

Thus, on October 15, 2005, Mr. Horowitz and Ms. Vitale were under a great deal of financial pressure and experiencing significant marital

strife.[12] Ms. Hill confirmed this situation:

> So, several arguments over the last year and a half to two years have been just exclusive house issues ... the last argument they had about this which I would say was within the last two months – maybe three months – was them just talking about the fact that he... this wasn't his house, ... he accused Pam of just ... that she didn't love him, and that ... she was just using him to make all the money so that she could build her house.
>
> (Exhibit C, Hill Interview, at 199.)

In one of her last conversations with her sister Ms. Vitale confided about yet another problem. When the workers started to install flooring in the new home, they realized the finish was ruined (from sitting in the basement for three years due to delay):

> [S]he was afraid to tell Daniel ... it was just one more thing, and he was starting the Polk case ... I don't know if she meant afraid 'cause now there's going to be this huge blow up, or just didn't want to put that extra stress on him...but I know there was this house thing recently, this week, that was a big issue. I mean it's three floors of flooring that might have to be replaced.
>
> And you never know if she actually told him about this or not?
>
> I do not know. On Tuesday ... I'm pretty sure she had not.

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[12] A man named Richard Sellers contacted the Contra Costa Sheriff's Department on or about 10/19/05. Approximately 4 months prior, Pamela came over to look at the tile in his home because she was considering using the same tile contractor. She arrived with a man she said was her husband, but upon seeing media coverage of the murder, he realized it was not the man Mr. Horowitz. Mr. Sellers described this man as a tall (6'3" or 6'4") Caucasian who appeared well groomed and affluent. (Exhibit Q, Report by Detective Martin, 10/20/05.)

(Exhibit C, at 199-200.)

This is compelling evidence of potential motive for Mr. Horowitz.

*4. Mr. Horowitz's Behavior Following Ms. Vitale's Death Seemed Inconsistent with that of a Grieving Husband and Indicated a Consciousness of Guilt.*

Sergeant Hoffman, first on scene, testified at preliminary hearing that when he first arrived, he placed Mr. Horowitz in a patrol vehicle, and Horowitz immediately said that he was with "a bunch of retired police officers that day" and that he was an attorney. (1 CT 36.)

Mr. Horowitz produced a Safeway receipt, his last "errand" before arriving home.[13]

While being interviewed by the police, Mr. Horowitz showed few signs of shock or grief. (See Exhibit B, B1, and B2, Transcript and Digital Recordings of Interview of Daniel Horowitz (hereinafter "Horowitz Interview").) Mr. Horowitz made numerous phone calls, and similar to Sergeant Hoffman's description, appears animated as he lays out his theory of the case: "I've pretty much figured out the time and manner and everything else. I just don't know who." (Exhibit B, at 31.)

When Mr. Horowitz explained his theory to Ms. Hill: "He wasn't

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[13] Mr. Horowitz purchased a few items, including salad and salad dressing. (Exhibit A, Photos, at 28.) However, a police inventory of the refrigerator and cabinets indicates that there were seven bags of lettuce in the fridge, and twenty-five bottles of salad dressing. (See Exhibit R, Report of G. Schiro, Dated 10/20/05, 499-501.)

enraged .... haven't seen him be angry over the death. (Exhibit C, Hill Interview, at 210, 219.)

While speaking with detectives, Mr. Horowitz answers a phone call from Bob Massi, with whom he had breakfast that morning, saying matter-of-factly: "Bob, I'm here with two homicide guys. My wife was murdered." (Exhibit B, Horowitz Interview, at 61-62.)

Although Mr. Horowitz made approximately fifty phone calls in the hours following his reported discovery of his wife's body, (See Declaration of Sara Zalkin), he did not personally notify her sister but instead had his sister Carol call Ms. Hill around 7:45, nearly two hours later. (Exhibit C, Hill Interview, at 208, 250.)

Mr. Horowitz immediately tried to steer the investigation. At the scene, Sergeant Hoffman tried to obtain basic personal information about Ms. Vitale from Mr. Horowitz. Instead, he provided details about a man named Joseph Lynch who was supposed to come over that day for a check. (1 CT 46; 1 CT 50)

Mr. Horowitz spoke of Mr. Lynch at least twenty times in the hours after the murder. (*See, e.g.*, Exhibit B at 38-42, 47, 49, 54, 57-58, 61, 67, 73-76, 78-79, and 94; Exhibit B1 at 97, 100-101, 103, 106-07, 109, 111-12; Exhibit B2, at 118, 121, 129, 149. *See also* Exhibit C, Hill Interview, at 220.)

Two days after Ms. Vitale's death, Mr. Horowitz pulled Ms. Hill aside to tell her why he was angry with his wife and how she had hurt him, which is inconsistent with a grieving spouse and implies consciousness of guilt. (Exhibit C, Hill Interview, at 243-45.)[14]

*5. Mr. Horowitz Possessed Information that He Should Not Have Known if He Was Being Truthful as to the Events Surrounding Ms. Vitale's Death.*

Mr. Horowitz made statements in the hours after the murder that contained certain information that he would not have had access to if he was being truthful. First, he made a statement that Mr. Lynch, who he insisted was the guilty party, was supposed to collect a check from Ms. Vitale that day. Second, he made statements implying knowledge about the

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[14] TH:And he said, "I was talking to Jan, and she said that Pam uh... had some calls with Neal, and... and even went out to dinner with him. What do you think about that?" And he... or... or, "Do you know anything about that?" And I was like, "Why are you asking me this?"

***

TH: And that uh... And I said, "Well, I think that maybe he did have some telephone conversations with her. I had no idea about any dinners."

PO2: Uhuh.

TH: And he goes, "What do you know about that neighbor [unintell]"...[H]e just kept going back to "This is her house. And I was just the money person...

PO2: This is... When was this?

TH: This was yesterday. And "I guess she loved me."

PO2: Uhuh.

TH: And I'm like, "What bizarre thing to tell me, then is asking me about at this juncture. And to tell me that really hurt him .... How am I supposed to react to that?

knife wound on his wife's stomach.

At the scene, Mr. Horowitz told Sergeant Hoffman that Mr. Lynch "was supposed to come by and **drop off** a check for $188.00. For water." (Exhibit L, Report by Sgt. Hoffman, dated 10/16/05, at 422.) In his interview at the police station the night of the murder, Mr. Horowitz claims Ms. Vitale told him that **they owed** Joe a check for $180 for water. (Exhibit B, Horowitz Interview, at 57 (emphasis added).)

However, as detectives took turns questioning Mr. Lynch and Mr. Horowitz (explaining their periodic appearance in the room with Mr. Horowitz) Mr. Lynch was adamant that he had just called that day, October 15, and left a message on their answering machine, at either 11 a.m. or 2 p.m., about needing the $180 check for the water (*See* Exhibit P, Report of Detective Pate, Dated 11/1/05, at 481.)

The detectives confronted Mr. Lynch with Mr. Horowitz's statement that Pamela had told him the day before that Joe needed a check for $180. Mr. Lynch was adamant that was impossible since he did not know when the water was going to be delivered, and he left the message that day (not the day before). Moreover, Mr. Lynch stated that normally Ms. Vitale brought the money to him; implying that Mr. Horowitz fabricated the story about Joe coming to the house. (See Declaration of Katherine Hallinan)

Mr. Horowitz told detectives that he left his residence at 7:30 a.m.,

and did not return until almost 6 p.m. when he found her. (Exhibit P, at 472-74.) Aside from touching her neck and calling 911, he claimed he did not touch or access any other areas or items within the residence. (Exhibit P, at 474.) Thus, based on Mr. Horowitz's account, he had no way to know Mr. Lynch was owed $180. Ms. Leonida did not raise this inconsistency.

Mr. Horowitz also made statements implying awareness of injuries that were not visible on Ms. Vitale at the scene. "There could have been other wounds too. There could have been a second one on the other side. I don't know." (Exhibit B1, Horowitz Interview, at 116.)

*6. With Tragic Irony, the Prosecution Accurately Anticipated the Obvious Defense that Defense Counsel Egregiously Failed to Pursue.*

Prosecutor Jewett anticipated many of the obvious defenses that defense counsel failed to present. Defense counsel moved to exclude the recording of Mr. Horowitz's 911 call. Counsel alleged the call was prejudicial because of the emotion one can hear in Mr. Horowitz's voice during the call. Ms. Leonida stated in her motion "The dispatch ... is not relevant to any issue at trial. Mr. Dyleski is not suggesting that Mr. Horowitz was responsible for his wife's death." (3 CT 758.)

However, in response, the prosecution notes that Mr. Horowitz's potential guilt is so obvious, that whether or not the defense pursues a defense of third party culpability, the jury will naturally wonder whether he

may be the true guilty party:

"[Mr. Dyleski] has suggested...(through counsel) that he will be denying any responsibility for this crime at trial. In doing so, he clearly raises the inference that someone other than himself murdered Ms. Vitale....[T]he jury's attention would naturally gravitate toward Ms. Vitale's husband whether or not defense counsel chooses to point the accusatory finger at him." (3 CT 873.)

The prosecutor recited some of the obvious evidence implicating Mr. Horowitz:

> 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.)

*7. Evidence Available to Defense Counsel Implicating Mr. Horowitz in the Death of His Wife Was Sufficiently Compelling that Counsel's Failure to Investigate and Develop Constitutes Ineffective Assistance of Counsel.*

Evidence of third party culpability need only be capable of raising a

reasonable doubt as to the defendant's guilt. People v. Cudjo (1993) 6 Cal.4th 585, 609; People v. Hall (1986) 41 Cal.3d 826, 833. Here, evidence linking Mr. Horowitz to the crime was capable of creating a such reasonable doubt. The physical evidence used to link Petitioner to the crime was "problematic at best" (Exhibit F, Turvey Report, at 344); the prosecution failed to develop a rational motive; Petitioner had a potential alibi; and Petitioner had no history of violence. In light of the weak of evidence against Mr. Dyleski, if the jury had evidence of Mr. Horowitz's abusive conduct, marital problems, incriminating physical evidence, and statements showing consciousness of guilt, it would likely have raised a reasonable doubt otherwise lacking.

In People v. Hamilton (2009) 45 Cal. 4th 863, the California Supreme Court affirmed trial court's preclusion of expert testimony as to third party culpability, because there was no nexus between the third party and the particular crime. *Id.* at 913-14. The proffered testimony was that of a forensic psychologist who would have said that the police should have looked more closely at the victim's husband, based on his juvenile record, some history of alcohol abuse, and a police report of domestic violence against his ex-wife. *Id.* at 913. In contrast, there was evidence here not only of prior domestic abuse, but also of opportunity, physical evidence, motive, inconsistencies, and consciousness of guilt.

Trial counsel made little effort to investigate evidence of third party culpability in general and Mr. Horowitz in particular. Ms. Leonida claimed that she investigated "everything," watched all interviews, and asked her investigator Ed Stein to interview the Hills and Ms. Powers. However, Mr. Stein did not recall interviewing the Hills, and had no idea who Ms. Powers was. (*See* Declaration of Katherine Hallinan.) There are no notes in trial counsel's file about any interviews of Ms. Hill or Ms. Powers, although there are notes on other witness interviews. (*See* Declaration of Katherine Hallinan.) This implies that even if Ms. Leonida did watch those interviews, she failed to recognize their worth.

Perhaps most compelling is Ms. Leonida's apparent lack of awareness of a crime scene photo, in her possession, which directly refuted the prosecution's denial that the perpetrator had showered. (See footnote 2, *supra*.)

By way of declaration, Mr. Dyleski relates that Ms. Leonida:

> [I]nformed me that no evidence or interview existed that implicated Daniel Horowitz in the murder of his wife ... besides the Declaration of Susan Polk. I found out recently from my habeas counsel that Ms. Leonida had in her possession ... multiple interviews that were exculpatory ... Ms. Leonida further stated that investigating Mr. Horowitz and presenting him as a suspect at trial would not be wise because of his notoriety. [15]

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[15] Susan Polk, a client of Mr. Horowitz at the time, provided a declaration stating that Mr. Horowitz told her that he framed Mr. Dyleski. (Exhibit J, Declaration of Susan Polk at 409; *see also* Exhibit S, Report of

(Exhibit H, at 392.)

Ms. Leonida's decision to not investigate compelling evidence of third party culpability because of Mr. Horowitz's "notoriety" cannot be considered strategic.

"[I]ntroducing compelling evidence that another person [committed] the murder should have been Petitioner's strongest ... defense, but counsel did not proffer the evidence he possessed in support of this defense. Counsel's performance, given every benefit of the doubt, was objectively unreasonable and thus constitutionally deficient." Lisker v. Knowles, *supra*, at 1121.

As evidence of prejudice in this case, there was a transcript in trial counsel's file from an online interview of a juror. (Exhibit X, Transcript of Chat with Peter De Cristofaro.) Mr. De Cristofaro said the defense was "weak" and "almost all character witnesses and even the number of character witnesses was not that much. I personally would have like to have seen more, or an alternate theory as to who might have done it. If Scott Dyleski didn't do it, I would have liked to have seen Ellen Leonida give us an alternate theory to the crime. She never did." (Exhibit X, at 538-39.)

Although Ms. Leonida had evidence of such an "alternate theory" available, she presented virtually no evidence or argument to counter the

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Deputy Wilhelm, Dated 1/13/06, at 507.)

prosecution's case. Thus, the jury had no alternative but to accept the prosecution's theory of events.

### C. Trial Counsel Failed to Present Manifest Evidence of Crime Scene Contamination.

Trial counsel was ineffective for failing to investigate or present evidence of contamination. Specifically, crime scene photos in her possession showed faulty practices on the part of the investigators that arguably led to contamination of key evidence. This evidence was powerful enough to challenge the integrity of the entire investigation.

Four images taken by law enforcement personnel in processing the crime scene show the same ruler being used in different locations, with identical apparent blood transfer in each image. (Exhibit A, Photos, at 19-22.) These images show how evidence can be easily and inadvertently contaminated, which likely occurred in this case.

Trial counsel additionally failed to question the chain of custody and potential contamination of critical inculpatory evidence: the duffel bag. Reserve Deputy Kovar testified that when he found the bag, he moved items around inside of it. (9 RT 2338.) A photo taken at 1050 Hunsaker Canyon Road shows the bag sitting on the porch, with some of its contents displayed on top, shows carelessness in the handling of important evidence. (Exhibit A, Photos, at 30. *See also* 9 RT 2323.)

Trial counsel likewise failed to challenge gaping holes in the chain

of custody for items reportedly found in the duffel bag. Mr. Kovar testified that he signed the forensic property tag for the bag, before handing it over to a crime lab technician.[16] (9 RT 2327.) However, Mr. Kovar did not sign a forensic property tag for its contents. (9 RT 2331-2332.) No one testified to having signed any forensic property tag or chain of custody for the individual items within the bag. Mr. Collins said he received the bag from Mr. Kovar but did not document its contents until later. (12 RT 3397-98.)

The unestablished chain of custody for the items within the bag is significant in light of the single photo of the bag and its contents on the porch of 1050 Hunsaker, which only shows two items of clothing, the pullover and the balaclava, but not the coat or glove that were allegedly found. (Exhibit A, at 30. *See also* 9 RT 2323.) It is perplexing that the investigators would photograph only some of the items but ignore the rest (including the all-important glove). In fact, nobody mentioned anything about a glove. Mr. Collins' handwritten field notes state: "Kovar reported finding a black duffel bag, cont. dark clothing, a ski mask, and a clump of loose reddish hairs ..." (*See* Exhibit AA, Field Services Information, at 545.)

Although Mr. Kovar did not report finding a glove, he was permitted to authenticate the glove at trial. (9 RT 2332-33.) However, the veracity of

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[16] Identified elsewhere as Eric Collins.

this testimony is questionable at best as he directly contradicts himself during his testimony, both at trial and preliminary hearing, as to whether or not he actually saw the glove at the scene:

Q. And what did you see?
A. I saw what appeared to be a dark, either lightweight sweater of pullover.
Q. What else?
A. Underneath that was a dark colored balaclava, a head mask?
Q. A balaclava. Okay.
Did you explore the bag further?
A. At that time, I called in to my supervisor and said I had an "item of interest" . . .
Q. And so what did you do?
A. I took the duffel bag with the contents still inside it down to the residence where the detectives were.

(9 RT 2322.)

Still on direct, Kovar later testifies:

Q. When you looked in the bag, did you see a glove?
A. Yes.
Q. At what point was that?
A. As I shown my light in there, I saw a glove. I didn't touch it, at that point.
Q. And so you are saying you saw the glove back when the you [sic] saw it by the van?
A. Yes.

(9 RT 2332-33.)

Mr. Kovar was then permitted to authenticate the glove.

At preliminary hearing, Mr. Kovar similarly contradicted himself:

Q. Did you search the bag?
A. I did not completely search the bag.
Q. What do you mean 'completely'?
A. I didn't take all the contents out and see what was inside.

Q. You just – you looked into it.
A. I looked into it. I believe I picked up the – there was a hood – some sort of balaclava-type thing, put that back in and then called my supervisor.
Q. So, the thing that was on top that you saw first was the balaclava?
A. No. I – I couldn't tell you exactly what was on top. There was dark clothing like a jacket of some kind, the balaclava, I believe a glove, again I saw – without pulling it out, this is what I saw.

(CT 1 151-152.)

On cross-examination Mr. Kovar gave more contradictory statements that further support the fact that he had not seen the glove at the scene:

Q. Did you move around the contents of the bag?
A. When I pulled the initial piece of clothing out, yes.
Q. And then you put the items back in the bag?
A. I put that – yeah, the balaclava right back in.
Q. Okay. And you don't remember, as you sit here, what was on top or what you saw other than dark clothing?
A. I believe it would be the balaclava if that is what I pulled out.

...

Q. Do you remember what else was near it or what order the things were placed in the bag in?
A. I don't, and I – the only reason I know there was a jacket in there is at the time it was taken to the front porch is when some of the contents were pulled out to be examined by the detective.
Q. Okay. So you don't know where anything was in relation to anything else inside the bag?
A. No.

(1 CT 154.)

Ms. Leonida did not ask any questions about these inconsistencies, or the failure to establish a proper chain of custody. This evidence would have been particularly meaningful in light of the strange nature of the duffel

bag evidence. Logically, in order for such items to have Ms. Vitale's DNA on them, they must have been worn by the perpetrator during the crime. However, the DNA analysis of the glove excluded Mr. Dyleski entirely. Moreover, the bag only contained a single glove, a mask, and a shirt and coat that had no blood on it whatsoever. Thus, if the killer had worn the mask and glove, what happened to the other glove and the rest of the clothes? Why were the rest of the items disposed of but for a few random items left in a bag that had Mr. Dyleski's name on it, mere yards from his home? In light of the damaging, but puzzling, duffel bag evidence, it was essential for defense counsel to provide an alternative explanation for the manner in which Ms. Vitale's DNA could have made it onto the bag (to wit, contamination). Defense counsel failed to do so, and this failure fell below an objectively reasonable standard of competence, and prejudiced Petitioner.

### D. Trial Counsel Failed to Seek Exclusion of Patently Irrelevant, Misleading and Prejudicial Evidence.

Trial counsel was ineffective in not moving to exclude irrelevant, prejudicial, and misleading evidence, specifically Mr. Dyleski's artwork and writings and a bumper sticker from his room. This evidence was irrelevant to any matter of consequence, and was so prejudicial and misleading that any probative value was significantly outweighed by the risk of prejudice and should have been excluded from trial. (Evidence Code §§

350; 352.) Trial counsel's failure to object fell below an objectively reasonable standard of conduct, and resulted in prejudice.

*1. Artwork and Writing*

Petitioner's artwork and writing were a central topic at trial, and symbols appearing in the artwork were compared to incisions observed on Ms. Vitale's back. However, the subject matter of the artwork and writings often depicted violent themes, which were highly prejudicial. (*See* 15 RT 4000-4005.) Moreover, the prosecutor used the symbols on the artwork to mislead the jury by arguing that they were similar to the marks found on Ms. Vitale's back, when in fact there were no similarities. This resulted in prejudice to Mr. Dyleski, and trial counsel's failure to move to exclude this prejudicial information fell below an objectively reasonable standard of conduct.

The district attorney argued extensively that "the content of that artwork and those writings may give you something of a window into the heart and mind of Scott Dyleski." (7 RT 1743. *See also* 15 RT 4004.) He further argued that "Mr. Dyleski was big into symbols." (7 RT 1743.) Mr. Jewett used the symbols with which Mr. Dyleski often signed his artwork (described variously as a three-pronged propeller, a star in a circle, and otherwise) (*See* Exhibit Y, Example of symbol drawn by Mr. Dyleski), to argue that the scratches on Ms. Vitale's back in the shape of a "H"with an

elongated horizontal line were in fact a symbolic signature. (14 RT 3795.) "It was the etching. It was the brand on her back. ... Something else is going on here that's beyond simply trying to cause her pain or kill her ... some other element there that you do not ordinarily see in a homicide that is at least circumstantially reflective of the mind, the heart, the soul of the person who inflicts that kind of injury." (15 RT 4004.)

Mr. Jewett repeatedly mentioned Mr. Dyleski's artwork. He elicited testimony from Detective Moore about art in Petitioner's room that utilized a variety of symbols, none of which were the same as the marks on Ms. Vitale's back. Yet, some of the artwork was highly inflammatory, containing themes of mass murderers, swastikas, anti-Christian and/or Satanic beliefs, vivisection, Absinthe use, violence and hate. (13 RT 3512-27; *see also* 9 RT 2454-47; 10 RT 2685; 11 RT 3075-77.)

In McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378 [overruled on other grounds], the court granted petitioner's writ, finding that evidence petitioner previously possessed a knife and scratched the words "Death is his" on a closet door was irrelevant and prejudicial, and that in light of the solely circumstantial evidence against the petitioner, likely swayed the jury towards conviction. *Id.* at 1385-86.

Similarly, in the instant case, the introduction of Petitioner's artwork and writings portraying violent themes likely negatively prejudiced the

jury.[17] Moreover, the artwork was highly misleading, as the symbols portrayed in the artwork were not sufficiently similar to the scratches in Ms. Vitale's back to be relevant, but nonetheless likely influenced the jury.

Trial counsel's failure to object to the admission of Mr. Dyleski's artwork, either *in limine* or at trial, although it was patently irrelevant, misleading, and prejudicial, fell below an objectively reasonable standard of counsel and prejudiced Petitioner.

*2. Bumper Sticker*

Mr. Jewett argued in closing about a bumper sticker from Petitioner's bedroom (Exhibit Z, Bumpersticker):

> I'm for the separation of church and hate,' kind of a play on the church and state separation. The interesting thing ...I s that the word 'hate' is kind of stylized in the letter 'H' and the letter 'A' and the word hate have an extended crossbar...that seems relevant to the People.
>
> (15 RT 4002)

Defense counsel did not object although it was patently irrelevant

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[17] In two recent highly publicized exonerations, the prosecution used drawings and writings of the accused as proof of guilt. See Echols v. State (Ark. 1996) 326 Ark.917 (affirming his conviction); Echols v. State, 2010 Ark. 417 (reversing the judgment); Masters v. People (Colo. 2003) 58 P.3d 979 (affirming the conviction); Masters v. Gilmore (Dist. Colo. 2009) 663 F.Supp. 2d 1027 (civil lawsuit filed by Mr. Masters alleging malicious prosecution). In both cases, as here, the prosecution relied on the defendant's interest in dark subject matter to paint an image of them as violent; in both cases, as here, the individuals were teenagers when the crimes occurred. And in both cases, the individuals were exonerated after spending over ten years in prison for crimes they did not commit.

and, as used by the prosecutor, highly prejudicial, because it contained the word "hate" and an anti-Christian theme. In addition to prosecutorial misconduct, defense counsel's failure to object further supports Petitioner's claim of ineffective assistance.

### E. Failure to Object to Expert Opinion that Gloves Found in the Duffel Bag Were Consistent with Prints Found in Blood.

Trial counsel failed to object to the evidence presented through Kathryn Novaes, a Sheriff's Office fingerprint analyst, that prints found on boxes in the Horowitz/Vitale home were likely made by fabric, that they were further likely made by a glove, and that the pattern on the boxes looked similar to the fabric pattern of the glove found in the duffel bag. (12 RT 3313, 3315-16.) Trial counsel not only failed to object to this unsubstantiated opinion, she also failed to cross-examine on this issue.

Ms. Novaes testified as an expert in the "composition and identification of latent fingerprints." All of her stated training and expertise was in the area of "fingerprints." (12 RT 3299.) She did not mention any sort of training whatsoever in any field besides fingerprints. She did not testify that she had received any training on fabric prints or fabric comparisons of any kind. However, despite her lack of qualification in any field besides the limited arena of fingerprints, she testified without objection that she not only could tell that prints left on boxes were made by fabric, but specifically

by a glove, and that the print was consistent with the glove found in the duffel bag.

Counsel was ineffective for failing to object to this unqualified expert opinion, or to cross examine Ms. Novaes on the basis of her opinion. In People v. Gutierrez, 14 Cal.App.4th 1425, the court found that counsel was not ineffective for failing to object to an gang expert's opinion because he was asked about matters within the scope of his expertise. *Id.* at 1435. Ms. Novaes testified to matters well beyond her expertise.

Moreover, this testimony was highly prejudicial, as there was little evidence tying Mr. Dyleski to the scene of the crime. Thus, this unsubstantiated expert opinion tying the glove, found in Mr. Dyleski's bag, to the crime scene was highly prejudicial and objectionable.

### F. Trial Counsel Did Not Challenge the Information. Pursuant to Penal Code §995.

To provide effective assistance of counsel, an attorney must investigate the merits of a 995 motion, and make a reasonable tactical decision on that basis of that investigation. People v. Maguire (1998) 67 Cal.App.4th 1022, 1032.

Petitioner was initially charged by complaint with murder (Penal Code § 187); a deadly weapon enhancement; and a special allegation that he was at least 16 at the time of the offense. Mr. Dyleski was held to answer as charged. On March 1, 2006, the information filed added a special

circumstance of felony murder, residential burglary (Penal Code § 190.2(a)(17) which carries a sentence of life imprisonment without the possibility of parole. (3 CT 683.) Although there was insufficient evidence of burglary provided at the preliminary hearing, counsel failed to challenge this lack of evidence through a 995.

### G. Counsel's Failure to Provide Effective Assistance of Counsel Prejudiced the Petitioner and Resulted in a Deprivation of his Fifth and Sixth Amendment Rights.

Petitioner was fatally prejudiced by the ineffective assistance of his counsel. "[I]n evaluating prejudice, we must compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently, and evaluate whether the difference between what was presented and what could have been presented is sufficient to undermine confidence in the outcome of the proceeding." Belmontes v. Ayers, *supra*, at 863 [internal quotations omitted; overruled on other grounds]. Here, evidence that sounded damning, at closer inspection, turned out to be primarily inflammatory and irrelevant, and the physical evidence contained potential weaknesses in both the collection and processing.

Trial counsel's failure to adequately investigate the evidence left her unable to effectively challenge the physical evidence presented by the prosecution, and her puzzling decision to ignore the most compelling

exculpatory evidence available left the jury without an alternative theory, necessary to effectively question the prosecution's interpretation of the evidence. Her failure to challenge the admission of irrelevant and inflammatory evidence allowed the prosecution to paint Petitioner as a violent sadist, thus infecting the entire trial with prejudice. The Petitioner was prejudiced thereby.

II.

PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED BY THE PROSECUTOR'S IMPROPER ACTIONS, WHICH RENDERED HIS TRIAL FUNDAMENTALLY UNFAIR.

The prosecutor engaged in misconduct so egregious that it resulted in a violation of the Fifth and Fourteenth Amendments to the United States Constitution. "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'" People v. Harris (1989) 47 Cal.3d 1047, 1084 [*quoting* Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-43].

Here, Mr. Jewett knowingly presented false evidence; manipulated and misstated the scientific evidence; made improper comments on the Petitioner's decision not to testify; improperly appealed to passion by harping on irrelevant and inflammatory information; and violated the so-

called golden rule. These intentional acts of misconduct so infected the trial with unfairness that it resulted in a deprivation of due process to the Petitioner. Each of these errors individually may be sufficient to render Petitioner's trial fundamentally unfair, and clearly when considered cumulatively resulted in overwhelming prejudice. Scott Dyleski's trial was fundamentally unfair.

**A. Mr. Jewett Knowingly Presented False Evidence**.

As discussed above, the prosecution alleged that the perpetrator could not have taken a shower because the blood had not started to drip. (8 RT 2058-59; 15 RT 4055.) "[T]he cast-off from your body, if you are taking a shower, it's going to start to drip and you are going to get drips of blood; but that shower was never run." (15 RT 4055. *See also* 8 RT 2057-59.) This was a critical argument, as Mr. Dyleski would not have had sufficient time to take a shower, and thus it would have strengthened his alibi defense.

However, scene photographs clearly showed "wet dripping" from the handprint in the shower, in direct contravention of the prosecution's arguments. (Exhibit A, Photos, at 16-18.) "Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." People v. Hill (1998) 17 Cal.4th 800, 823. Moreover, it appears from Mr. Jewett's questioning of Mr. Kovar (*see* argument I(c), *supra*) that Mr. Jewett knew of a problem

with the glove's chain of custody and may have elicited perjurious testimony or improperly coached the witness.

### B. Mr. Jewett Knowingly Manipulated the "Scientific Evidence".

Throughout trial, the prosecutor referred to "presumptive" tests for blood results in a misleading fashion in his effort to secure a conviction. (*See, e.g.*, 13 RT 3649, 3665.) This misrepresentation violates due process and constitutes prosecutorial misconduct. *See, e.g.*, Miller v. Pate (1967) 386 U.S. 1 [granting writ due to the prosecution's presentation of red stains as blood, when this was known to be false].

### C. Improper Comment on Petitioner's Decision to Not Testify.

The prosecutor made improper comments on the Petitioner's decision not to testify. This violates the defendant's Fifth Amendment right against self-incrimination. Griffin v. California (1965) 380 U.S. 609, 611. In closing, the prosecutor stated repeatedly asked rhetorical questions of the Petitioner. "What exactly, what time is it that you, Scott Dyleski, think you have an alibi for?" (15 RT 4089, *see also* 15 RT 4087.) By implication, the prosecution is stating that there are questions that only Mr. Dyleski can answer, which is by implication a comment on his failure to testify. Such comments are improper and violate Petitioner's Fifth Amendment rights.

### D. The Prosecutor Intentionally Misled the Jury with Irrelevant, Inflammatory, and Misleading Evidence.

The prosecutor throughout trial spent time on evidence that was not only irrelevant, but tended to inflame the passions of the jury and mislead them as to the true facts. Specifically, the prosecutor spent a great deal of time presenting evidence of the Petitioner's artwork and writings, and argued the subject matter of his art showed that he was capable of committing a violent murder. (See argument I(d), *supra*.) Moreover, the prosecutor focused on this irrelevant evidence because he was aware of the general dearth of direct evidence of Petitioner's guilt.

### E. The Prosecutor Violated the Golden Rule.

Mr. Jewett violated the golden rule by asking the jury to see the crime through the eyes of Ms. Vitale."[A]n appeal to the jury to view the crime through the eyes of the victim is misconduct." People v. Jackson (2009) 45 Cal.4th 662, 691. Here, Mr. Jewett led the jury through a possible scenario of what may have occurred the morning of October 15, from the perspective of Ms. Vitale:

> Imagine the vision presented to the senses of Pamela Vitale when a masked person ... there can be no question whatsoever that this person was wearing a mask and gloves at the time he entered this house and that is what Pamela is confronted with as she is in a completely different world, looking into her family tree.
>
> There's a few things she knows that her assailant doesn't know. Perhaps the most notable, the back door is not

> accessible ... That was not a means of escape and she knew that not only consciously, but she knew probably knew it intuitively ...
>
> So what does Pamela do? I submit to you she gets up, she tries to move sideways, she's confronted with her assailant's hand ...
>
> That's probably when she starts to bleed. And what is she doing at that point? She's thinking about a way to get out of there. And the only way out of that house is through the front door and so that's where she heads.
>
> (15 RT 4041-43.)

This is the exact sort of argument that has been found to improperly inflame the jurors sympathy:

> The improper arguments shifted the jury's attention from the evidence to the all too natural response of empathizing with the victim's suffering . . . Once such emotions are unbridled they are hard to rein in.
>
> People v. Vance (2010) 188 Cal.App.4th 1182, 1207 [overturning conviction due to prosecutor's improper argument].

Here, the cumulative effect of Mr. Jewett's misconduct so infected the Petitioner's trial with unfairness that the trial was rendered a violation of due process.

III.

PETITIONER'S FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW AND HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY THE FAILURE OF APPELLATE COUNSEL TO SUFFICIENTLY REVIEW THE RECORD IN THE CASE AND PRESENT MERITORIOUS DEFENSES AVAILABLE TO PETITIONER.

The two-prong test for ineffective assistance of counsel articulated in Strickland applies to claims of ineffective assistance of appellate counsel. *See* Smith v. Robbins (2000) 528 U.S. 259, 285. Thus, when alleging that appellate counsel was ineffective, a petitioner must show the performance was objectively unreasonable and there is a reasonable probability that, but for appellant counsel's error, petitioner would have prevailed on appeal. Smith, *supra*, 528 U.S. at 285. Here, if Mr. Brooks had raised ineffective assistance of trial counsel, based on the abundance of evidence of such ineffectiveness in the record and raised herein, petitioner would likely have prevailed on appeal.

Moreover, appellate counsel was aware of Mr. Turvey's report, indicating there may be meritorious grounds for a habeas petition and thus he had an ethical obligation to advise Mr. Dyleski as to how to pursue such claims. *See* In re Clark (1993) 5 Cal.4th 750, 783, n. 20. However, Mr. Brooks provided erroneous legal advice and discouraged Mr. Dyleski from contacting a habeas attorney. (*See* Exhibit V, Letter from Philip Brooks to

Scott Dyleski, dated May 26, 2010; Exhibit V1, Letter from Philip Brooks to Scott Dyleski, dated June 27, 2010; Exhibit V2, Letter from Philip Brooks to Scott Dyleski, dated Feb. 5, 2011.)

Mr. Brooks' failure to properly advise Mr. Dyleski constituted ineffective assistance of counsel and resulted in delays: on the part of Mr. Dyleski in seeking habeas counsel and therefore significantly reduced the amount of time available to habeas counsel to investigate potentially meritorious grounds for post-conviction relief. (*See* Declaration of Katherine Hallinan.) In this case, appellate counsel also failed Petitioner.

IV.

THE CUMULATIVE EFFECT OF THESE ERRORS RESULTED IN A FUNDAMENTAL MISCARRIAGE OF JUSTICE THAT FATALLY PREJUDICED THE PETITIONER IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Courts may consider the effect of the cumulative prejudice from all the errors that occurred at trial: "Even if no single error were [sufficiently] prejudicial, where there are several substantial errors, their cumulative effect may nevertheless be so prejudicial as to require reversal." Alcala, *supra*, at 893 [internal quotations omitted]. *See also* Kwan Fai Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, 622.

Here, the fundamental constitutional errors of ineffective assistance of counsel and prosecutorial misconduct worked together to deprive

Petitioner of his Constitutional right to Due Process under the Fifth, Sixth, and Fourteenth Amendments. While the prosecution presented false evidence and used improper evidence and argument to inflame the passions of the jury, defense counsel failed to adequately investigate the case, such that she was unable to counter the prosecution's improper tactics. Moreover, trial counsel's failure to present the most persuasive exculpatory evidence in her possession left the prosecution's case unchallenged, and the jury with no alternative but to accept the prosecution's theory. This fatally prejudiced Mr. Dyleski, and resulted in his erroneous conviction for a crime he did not commit.

## CONCLUSION

Petitioner SCOTT DYLESKI was deprived of his right to a fair trial and due process of the law through the ineffective assistance of counsel and his trial was rendered fundamentally unfair due to egregious and pervasive prosecutorial misconduct. Petitioner's public defender failed to investigate and pursue exculpatory evidence and viable defenses that could have established his innocence. Likewise, Petitioner's representation by appointed counsel on direct appeal was constitutionally deficient and he was prejudiced thereby. Based on the foregoing, Petitioner SCOTT DYLESKI has made a *prima facie* showing entitling him to relief.

Dated: December 23, 2011

Respectfully submitted,

KATHERINE HALLINAN
SARA ZALKIN
Attorneys for Petitioner
SCOTT EDGAR DYLESKI

DECLARATION OF KATHERINE HALLINAN

I, Katherine Hallinan, hereby state and declare:

1. I am one of Mr. Scott Dyleski's post-conviction attorneys. Ms. Sara Zalkin is my co-counsel.

2. I was contacted by Ms. Esther Fielding, Scott's mother, in mid-February 2011.

3. At that time, Esther requested that I review the federal habeas materials prepared by Mr. Philip Brooks, Scott's appellate attorney.

4. Esther, Ms. Zalkin, and I had an initial meeting on February 28, 2011.

5. Esther informed us that Mr. Brooks had told her that so long as a federal habeas petition was filed raising the issues brought on direct appeal by the May 24, 2011 deadline, Scott could use the stay-and-abeyance procedure approved in Rhines v. Weber (2005) 544 U.S. 269, to return to state court and exhaust any claims that may arise at a later date.

6. Ms. Zalkin and I explained to Esther that Mr. Brooks' advice mischaracterized the state of the law. We explained how state habeas and federal habeas procedure interact, and that because of the exhaustion doctrine, it was imperative that all potential post-conviction issues not yet raised on direct appeal be investigated and presented to the court prior to the May 24, 2011 deadline. The Rhines v. Weber stay-and-abeyance

procedure only allows a petitioner to return to state court to exhaust new claims raised in the federal petition, and only when there is good cause for the failure.

7. After speaking with Esther for a short time, we ascertained there were a number of potentially meritorious post-conviction claims that should be raised in a habeas petition. Esther provided us with Mr. Turvey's report from May of 2010, and this immediately identified a number of potentially fruitful areas for investigation, including error in the DNA analysis, potential mishandling of evidence, and the other issues pertaining to the physical evidence.

8. On February 28, 2011, we agreed to seek to compile the record and files and attempt to review the potential issues for habeas. However, because we were so concerned about the looming May deadline, we did not agree to be retained at that time, until we could obtain the record and conduct further investigation to determine if it would be possible to file a habeas petition in such a short timeframe.

9. Ms. Zalkin and I immediately began seeking to obtain the records and other case files, and investigate the potential issues in the case.

10. I called Ms. Ellen Leonida, Scott's trial counsel, on February 28, 2011. She informed me that all of her records had been provided to appellate counsel. I asked her if she was aware of any potential habeas issues that

she believed worth pursuing. She informed me that she had communicated extensively with Mr. Brooks, and I should speak to him about obtaining the record and any potential issues.

11. Ms. Zalkin contacted Mr. Brooks via email on March 1, 2011 and inquired as to the size of the record, and its availability. On March 2, 2011, Mr. Brooks informed Ms. Zalkin that he had provided the record to Scott in prison, and that Scott sent it to Esther. However, he stated that he was in possession of approximately ten boxes of materials from the public defender's files, which we could obtain from him.

12. Esther informed us that she was not in possession of the record. As a result, there was some delay as we attempted to ascertain what had become of the record. We were unable to determine what had happened to the official record.

13. When we were unable to determine what had become of the materials Mr. Brooks had provided to Scott, we obtained all the materials Mr. Brooks had in his possession on March 24, 2011. This included a digital copy of 13 out of 15 volumes of the reporter's transcript, and Volumes 3-5 of the clerk's transcript, and a hard copy of Volumes 1 and 2 of the clerk's transcript.

14. Upon obtaining the ten boxes of materials from the public defender's files, and 16 of the 20 volumes of the reporter and clerk's

transcript, we immediately began to organize and review the voluminous materials. This consisted of tens of thousands of pages of materials.

15. After obtaining the partial record and files from Mr. Brooks on March 24, 2011 and conducting a cursory review, we met with Esther for a second time on March 29, 2011. At that meeting, we agreed to write the present petition. Although we remained concerned about time, we had already identified so many potentially meritorious issues, we felt that we could proceed. This left us less than a two month window to review the records and files, ascertain potential issues, conduct further investigation, contact experts and have them review the evidence and provide declarations, obtain declarations from other relevant persons, and write and perfect the present petition.

16. Prior to receiving the materials from Mr. Brooks, Ms. Zalkin contacted Mr. Turvey to discuss his opinion as to the possible viable habeas claims.

17. Ms. Zalkin sought to contact Dr. Michael Laufer, an expert in injury reconstruction to assess the injuries and physical evidence in this case. However, we were unable to locate the autopsy report or crime scene photos in the materials provided to us by Mr. Brooks. Ms. Zalkin determined that those materials had been provided to Mr. Turvey, and that Mr. Brooks had not retained a copy. Mr. Turvey set about copying those

materials and we received them on or about May 1, 2011. At this time, we immediately provided them to Dr. Laufer for his review.

18. I contacted Ms. Ellen Leonida on May 10, 2011 to ask whether she investigated certain avenues, including whether she consulted with DNA experts and whether she investigated alternative theories. I specifically asked her whether she watched the videotapes of the interviews of Mr. Horowitz, Ms. Hill, and Ms. Powers. Ms. Leonida informed me that she watched "everything" and read "everything." She stated that she had Mr. Ed Stein, her defense investigator contact both Ms. Hill and Ms. Powers.

19. Ms. Zalkin and I spoke with Mr. Ed Stein on May 18, 2011. Mr. Stein informed us that he had not contacted the Hills or Ms. Powers. He said his associate may have contacted them, but he did not believe so.

20. In trial counsel's computer files, provided to present counsel by appellate counsel, there are no notes relating to the interview of Tamara Hill or Donna Powers, although there are notes documenting the contents of most of the other interviews (such as the Curiels and Jena Reddy).

21. On May 3, 2011, Mr. Rick Ortiz contacted the webmaster of a website related to Mr. Dyleski's case, stating that he had never been contacted by the police. This email was forwarded to me on May 3, 2011, by the webmaster. We immediately sought to make further contact with Mr. Ortiz. This resulted in us obtaining a great deal of information that we had

heretofore not been privy to, including the scope of the problems with the Horowitz /Vitale home construction. This resulted in further investigations into the evidence of third party culpability; the lack of investigation into third culpability by law enforcement and Ms. Leonida; and a variety of other issues.

22. The interview of Joe Lynch has not yet been transcribed.

23. I watched the interview of Mr. Lynch conducted at the Contra Costa Sheriff's Department on October 15, 2005, and the early morning hours of October 16, 2005. In that interview, Mr. Lynch states that he had not told Mr. Horowitz or Mr. Vitale that he was owed $180 for water, or that the water had been delivered until that day, October 15, 2005, when he called and left a message at approximately 11 am or 2 pm, on the Horowitz / Vitale answering machine. Mr. Lynch was adamant that there was no way Ms. Vitale could have told Mr. Horowitz that Mr. Lynch was owed such money before October 15, 2005. He further stated that he does not normally come up to the Horowitz /Vitale household to pick up such checks, but rather that Ms. Vitale or Mr. Horowitz normally bring such checks to him.

24. I, along with my co-counsel, Sara Zalkin have continued to conduct research and investigation into Mr. Dyleski's case, after the filing of the initial petition on May 23, 2011, in the Superior Court.

25. Because of the extremely short time-frame within which we

investigated, researched, and drafted our initial petition; following the filing of said petition, we necessarily spent a significant amount more time reviewing and organizing the voluminous record in this case; including the Horowitz /Vitale cell phone records, which required further investigation in order to accurately decipher.

26. We met with and interviewed Mr. Dyleski, who is housed in a facility several hours away from our offices, and obtained a declaration from him.

27. We met with the family and friends of Mr. Dyleski, and obtained declarations from them.

28. We caused several witness interviews that had been provided in analog form, to be digitized and transcribed (including the lengthy interview of Mr. Daniel Horowitz), and watched and reviewed said interviews.

27. We contacted numerous witnesses in an attempt to obtain statements from them.

28. We met with and retained the services of a private investigator. We gathered and furnished him with the necessary materials to gain a familiarity with the case. We had him contact a relevant witness, and conduct other investigations.

29. We met and consulted with a DNA expert, Dr. Edward Blake of the Forensic Analytical Sciences (FAS), and provided him with relevant

materials to review.

30. We drafted a Motion for Order Allowing Expert Access to Physical Evidence for DNA Testing, pursuant to Penal Code § 1405, requesting access to certain items of evidence, to wit: item 3-10 (the foot swab) and the bloody tissues found in the garbage at 1901 Hunsaker, and never tested. We are seeking access to these items so that Dr. Blake may test and re-test them.

31. Dr. Blake is currently reviewing said motion, and we intend to file that motion in the Superior Court of Contra Costa County, concurrently with the Petition herein.

32. We contacted Dr. Carole Lieberman, who had sent a letter to Ms. Leonida prior to Mr. Dyleski's trial. Dr. Lieberman, a psychiatrist, expressed concern that Mr. Horowitz was not acting in a manner "typical" of grieving husbands.

33. We have made preliminary contact with a blood spatter expert; a shoe print expert; and a crime scene analyst.

I declare under penalty of perjury that the foregoing is true and correct, except as to matters stated on information and belief (which I have been so informed and do so believe). Executed this 23rd day of December, 2011 at San Francisco, California.

_____

KATHERINE HALLINAN

DECLARATION OF SARA ZALKIN

I, Sara Zalkin, hereby state and declare:

1. Attorney Katherine Hallinan and I represent Scott Dyleski, petitioner herein.

2. Ms. Esther Fielding spoke with Ms. Hallinan in mid-February, 2011.

3. At that time, Ms. Fielding requested that Ms. Hallinan review the federal habeas materials prepared by Mr. Philip Brooks, Scott's appellate attorney.

4. Ms. Hallinan and I met with Ms. Fielding on February 28, 2011.

5. Esther said that Mr. Brooks told her that so long as a federal habeas petition was filed raising the issues brought on direct appeal by the May 24, 2011 deadline, Scott could use the "stay-and-abeyance" procedure approved in Rhines v. Weber (2005) 544 U.S. 269 to return to state court and exhaust any claims that may arise at a later date.

6. Ms. Hallinan and I explained to Esther that Mr. Brooks' advice was incorrect. We explained how state habeas and federal habeas procedure interact, and that because of the exhaustion doctrine, it was imperative that all potential post-conviction issues not yet raised on direct appeal be investigated and presented to the court prior to the May 24, 2011 deadline. The Rhines v.Weber "stay-and-abeyance" procedure only applies

to "mixed petitions," and only allows a petitioner to return to state court to exhaust claims raised in the federal petition.

7. Within the first hour of this meeting, we determined that there were a number of potentially meritorious post-conviction claims that should be raised in a habeas petition. Esther provided us with Mr. Turvey's report from May of 2010, which specifically identified a number of issues requiring investigation, including error in the DNA analysis, potential mishandling of evidence, and the other problems with the physical evidence. (*See* Petition, Exhibit F.)

8. As fate would have it, I was already familiar with Mr. Turvey's work, having assisted in matters in which he consulted on two prior occasions.

9. On February 28, 2011, Ms. Hallinan and I agreed that we would try to compile the record and files and conduct a preliminary review.

10. With our concern about the looming deadline, we did not agree to be retained at that time, until we had the files in our possession and then confirm whether or not it would be possible to file a habeas petition prior to May 24, 2011.

11. I contacted Mr. Brooks via email on March 1, 2011 regarding the size and location of the record and files. On March 2, 2011, Mr. Brooks informed me that he had provided the record to Scott in prison, and that

Scott sent it to Esther. However, he retained approximately ten boxes of material that he had received from the public defender which he agreed to make available.

12. Esther informed us that she did not have the record. As a result, there was some delay as we tried to ascertain what had become of the record (without success).

13. On March 24, 2011 Ms. Hallinan met with Mr. Brooks, who provided her with the public defender's file, and an incomplete record in electronic form (13 out of 15 volumes of the reporter's transcript and 3 out of 5 volumes of the clerk's transcript).

14. We then began to organize and review the material obtained from Mr. Brooks. In addition to tens of thousands of documents, there were also hours of recorded interviews (some audio only; some in digital form; and some analog).

15. Ms. Hallinan and I met with Esther again on March 29, 2011, and agreed to prepare a Petition for Writ of Habeas Corpus on Mr. Dyleski's behalf to present to the Superior Court of Contra Costa County (where Mr. Dyleski was tried and convicted).

16. Thus, we had less than two months to review the available material; identify potential issues; investigate; contact experts and then arrange for their review the evidence and present their expert opinion;

obtain declarations from other relevant persons; and file the petition prior to May 24, 2011 in order to not run afoul of timeliness within the meaning of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA").

17. I contacted Dr. Michael Laufer, an expert in emergency medicine/trauma surgery and injury reconstruction to elicit his opinion on the evidence. At that time I was only able to provide a copy of the autopsy report and he testimony of the forensic pathologist (Dr. Brian L. Peterson); Dr. Laufer requested photographs of the autopsy and crime scene.

18. By then we had completed a full inventory of the file, and determined that we did not have these photographs in our possession.

19. At some time in April, I determined that Mr. Brooks had sent his only set of photographs (in digital form) directly to Mr. Turvey (who resides in Sitka, Alaska).

20. Mr. Turvey duplicated these items (consisting of at least fifteen compact disks) and sent them by private carrier. We received these on or about May 1, 2011, duplicated the specific items requested by Dr. Laufer and provided him with five disks to review along with the autopsy report.

21. Ms. Hallinan contacted Ms. Leonida to ask about her trial strategy in general, and with regard to specific witnesses. (*See* Declaration of Katherine Hallinan.)

22. Ms. Leonida referred us to her investigator in this case, Mr. Ed

Stein, for specific details that were beyond her immediate recall. (*See* Declaration of Katherine Hallinan.)

23. Ms. Hallinan and I both contacted Mr. Stein on May 18, 2011, and learned from him that he had not contacted the Ms. Vitale's sister and brother-in-law (the Hills) or Ms. Powers. Although it was possible that his associate may have, he did not have that impression. Mr. Stein explained that he works at the direction of counsel, and if he had not contacted any witnesses he must not have been asked.

24. In trial counsel's computer files, provided to us by appellate counsel, there are no notes relating to the interview of Tamara Hill or Donna Powers, although there are summaries of interviews for other witnesses.

25. On or about May 3, 2011, Ms. Hallinan received information from Mr. Rick Ortiz (who had contacted a website related to Mr. Dyleski's case). (*See* Declaration of Katherine Hallinan.)

26. We immediately followed up with Mr. Ortiz, who was the general contractor for the home designed by Ms. Vitale, and became close with her and Mr. Horowitz - until money ran out and he became a target of his rage. Mr. Ortiz provided a wealth of information relevant to the claims set forth in Mr. Dyleski's petition (*See* Petition Exhibits K and K1.) .

27. With the extremely short time frame in which we had to file the

petition in the trial court (in order to preserve Mr. Dyleski's right to challenge his conviction in the federal system, if need be), we were only able to transcribe two recorded interviews: Ms. Hill (sister of the victim, Pamela Vitale, who had contacted police after the murder) and Ms. Powers (who had also contacted police to provide information suggesting that Mr. Horowitz may have been engaged in an extramarital affair in the months prior).

28. The process of converting the interviews provided in analog to digital for transcription is still ongoing.

29. After the trial court denied Mr. Dyleski's petition, I received the transcription of Mr. Horowitz at the police station, and reviewed it in conjunction with the recording (now on DVD) for accuracy. (*See* Petition Exhibit B; B1; and B2.)

30. Ms. Hallinan, co-counsel herein, reviewed the videocassette (VHS) of Mr. Lynch's interview at the station (the tenant/neighbor who Mr. Horowitz initially insisted was responsible). (*See* Declaration of Katherine Hallinan.)

31. Ms. Hallinan and I have continued to research and investigate the facts of this case.

32. As a conservative estimate, I have personally spent hundreds of hours immersing myself in Mr. Dyleski's file (in addition to my existing

caseload), including analysis of cell phone records contained in the public defender file, for the purpose of presenting supplemental evidence to this Court.

33. We met with and interviewed Mr. Dyleski, who is incarcerated in Salinas Valley State Prison, approximately 130 miles from our office, and obtained a declaration from him. (*See* Petition, Exhibit H.)

34. We have also contacted several other witnesses in the attempt to obtain further information from them.

35. Also since filing the petition in the trial court, we met with and retained the services of a private investigator, then gathered and furnished him with the necessary materials to gain a familiarity with the case. To date, our investigator has contacted one witness and has also obtained documents relevant to our investigation.

36. In June of 2011 we met with DNA expert, Dr. Edward Blake, who provided us with invaluable direction even prior to his review of the scientific data within our actual possession, and have discussed this case by telephone since.

37. Our consultation with Dr. Blake prompted us to draft a Motion for Order Allowing Expert Access to Physical Evidence for DNA Testing, pursuant to Penal Code § 1405, requesting access to evidence items such as: 3-10 (the foot swab) and bloody tissues and paper towels collected from the

trash at 1901 Hunsaker, but never tested. We are seeking access to these items so that Dr. Blake may test and re-test them.

38. As of the date of writing, Dr. Blake is reviewing said motion, which we intend to file in the trial court concurrently with the Petition herein.

39. We also contacted Dr. Carole Lieberman, who had sent a letter to Ms. Leonida prior to Mr. Dyleski's trial. Dr. Lieberman, a psychiatrist, expressed concern that Mr. Horowitz was not acting in a manner "typical" of grieving husbands.

40. Most recently, we have made preliminary contact with a blood spatter expert; a shoe print expert; and a second crime scene analyst.

41. Ms. Hallinan and I will continue to diligently pursue our investigation into the wrongful conviction of Mr. Dyleski.

I declare under penalty of perjury that the foregoing is true and correct, except as to matters stated on information and belief (which I have been so informed and do so believe). Executed this 23rd day of December, 2011 at San Francisco, California.

SARA ZALKIN

## CERTIFICATE OF COMPLIANCE

I hereby certify that this document was word processed, is mono-spaced, and that the Argument portions contains approximately 13,650 words.

KATHERINE HALLINAN

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 within:

PETITION FOR WRIT OF HABEAS, EXHIBITS, APPENDIX

to be served on the following parties in the following manner:

| | |
|---|---|
| Office of the Attorney General<br>455 Golden Gate Avenue #11000<br>San Francisco CA 94102 | personal service |
| Contra Costa County Superior Court<br>725 Court Street<br>Martinez CA 94553 | U.S. Mail |
| Mark A. Peterson<br>Deputy District Attorney<br>900 Ward Street<br>Martinez CA 94553 | U.S. Mail |
| Scott Dysleski F46590<br>Salinas Valley State Prison B5-139<br>PO Box 1020<br>Soledad CA 93960-1020 | U.S. Mail |
| Ellen Leonida<br>Office of the Federal Defender<br>555 12th Street #650<br>Oakland CA 94607 | U.S. Mail |

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on December 28, 2011, at San Francisco, California.

_____