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PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF THE SUPERIOR COURT, COUNTY OF CONTRA COSTA:

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 to Salinas Valley State Prison 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 in and for the County of Contra Costa, Case No. 5060254-0.

III.

The information filed March 1, 2006 accused petitioner of violating Penal Code section 187 (murder), with a charge enhancement pursuant to 12022(b)(1)(e) (use of a deadly weapon/bludgeon); and a special circumstances allegation pursuant to 190.2(a)(17) (felony murder/residential burglary); Count Two alleged a violation of Penal Code sections 459/460(a) (residential burglary). As to both counts it was further alleged pursuant to Welfare and Institutions Code section 707(b) that Petitioner was a minor at least 16 years of age at the time of commission.

#### IV.

The evidence presented by the prosecution in the subsequent proceeding against petitioner is summarized in the accompanying statement of facts, incorporated by reference as if fully set forth herein; and is also contained in the record on appeal in Case No. A115725, of which petitioner requests this Court take judicial notice.

#### V.

Petitioner was deprived of his Fifth Amendment right to due process of law and his Sixth Amendment right to the effective assistance of counsel by trial counsel's failures to: investigate the facts of the case and present available meritorious defenses (such as alibi and third-party culpability); establish material inconsistencies in the prosecution's case and present evidence implicating the actual perpetrator ; challenge the information pursuant to Penal Code section 995; effectively cross-examine material prosecution witnesses; and failed to request special jury instructions to pinpoint the defense theory of the case.

#### VI.

Petitioner's Fifth Amendment right to due process of law and his Sixth Amendment right to the effective assistance of counsel were violated by appellate counsel's failure to sufficiently review the record and files on direct appeal present meritorious defenses available to petitioner, including but not limited to overlooking trial counsel's ineffectiveness for the reasons stated above and in the accompanying statement of facts; for not addressing errors in the jury instructions; for beginning his petition for review in the

California Supreme Court with an argument that essentially assumed petitioner's guilt (relating to the constitutionality of a life sentence without the possibility of parole for a person who was a minor at the time of commission) when in fact actual innocence is apparent, and for discouraging petition from timely pursuing the assistance of counsel to establish claims outside the record (as presented herein).

VII.

On the basis of this evidence summarized in the accompanying statement of facts, on August 26, 2006 petitioner was convicted following jury trial of the charges and allegations against him.

VIII.

On September 26, 2006, the trial court sentenced petitioner to life without the possibility of parole in the custody of the California Department of Corrections and Rehabilitation. A Notice of Appeal was timely filed.

IX.

At all proceedings prior to trial, at trial, and at sentencing petitioner was represented by Ms. Ellen Leonida of the Contra Costa County Public Defender. On direct appeal, petitioner was represented by Mr. Phillip Brooks on appointment from the First District Appellate Project.

X.

Petitioner's conviction was affirmed and became final on or about May 24, 2010, when the United States Supreme Court denied certiorari.

XI.

The judgment rendered against petitioner is invalid, and his

consequent imprisonment is unlawful, because he was denied effective assistance of counsel at trial, in violation of the rights guaranteed to him by the Fourteenth, Fifth, and Sixth Amendment to the United States Constitution and by Article I, Section 15 of the California Constitution.

XII.

The contentions in support of this petition are fully set forth in the accompanying Argument and Points and Authorities and Exhibits in Support of Petition for Writ of Habeas Corpus, which are all incorporated by reference herein.

XIII.

The grounds set forth in section V, *supra*, have not been previously presented by this petitioner to this or any other court, state or federal, in any petition, motion, or application, apart from reference to arguments made in petitioner's direct appeal in case number A115725.

XIV.

Petitioner believes the record on his direct appeal is insufficient to entitle him to a reversal of his conviction, and has no other plain, speedy, or adequate remedy at law.

XV.

This petition is being presented in the first instance to this court, under its original habeas corpus jurisdiction.

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.

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

Executed on May 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 the attorney 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.

Executed this 23<sup>rd</sup> day of May, 2011 at San Francisco, California.

\_\_\_\_\_  
SARA ZALKIN  
Attorney for Petitioner  
SCOTT EDGAR DYLESKI

**MEMORANDUM OF POINTS AND AUTHORITIES**

**STATEMENT OF THE CASE**

On March 1, 2006, the District Attorney of Contra Costa County filed Information No. 5060254-0, accusing Scott Edgar Dyleski (petitioner) of the murder of Pamela Vitale and burglary on October 15, 2005. It was alleged that the murder was committed by use of a bludgeon, and during the commission of the burglary, within the meaning of California Penal Code section 190.2(a)(17).) Further, it was alleged that petitioner was at least sixteen years old at the time of the commission of the offenses pursuant to Welfare and Institutions Code, section 707 (b). (3 CT 683-684)

On March 2, 2006, represented by the public defender, petitioner was arraigned on the charges and pleaded not guilty. (3 CT 685)

On June 30, 2006, the defense moved for a change of venue for trial, based on the pervasive and detailed media coverage of the case in Contra Costa County. (3 CT 908-971) The motion was denied.

The jury was sworn on July 25, 2006. Presentation of evidence concluded on August 17, 2006 (14 RT 3931), and on August 23, 2006, at 11:00 a.m., the jury retired to deliberate. (5 CT 1481)

On August 28, 2006, the jury found petitioner guilty of first-degree murder and residential burglary, and found true the deadly weapon and the special circumstance allegations. (5 CT 1701-1704; 15 RT 4224-4226)

On September 26, 2006, the court sentenced petitioner to life in prison without the possibility of parole. (5 CT 1729-1734; 15 RT 4300-4307.) He timely appealed from the judgment. (5 CT 1768-1769.)

## STATEMENT OF FACTS

*“The grass is greener somewhere else. Our thoughts persuade, and we comply. And when we get to somewhere else, we find the grass is often dry.”<sup>1</sup>*

Pamela Vitale met her husband, Daniel Horowitz, through her sister, Tammy Hill. They married on November 6, 1994, and she moved in with him thereafter. (8 RT 2070-2071; 2076) He owned acres of land in Lafayette, California, and enjoyed the rustic beauty of Hunsaker Canyon.

At first he lived in a “two-room place with a kitchen and sink,” then later a “double wide” manufactured home. He was happy, but wanted his bride to be happy, and she had always wanted a “real home.” Years later (sometime around 2002) she captured her dream home on paper, and retained an architect. (8 RT 2077-2078)

Although the construction was supposed to take about only nine or ten months, it had been ongoing for more than three years. In retrospect, Mr. Horowitz “should have known better, but it kept dragging out.” (8 RT 2084) They were “cramped for space” in the double-wide; “ready to move out. (8 RT 2096)

On the morning of October 15, 2005, Mr. Horowitz said he woke up early, around 6:00 a.m. (8 RT 2103) He had coffee and placed the coffee cup in the sink. (8 RT 2120) He left the home before 8:00 a.m. Pamela was still sleeping. (8 RT 2106-2107)

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<sup>1</sup> Quote of the Day, Pre-Preprinted, October 15, 2005, Franklin Covey Planner belonging to Pamela Vitale.

*Petitioner's counsel did not ask Mr. Horowitz why he steadfastly and repeatedly maintained that he left home that morning at 7:30 a.m.<sup>2</sup>*

Mr. Horowitz testified that, after a breakfast meeting in Lafayette, he went to his office for another meeting. When he left his office he ran errands and went to the gym before driving home. Pamela had plans that night to attend the Kirov Ballet with a friend of theirs.<sup>3</sup> (8 RT 2109-2112)

*Nor did anyone ask Mr. Horowitz why Deputy Ritter's examination of a Toshiba laptop revealed that it had been shut down on Friday, October 14 at 9:44 p.m.; "powered on" on Saturday, October 15 at 6:10 a.m. and; used several times until it was shut down at 7:50 a.m.; then restarted again at 9:19 a.m. with activity throughout the day until it was powered off at 3:50 p.m; back up at 4:23 p.m., then powered off for last time that day at 4:29.<sup>4</sup>*

*The other Toshiba laptop ("the Vitale computer") was shut down on October 15<sup>th</sup> at 12:27 a.m., and powered back on at 7:49 a.m. Deputy Ritter could not determine the accuracy of this computer's internal clock, because the clock was password protected. At 7:49 a.m. this computer went into Quicken, then to CNN.com at 8:07 a.m.<sup>5</sup> There were two user names. The*

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<sup>2</sup> Evidenced by the several hours of video recorded at the police station.

<sup>3</sup> *The identify of this mutual friend was never ascertained.*

<sup>4</sup> 8 RT 2235-2240.

<sup>5</sup> "Quicken is a financial banking checking program, tax program, commercially available." (8 RT 2243)

*first was Daniel Horowitz; the second was Pamela Vitale.<sup>6</sup> The last entry Deputy Ritter found was a Google search on the name “Darge” at 10:12 a.m. Defense counsel had no questions for this witness.<sup>7</sup>*

Mr. Horowitz was disturbed when he arrived home and saw Pamela’s car, because he thought she would have already been gone. There were “smears” on the front door. When he opened the door he felt like he was “looking at a photograph of a crime scene” but it was real. He started screaming and fell to the floor. Even though he could tell she was dead, he touched her neck just to make sure.<sup>8</sup> (8 RT 2113-2114)

He called 911 using the home phone, talked to them “for a second,” left the phone on the sofa and returned to his wife’s body. He “knelt down one more time and touched her one more time on the neck ... just to make sure,” and then went outside “at the threshold of the door.” Mr. Horowitz cried and screamed and “just talked to her.” Then he got on his cell phone.<sup>9</sup>

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<sup>6</sup> 8 RT 2241-2243.

<sup>7</sup> 8 RT 2245; 2248.

<sup>8</sup> *There was little if any visible blood on Mr. Horowitz’ clothing, except for a tiny amount - that did not seem to be noticed by anyone but him - on the right knee of his slacks. Although the scene photos and autopsy photos depict the carpet soaked in blood, her hair soaked in blood from the head trauma; and on her face and neck, Mr. Horowitz also managed to avoid getting blood on his hand either time he touched her neck. 7 RT 1953. He certainly did not go into the kitchen or hallway bathroom when he came home to the crime scene. 8 RT 2117-2118.*

<sup>9</sup> *Mr. Horowitz’ cell phone records indicate frequent activity to and from numerous different phone numbers, including “411” (directory assistance); attorney friends and colleagues (e.g. Ivan Golde); Barbara and Charles Lehman; inter alia. However, he did not call his wife’s sister, Tammy Hill; as the accompanying transcript of her interview reflects (Exhibit A, Transcript of Interview of Tamara Hill, at 37,39 (hereinafter*

(8 RT 2115)

*Defense counsel's cross-examination of Mr. Horowitz comprised two pages of transcript.*<sup>10</sup>

Sergeant Hoffman of the Contra Costa County Sheriff's Department was the first officer on scene. He testified at the preliminary hearing but not at trial. He got the call shortly before 6:00 p.m. and arrived at 1901 Hunsaker about seven minutes later. The gate at the bottom of the driveway was closed. Since he didn't have the gate code he manually opened the right side. (PX 31-33)

Sergeant Hoffman and Officer Henriquez proceeded up the driveway. They saw Mr. Horowitz pacing between two cars parked in front of the double-wide, talking on his cell phone. He advised that his wife had been murdered inside the house. Anxious to secure the scene, they had him sit in the rear of Officer Henriquez' patrol vehicle. (PX 34-35)

As he got settled, he said he was an attorney and had been with "a bunch of retired police officers that day." He was "very animated" and "wanted to make sure that I was aware that the grocery bags were his, that he had brought those home."<sup>11</sup> (PX 36-38)

The front door of the manufactured home was wide open. In

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*"Hill Interview"), he had his sister call on his behalf. Inspector Venable went to the station specifically to examine the cell phone(s) around midnight on October 16th. (8 RT 2249)*

<sup>10</sup> 8 RT 2121-2122.

<sup>11</sup> There were two grocery bags near the front door, one outside and one inside. (PX 40)

addition to the grocery bags and spilled water near a dog bowl, there was a black leather case that looked like it could be for a laptop computer. Just inside the entryway, a woman was on the ground with her head closest to the door, on her right side in a fetal-type position, with visible head trauma and copious blood loss. Without doubt she was deceased “due to the coloration of her skin.” She had on a black skirt but it was bunched all the way up at her waistline. A lot of the blood was dried, especially around her head and in her hair. (PX 39-42)

The residence was very cluttered. In addition to the large puddles of blood, there were droplets “all over the front room, on pieces of furniture and on the wall and on the doors.” A large big-screen TV was pushed against the wall blocking a doorway, which the Sergeant slid a couple of feet in order to clear the rear room by checking for “further victims or suspects.” (PX 43)

Sergeant Hoffman tried to elicit personal identifying information about Ms. Vitale from Mr. Horowitz, but he started telling them who he thought was responsible. Joseph Lynch - with whom they had a “history of problems” - was due to bring by a check that day. (PX 46; PX 50)

#### Medical Evidence

Dr. Brian L. Peterson of the Forensic Medical Group performed the autopsy on October 17, 2005.<sup>12</sup> Ms. Vitale was 69 inches tall and weighed

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<sup>12</sup> A recent episode of “Frontline” centered on problematic cases involving some pathologist members of the Forensic Medical Group. See <http://inthepublicinterest.org/article/forensic-medical-group-scrutinized> (last accessed May 22, 2011).

178 pounds. The cause of her death was blunt force head injury. (14 RT 3825) The pathologist opined that death would have ensued within a matter of minutes after initiation of the attack. (14 RT 3791)

However, defense counsel clarified that “minutes” was “opposed to hours or days.” The doctor was “trying to be purposely vague.” Defense counsel asked if that could be “between 1 and 607 minutes” and he replied that was “probably more specific than even I would like to get. I would just say minutes.” (14 RT 3827-3828) *There was no medical investigation regarding time of death.*<sup>13</sup>

In addition to the head injuries, there were many lacerations and abrasions on Vitale’s body. (14 RT 3776) She had contusions on the bottom of her foot and on the bottom of her big toe, which were probably defensive wounds.<sup>14</sup> (14 RT 3796) She also suffered a stab wound to her abdomen. (14 RT 3776) At the time this wound was delivered, circulation had stopped or was just about to stop. (14 RT 3790) On her back was “a series of three intersection superficial incisions” that “represented a shape.” Dr. Peterson described it as an “H-shaped incision with an extension. (14 RT 3794-3795)

DNA Evidence: Y-STR

Before trial, Petitioner requested an evidentiary regarding the

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<sup>13</sup> See Exhibit B, Declaration of Michael D. Laufer, M.D. (hereinafter “Laufer Declaration”).

<sup>14</sup> Peterson said the foot injuries were “odd...” [add]

admissibility of Y-STR DNA analysis.<sup>15</sup> Specifically, Petitioner sought to (1) whether Y-STR DNA testing is generally accepted within the scientific community; (2) whether proper storage, collection and testing procedures were followed;<sup>16</sup> and (3) whether statistical formulations used to report the results of the Y-STR tests are generally accepted within the relevant scientific community, and if so, whether they can be reliably applied here.

Although courts have held that STR (Short Tandem Repeat) testing has gained general acceptance...**Y-STR typing has not been considered by any California Court of Appeal.** Y-STR is distinct from STR in that it tests only the Y chromosome. Y-STR typing claims to be able to detect a male profile in samples where only a single female profile may have been evident using standard autosomal (non-sex chromosome) STR typing *and* to be able to eliminate any information contributed by female sources.

(3 CT 747) [Emphasis added.]

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In the instant case, no statistical analysis accompanies the results of the Y-STR testing conducted by the Serological Research Institute (SERI). **Gary Harmor, a SERI Forensic Serologist, admits that Y-STR is a better test for exclusion than inclusion - i.e. it can reliably determine that a given DNA sample does *not* come from a particular person, but it cannot reliably determine that a given DNA sample *does* come from a particular person.** Therefore, the only ‘data’ that he can offer regarding the Y-STR profile which he developed from the crime scene evidence is that it was not found in a database of 3,561 profiles.<sup>17</sup>

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<sup>15</sup> 3 CT 740-754.

<sup>16</sup> See Exhibit C1, Supplemental Report of Brent Turvey, M.S. (hereinafter “Turvey Supplemental Report”) regarding evidence of blood transfer visible on photographs of the crime scene technicians’ measurement instruments.

<sup>17</sup> Citing Reporter’s Transcript of Preliminary Hearing, RT 585:8-13; RT 582:23-583:6.

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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) [Emphasis added.]

Contra Costa's Laboratory began doing Y-STR analysis in the fall of 2002, and started using "Y-Filer" in August of 2005. (1 RT 163-164)

Mr. Jewett argued that "Y-STR is nothing more than a test kit (Y-Filer) utilized to examine certain alleles at given loci on the Y (male) chromosome." Furthermore, "the People have no intention...to offer an expert opinion regarding the statistical significance of his Y-STR analysis;

The People do intend 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...that Defendant's Y-STR profile does not match any of the Y-STR profiles in the data bank used by Dr. Harmor<sup>18</sup> (approximately 3,600); and that the Y-STR results reflect a single source for this minor component of the evidence sample.

(3 CT 887-888) [Emphasis added.]

Petitioner replied that evidence of a DNA "match" is irrelevant absent reliable scientific evidence of the statistical significance.

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<sup>18</sup> On paper the prosecutor referred to this witness as "Dr. Harmor" but did not establish any evidence of a medical or doctoral credential during these proceedings, and in fact addressed the witness at "Mr. Harmor," for instance, at the preliminary hearing (RT 578).

The California Supreme Court has framed the ‘question’ posed by DNA analysis as follows: ‘Given that the suspect’s known sample has satisfied the “match criteria,” what is the probability that a person chosen at random from the relevant population would likewise have a DNA profile matching that of the evidentiary sample?’ People v. Venegas (1998) 18 Cal.4th 47, 63-64. [A]nswering that question is more than ‘simple counting of the numbers of the profiles in the data bank,’ which the prosecution advocates in this case. (Prosecution opposition at p. 9.) In order to draw *any* inference from the absence of a particular DNA profile in a database, the court must be satisfied that the database complies with a myriad of complex, technical requirements and that the inference regarding the rarity of the profile in the general population is supported by reliable, scientifically valid statistical calculations. (See *id.* at 66-68.)<sup>19</sup>

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Here, the district attorney [seeks] to introduce evidence of the absence of a particular Y-STR profile in a databank. He is *not* introducing any evidence of the statistical significance of that fact....

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The prosecution’s efforts to compare DNA evidence to tattoos and eyeglass prescriptions are similarly misguided. Courts have long held that “DNA evidence is different.” (People v. Brown (2001) 91 Cal.App.4th 623,646.) [A]dmission of DNA evidence depends more heavily on proof of compliance with Kelly because “[u]nlike fingerprint, shoe track, bite mark, or ballistic comparisons...questions concerning whether a laboratory has adopted correct, scientifically accepted procedures for [DNA testing] or determining a [profile] match depend almost entirely on the technical interpretations of experts.” [Citation.] The significance of a DNA match has also always been subject to Kelly scrutiny. (Brown, *supra*, 91 Cal.App.4th at 649.)

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<sup>19</sup> “In order to draw scientifically valid conclusions regarding the rarity of a profile, for example, the database must be in Harvey-Weinberg [sic] and linkage equilibrium; there must be proof that the profiles in the database are not skewed by geography; the samples should be random (as opposed to convenience samples); and sufficient steps must be taken to insure [sic] that the racial groupings are accurate.” (3 CT 896, fn. 1)

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The evidence the district attorney seeks to offer here is 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)

On June 26, 2006 the court said it would be necessary to hear expert testimony as to whether or not Y-STR is "just another kit."

I have to agree with Ms. Leonida that this isn't like the examples you used in your papers, sir. Because of the state of DNA evidence now...in all of these crimes programs, that it is almost that the layperson has a basic understanding of what DNA is, to the extent that you have a number and it matches up with something else.

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, deputy director of Reliagene Technology, located in New Orleans, the first company to patent Y-STR technology. She received her Ph.D. in microbiology from Louisiana State University. Reliagene began Y-STR testing in 2003. The cost per sample is \$1,095.00; they test 20-30 samples per month. (1 RT 68-69; 1 RT 72; 1 RT 104)

Different kits are available to test for short tandem repeats (STRs) on a DNA molecule. The most common are Profiler Plus; CoFiler; Identifiler; and Y-Filer. Reliagene uses Y-Filer, which was developed about two years

ago by Applied Biosystems, and tests the Y chromosome at 17 different loci. (1 RT 78-79; 1 RT 97)

The first step in DNA analysis (whether STR or Y-STR) is to extract the DNA from the cells on the evidence (usually received on a swab). DNA looks like a “spiral staircase.” A thermocycler is used to separate the two strands. The PCR process uses a primer: a “small piece of DNA which matches to both different strands” and is “specific to this particular location on this chromosome. And each of these primers has a small fluorescent dot attached to it.” The thermocycler “opens up” a strand which is then duplicated to make two strands, both of which have fluorescent markers.

When the PCR cycle is completed, there will be “about 10 to 28 different copies of this particular location.” This “amplification” produces “billions and billions of pieces [of] DNA that all have a fluorescent tag.” (1 RT 76-78)

Capillary electrophoresis is the process by which the pieces of amplified DNA pass through filament in front of a camera which can “recognize this particular dye that’s on the primer that allows us to identify these billions of pieces of DNA.” When the amplified fragments pass through, “the light on the camera excites the fluorescent dye and allows us to determine the size of that particular piece of DNA.” (1 RT 78)

The migration of the amplified fragments depends on their size. The Profiler kit has four different dyes. The red dye is the standard. It provides:

[A] timeline that allows us to determine how fast each piece of DNA is moving through. So you know if you’re seeing a blue dye here, it’s migrating at a different speed than the standard, so you can determine the size of that DNA....

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The purpose of having different dyes is because you're looking at several different regions. For example, a blue colored dye is specific to chromosome location D3, which chromosome three. A green dye is specific to chromosome eight, which is known as D8.

Both of these particular regions that are amplified produces a product of approximately the same size. To make sure we don't confuse the result of D3 with the results of D8, one is labeled blue and one is green.

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[N]ext the computer aligns these size fragments, these florescent fragments, with both an internal weight standard as well as the ladder of known alleles, which are different possibilities that each person can have at each different location. So D3 will have numerous known alleles.

[W]e look at the migration of this DNA compared to the ladder, and the computer allows us to label that with a particular size.

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[O]n a standard DNA report ... D3 will be reported at like 8-10. So one chromosome carries a size 8 marker and the other chromosome carries a 10. You get one from mom and one from dad, and you have one of each.

(1 RT 80-82)

- Q. Okay. There is a very important difference between the way in which the statistical analysis of a profile is treated when you're looking at STRs versus Y-STRs; is that true?
- A. That's correct.
- Q. [W]ith respect to STRs, what ... is done in an effort to get some kind of a statistically meaningful number as to whether or not a person selected at random from the community would share that same profile?
- A. The way that we provide statistics for autosomal STRs or STRs as you're referring to them is you take the results from each particular locus that we're looking at and an individual

locus. It's an unlinked site as compared to all the rest that we're looking at.

Because of this, we use something called the product rule, which allows us to multiply each particular location and the frequency of that allele to all the other frequencies that we've tested, which allows us to get the numbers that you see, one in 350 billion, very large numbers like that. Because the loci are unlinked - they're independent of all the others - we can use the product rule.

Q. And is there some significance to this question of linkage that has to be present before you can utilize the product rule for purposes of coming up with this statistical probability?

A. Yes. There has to be an analysis. It's called a linkage equilibrium analysis on different markers that was done initially before the statistics were reported before the autosomal loci.

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Q. And is that independence that enables you to reliably use the product rule to establish a statistical probability that a random person would contain the same profile?

A. That's correct.

Q. Now, to what extent and why does a statistical analysis of Y-STR differ from that?

A. Y-STRs are very different because on the Y chromosome, which are what Y-STRs are looking at. The chromosome is inherited father to son intact. There's no re-assortment. There's no changing of that chromosome. Therefore, every marker that we look at on that chromosome is linked, so we cannot use the product rule.

Q. So what do you do?

A. We use what's called the counting method....we take several random samples. We profile the men that are in those samples, and we count the number of times that that frequency of profile has been seen in that sample.

(1 RT 89-92)

Reliagene's database comes from paternity samples submitted for

testing from all over the country, and includes 1600 “Caucasian” profiles; 1200 “African-American” profiles; 430 “Hispanic” profiles; and 100 “Native American” profiles. (1 RT 92-93)

Q. [Y]our computation ... included two things, as I understand it: The number of people who were in your database for that particular race - in this particular case, it’s Caucasian - also the number of alleles that were being compared to that database. Is that true?

A. Actually, it’s the number of people in the database and the number of times this profile is seen within the database.

Dr. Shaffer asserted that “when we have not observed this profile, the exclusion probabilities will always be over 99 percent.” (1 RT 102)

The hypothetical exclusion probability Dr. Shaffer came up with (using the African-American database although Petitioner is Caucasian) was 99.78%. Using statistical extrapolation, .22 percent of all people would not be excluded from having that profile; stated otherwise, about 1 in 500 people. Assuming that Contra Costa County’s population is one million, “if you assume 1 in 100 then you would have 20,000 people, if my math’s right, included. A fairly large number.” (1 RT 124-125)

Dr. Shaffer was aware of research findings of “anomal polymorphism on the X chromosome that’s homologous to the DYS456 locus” - in other words, “cross-reactivity with the primers from the DYS385 locus to a specific mutation found on some X chromosomes. Consequently, that section of the X chromosome could show up in the Y-Filer. (1 RT 110-111)

Gary Harmor testified next. Counsel stipulated that (1) for the purpose of this motion only, the Court may consider his testimony from the preliminary hearing; and (2) he is sufficiently qualified as an expert in

forensic DNA, forensic biology and forensic serology. (1 RT 143)

Before a sample may be profiled, in the process of Y-STR analysis another “kit” is used, “Quantifiler.” There is a human Quantifiler kit and a male Quantifiler kit. Quantifiler helps the estimate the amount of human DNA in the sample, and how much male DNA, if the analyst chooses to do so. (1 RT 144)

Applied Biosystems produces the two different kits. The kit for testing human DNA amplifies a marker. The more marker produced, the stronger the “color signal” from the sample.

It’s a similar principle with a Y male quantification. A marker was chosen on a Y chromosome that is copied over and over again, and how much signal you get...tells you the quantification.

The signal is put into the system, and as the analyst does the work, they produce a positive control ladder consisting of eight different dilutions of DNA. And that’s run twice. So two columns ... are taken up by the...male human DNA in this case from the kit itself.

The concentration in the DNA sample varies from kit to kit. This process renders a comparison between the kit sample and the forensic sample, expressed as nanograms per microliter.<sup>20</sup> (1 RT 145-146)

Quantifying the amount of DNA in a sample is important to avoid overloading the typing system with too much DNA, which can cause over-amplification of some markers, “which then the signal goes off scale and you don’t get an accurate peak height,” and increased “stutter.” Another reason for quantification is to be sure that “you don’t use more DNA than

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<sup>20</sup> A microliter is 1/1000 of a milliliter. A nanogram is 1/1000 of a gram. A paper clip weighs about half a gram. (1 RT 146)

you have to because you want to conserve the sample.” (1 RT 146-147)

The “typing cocktail” is set up to accept 10 microliters of liquid as a volume - only a “half a drop or less of actual physical liquid. In that liquid, I want to keep the maximum DNA...at or below two nanograms, as close as I can get to that.” (1 RT 148)

In this case, Mr. Harmor received an evidence swab marked 3-10, reportedly collected from Ms. Vitale’s foot, that Mr. Stockwell had already prepared and quantified. (1 RT 150) The first estimate Mr. Stockwell obtained was .08 nanograms, but he disregarded that result due to “apparent DNA in some of his negative controls.” When a negative control turns out to be positive, “it shows us there’s something wrong the test, and it has to be investigated.” (1 RT 155)

Mr. Stockwell took out a different kit and requantified the same DNA; this time the estimate was .15 nanograms of male DNA. (1 RT 151)

Mr. Harmor did his own human and Y-quantification, with an estimated result of .022 nanograms - roughly six to seven times less than .15. However, since the maximum amount of DNA to input would be two nanograms, ten times .15 nanograms is 1.5 or 1.6 nanograms - still less than two nanograms. This “apparent discrepancy” did not have any impact in the subsequent procedures followed to obtain a Y-STR profile within that sample. (1 RT 152)

David Stockwell testified on July 13, 2006. The parties stipulated that for the purpose of this motion only that the Court may consider the witness’ testimony from the preliminary hearing. (2 RT 330-331)

Mr. Stockwell analyzed a number of items of evidence in this case utilizing the STR method of PCR analysis, and prepared a sample for Mr. Harmor's analysis of Y-STRs. (2 RT 341-342)

Mr. Stockwell said that Mr. Harmor gave him a copy of his report on the Y-STR analysis, wherein "the profile as he had observed was not present in that database that he chose" (provided by Applied Biosystems). (2 RT 342) Mr. Stockwell verified Mr. Harmor's conclusion that the profile was not present in the Applied Biosystems database, which is comprised of 3,561 individuals. Mr. Stockwell calculated a "confidence interval based on the number in the database." (2 RT 343)

The purpose in sending the sample for Y-STR testing was to determine whether the male portion of the sample came from a single individual. (2 RT 346) Mr. Stockwell has not himself researched the frequency of Y haplotypes in different racial or ethnic populations, but said he was familiar with the research. (2 RT 346-347)

Dr. Jason Eshleman testified on July 20, 2006 as a defense expert in "population genetics, Y-STR DNA analysis, and mitochondrial DNA analysis and interpretation." (3 RT 822; 841)

He earned his doctorate in molecular anthropology in 2002 at the University of California, Davis and serves as the senior research director at Trace Genetics, in Richmond, California. The company analyzes "human genetics in the context of worldwide populations for assisting individuals in tracing their lineage ancestry" and creates "databases of...genetic variances between populations throughout the world to formulate our conclusions." (3

RT 816-818)

Dr. Eshleman was engaged in post-doctoral research for the University comparing conclusions drawn from mitochondrial DNA variation with conclusions based upon Y-STR analysis. Familiarity with the “rich literature in Y chromosome databasing” is critical, because “in a vacuum no one sample means all that much.” (3 RT 822) One must:

[S]cour the literature to see where samples have already been obtained and to see what the distribution that’s been published is to see where you have samples that you can compare them to.

The second part...is to extract that DNA [from the samples], amplify that DNA through the preliminary chain reaction or PCR, and then to analyze and quantify the number of repeats in the STR’s so that you can come up with what we call a Y-STR haplotype...the specific number of alleles at different points along the Y chromosome.

(3 RT 836)

Dr. Eshelman uses a database called YHRD, from a web site called YHRD.org. He has reviewed Reliagene’s databases, as well as those maintained by Promega Corporation and others sampled by academic researchers. He has read 100-200 published papers on Y-STRs that he has assembled into his own file of STR types to get as many samples as possible for comparison. (3 RT 837)

The import of database analysis is to see “whether or not there is structure within and between populations.” (3 RT 842) In the past year, at least three publications found structure among Y chromosome types. (3 RT 848) He explained “structure” as:

[W]hether or not there are ... specific similarities between genetic types with respect to some other factor, whether or not

that factor may be geography where you find, for example that...certain genetic types are found in one location, but aren't found in another location, that would be an example of structure with respect to geography.

Q. ... [W]hat is the significance of structure in terms of interpretation of Y-STR analysis?

A. The significance is that if you find structure between populations, you can't combine those populations to make a larger statistical sample.

[Y]ou have to analyze the particular components of the structure separately. Otherwise, you are confounding your results by making a mishmash of several different things that aren't equivalent.

Q. So if you are trying to figure out the frequency of the occurrence of a Y-STR profile ... how would structure impact that analysis?

A. It would impact it; because if you have a group, you may have a group where it's very, very very common, you know, several, where a larger number of the people have it and then a group where it's very, very, very rare or absent.

If you were making an inference as to how it got into any group and you looked at ... where it was in the less common group, the inference ... is that it's very rare and...either hasn't been there that long in that group or it's dying off in that group versus the inferences that you would make about it in a more common group are radically different....

If you begin to combine the two groups, though, you get a nonsense answer that doesn't tell you anything about the history of those genes in either population or any of the factors that brought it to either of those populations because they are different populations and they have their own unique histories in that case, and the conclusions of the histories of one are very different than the conclusions of histories in the other.

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The problems [with Reliagene and Applied Biosystems' Y-STR database] are that the categorical delineation of different types in those have either not been subject to analysis to see if there is structure inside of them, there has been structure, and

some of the categories are actually amalgams of more than one biological population.

Q. When you talk about the categories, what specifically are you referring to?

A. Specifically something like Hispanic. The term 'Hispanic' is given to the individuals who are self-declared as Hispanic; but that includes individuals who can trace their ancestry to Puerto Rico, to Cuba, to the Caribbean.

And to individuals who can trace their lineage to Mexico, to Meso-America, we have found in analyzing the STRs...a rather sizable difference in the STR types...among individuals who are Puerto Rican-Hispanic versus...Mexican Hispanic versus West Coast Hispanic and not East Coast Hispanic.... individuals from Caucasian samples from New York that appear to be statistically different from other Caucasian samples collected around the United States.

These are the cases where we have seen structure, where it's still all been put together in the same database. But that database then, because of the structure, can't be used to make inferences about genes on a local level.

Q. ... [C]an that database then reliably be used to make inferences about the frequency of occurrence of a particular Y-STR profile?

A. No

(3 RT 842-845)

The problem with reporting Y-STR results by reference to the "counting method" is that it is only as reliable as the data pool. (3 RT 845)

A figure that combines all of the people in a database - regardless of ethnicity - is "meaningless."

It's like looking for ripe tomatoes at a supermarket and finding there aren't many and then going to a hardware store and finding there aren't ripe tomatoes there too.

You are looking in the wrong places for it. You can't say that it's rare, because it's not also in the hardware store. You are looking in the wrong places, you are assembling a database

that's not going to be a random sample in that case.

And the conclusions that you draw about frequency in something that's not a random sample are not going to accurately reflect it's true for frequency in any of the components.

(3 RT 848)

According to Dr. Eshleman there is a lack of consensus in the scientific community of population geneticists regarding the reliability of determining frequencies of Y-STR profiles. (3 RT 876)

David Stockwell said that the sample from the swab of Ms. Vitale's right foot contained a mixture in which she was the primary donor. A minor component was male in origin. (13 RT 3631)

Mr. Stockwell developed a partial profile of the donor of the minor component. Because it was not a complete profile, he could only say that it would be present in one out of every 81,000 African-Americans, one in every 43,000 Caucasians, and one in every 23,000 Hispanics. At the limited number of loci used for this calculation, Scott could not be excluded. (13 RT 3634) Mr. Stockwell submitted the sample to SERI for "Y-STR" analysis. (13 RT 3635)

On cross-examination, Stockwell admitted that initially, there was a problem getting data strong enough to clear the lab's threshold for identifying alleles for this foot swab sample. Therefore, he did some additional processing of the amplified DNA in order to raise those alleles to a measurable level. (14 RT 3701) The problem was that the proportion of male DNA to total DNA in the sample was very small. (14 RT 3717)

The alleles identified are 13, 14, 15, 16, and 17. 14 and 17 are from

the major contributor, Vitale. 13, 15, and 16 are smaller peaks, of which the tallest was 16. (14 RT 3705) When Stockwell initially looked at this analysis, he did not identify the 16 as a peak; he labeled it as “stutter” -- irrelevant data -- and removed the peak. He also removed 13 as apparent “stutter.” So, what he actually identified at that location was 14, 17, and a weak 15. Thus, he would not exclude someone who was a 13/15; but he would exclude someone who was a 13/16. He would not exclude a 15/16. At that location, Scott is a 15/15. The actual minor contributor could be a 15/16, which would exclude Scott. (14 RT 3706-3707)

When the value in a particular profile chart is greater than 8100 RFU, it is “saturated” - beyond the machine’s capability to assess its intensity. Saturation can create false peaks, and other “artifacts.” (14 RT 3709) At the preliminary hearing Mr. Stockwell testified that there was no saturation in his analysis of the foot swab sample, consistent with his report. However, he conceded at trial that there were two peaks that appeared to be saturated. (14 RT 3710; 14 RT 3733)

Mr. Stockwell recalled that the first “injection” into the machine was below the threshold diagnostic level; in other words, it was an insufficient sample. Mr. Stockwell performed additional manipulations on the sample and subjected it to further injections on the instrument, which increased the intensity. However, in so doing he obtained a result where two of the peaks went to saturation, in order to raise the minor component enough for the machine to assess. (14 RT 3735)

Mr. Stockwell acknowledged past contamination issues with the

laboratory, and in this case, his first test of the foot swab sample was contaminated by the presence of human male DNA in the reagent blank. Rather than attempting to clarify where this contaminant DNA had come from, Stockwell just removed the suspect kit. (14 RT 3707-3708)

A sample from a zipper clasp of the duffel bag found in the abandoned van contained a mixture of DNA; in which the major component matched Ms. Vitale. (13 RT 3639) The minor component matched Scott's profile at 7 loci, and thus he was a possible or potential contributor - along with one in every 4500 African-Americans, **one out of every 560 Caucasians**, and one in every 650 Hispanics. (13 RT 3639) A swab of the carrying handle of the bag contained an allele not possessed by Ms. Vitale nor Scott; from a third source. (14 RT 3697-3698)

A sample from the glove found in the duffel bag also showed a "mixture" of DNA from several sources, with the major component matching Ms. Vitale. (13 RT 3640) The minor component had two "trace alleles" that Scott does not possess. Therefore, if there are only two contributors to the mixture, Scott is excluded. (13 RT 3642, 3670) If there are more than two contributors, Scott could be one of them, but there must be more than two contributors in order for Scott to be included at all. (13 RT 3642) However, the witness found no evidence that there were more than two contributors. (13 RT 3669)

Samples from the balaclava found in the duffel bag in the van matched Ms. Vitale's DNA. (13 RT 3645) A sample from the balaclava also matched Scott's DNA profile. (13 RT 3647) A separate sample, from

another area of the mask, yielded a mixture that could be accounted for as a mixture of Scott and Vitale, but the number of potential contributors in the population is relatively large: one in 150 African-American persons, **one in 59 Caucasians**, and one in 79 Hispanics. (13 RT 3653) Thus, there would have to be at least three people to account for all of the results of the mask as a whole. (14 RT 3696) And, DNA analysis does not indicate in what order the DNA may have been laid down. (14 RT 3696)

A sample from the long-sleeved shirt found in the duffel bag matched a full profile of Scott. (13 RT 3654) However, no DNA matching Vitale's was found on the shirt. (14 RT 3698)

Two separate samples from the shoes that Esther Fielding turned over to the police gave a full profile matching Vitale's. Another sample from the shoes showed a mixture of three people. Scott could be included, as could Vitale; but so could many others: one of every 13 African-Americans, **one of every 6 Caucasians**, and one out of every 9 Hispanics. (13 RT 3655-3656)

A sample from a water bottle collected from the crime scene showed a mixture. The major contributor was Vitale. However, the minor contributor was only detected at a trace level. Scott could possibly be the minor contributor, but so could one out of every 14 African-Americans, **one out of 7 Caucasians**, and one out of 5 Hispanics. (13 RT 3658-3659)

A DNA sample from a coffee mug from the crime scene showed that Daniel Horowitz was the major contributor, with a trace of minor component that would be shared by one of every two African-Americans,

one out of five Caucasians, and one out of nine Hispanics. It could be Vitale's DNA. A sample from another coffee mug at the crime scene matched Vitale, with a minor component that could be Daniel Horowitz but excluded Petitioner. (13 RT 3660-3661)

Mr. Harmor also testified for the prosecution at trial as an expert in Y-STR analysis. (14 RT 3749) Y-STR analysis is valuable with a mixed sample (male and female DNA) where the former is present in a very small proportion compared to the latter. (14 RT 3751)

Mr. Harmor testified that he received DNA samples from Stockwell for analysis. (14 RT 3752) He amplified the DNA for 17 different Y-STR markers. [One amplification because he was being rushed by the detectives....] He then compared the swab from Vitale's right foot to the known reference sample containing Scott's DNA, and they were indistinguishable for all 17 markers that he used. (14 RT 3756)

However, unlike the "product rule" system used with autosomal STRs for determining the frequency of a profile (based on a mathematical calculation in which the frequency of a match at each locus is multiplied by the likelihood of a match at each of the other loci), in Y-STR analysis the only method is to compare the developed (partial) profile to a database. This is so because in Y-STR testing, the results at each locus are not independent of the results at the other loci, and therefore the use of the product rule would give a false result.

Using a database from Applied Biosystems, which manufactured the

kit that he used for his analysis (14 RT 3760),<sup>21</sup> he observed that the Y-STR profile from the foot swab sample, like Scott's Y-STR profile, did not match any of the 3561 profiles in the database. (14 RT 3762)

On cross-examination, Harmor explained that the profile he generated for Scott is not unique to an individual; nor to a particular family. It is a better tool for exclusion than for inclusion. (14 RT 3764) It can reliably tell you if DNA did not come from a specific person, but if the person is not excluded, the test can only say the person could be the source of the DNA; it cannot say that that person is the source of it. (14 RT 3765) Furthermore, in this kind of DNA typing, you will always have "stutter" accompanying the main DNA peak. In addition, interference from particulate matter may get into the electrophoresis gel and cause misleading spikes. Thus, false peaks may appear in test results, that may not accurately represent actual peaks in the sample. (14 RT 3766-3767) One thing that can produce false peaks (or "artifacts") is an "overamplified" sample.

After his initial quantitation he contacted Mr. Stockwell because he was concerned about an approximately tenfold difference between their estimates of how much DNA the sample contained, and he wanted to review Mr. Stockwell's data. Stockwell said that he was pushing through as many samples as possible, and that his first run had been contaminated, so he discounted the first run and repeated the process. (14 RT 3768-3769)

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<sup>21</sup> The Applied Biosystems database includes profiles from 985 African American males, 330 Asian males, 1276 Caucasian males, 105 Filipino males, 597 Hispanic males, 106 Native American males, 59 sub-Saharan African males, and 103 Vietnamese males. (14 RT 3763)

Homicide inspector Paul Peterson received a pair of shoes with “some type of dry reddish substance on the outside.” (12 RT 3223; 3228) The crime lab later collected the shoes.<sup>22</sup> (12 RT 3230)

Donald Finley was a criminalistics lab aide at the time of the homicide. (12 RT 3274) On October 26, 2005, he processed and photographed a Toyota van, looking for fingerprints; blood; and any weapons. (12 RT 3275) The title of the van was in the name of Esther Fielding (Scott’s mother). (12 RT 3290) The exterior of the van was “covered with a layer of dust.” (12 RT 3276) There were areas that looked like there could be blood. (12 RT 3278) Mr. Finley agreed that that a presumptive test “does not confirm” whether there is blood on an object. Other compounds, including rust and bleach could also result in a presumptive positive. (12 RT 3282-3283)

Kathryn Novaes qualified as an expert witness in the “composition and identification of latent fingerprints. (12 RT 3299) **Ms. Novaes 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,” and a “broken pottery piece.” (12 RT 3320)** Ms. Novaes opined that some of the “prints” on cardboard boxes seized from 1901 Hunsaker were “most likely that of a fabric type glove.” (12 RT 3313) **None of Scott’s fingerprints were found anywhere at 1901 Hunsaker Canyon Road.** (12 RT 3312)

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<sup>22</sup> The “Lands’ End” shoes were received into evidence over petitioner’s objection as People’s Exhibit 23A. (12 RT 3231-3232)

Deputy Sheriff Eric Collins testified on August 14, 2006. (12 RT 3368) Previously he qualified as an expert witness in criminalistics on approximately five occasions; in this case “in the general area of criminalistics with specific reference to the examination of physical evidence collected at the crime scene and the administration of presumptive tests for the presence of blood or other bodily fluids.” (12 RT 3370)

Mr. Collins attended the autopsy of Ms. Vitale on October 17, 2005, performed by Dr. Brian Peterson. Mr. Collins arrived at approximately 8:15 a.m. (12 RT 3370) Mr. Collins, without any objection by defense counsel on the basis of 352, presented the jury with cumulative evidence.

Mr. Collins collected Ms. Vitale’s clothing, “hair standards,” and “a few shards of pottery” from her hair. (12 RT 3376) People’s Exhibit 16C was Ms. Vitale’s skirt. (12 RT 3380) Exhibit 16D was Ms. Vitale’s purple underwear, and her socks were 16E. (12 RT 3383)

At first Mr. Collins said that the sock on Ms. Vitale’s right foot was in its normal position but the other sock had a “large separation” or rip; however, with reference to People’s Exhibit 3B, a photograph of Ms. Vitale at the scene, and with reference to his report, he corrected himself and said that the sock on her right foot was not intact. (12 RT 3384-3386)

Mr. Collins collected pubic hair standards; fingernail clippings; and swabs from her face, neck, hands, and exposed right foot. (12 RT 3387)

Although he agreed that he did not observe any “remarkable lacerations or abrasions” on Scott (13 RT 3479-3480), Mr. Collins reported “a linear scratch on the exterior of [Scott’s] right nostril, which was also

accompanied by an area of redness that followed the curvature of his nose” on the right side; an “apparent contusion [bruise] with a dark coloration” measuring about 5/16ths of an inch by one and a quarter inches” on the “outer aspect of the upper left arm with its length running parallel to the length of the arm”; two “contused areas in the stage of yellowish coloration which was approximately two and a quarter inches by five inches” on the outside of his upper right arm; a “slightly curved area of red discoloration measuring about one inch by one and a half inches” mid-back; abrasions that “appeared to be healing on the front and inner aspect of his lower right leg” that ranged from one to two inches in length; an “area of dull yellow discoloration on the tip of his left thumb which measured about a quarter or an inch long”; and “other miscellaneous reddish marks on his skin, on his left and right shoulders, his chest, his left and right scapula on his back, the left side of his waist, on his left thigh” and on both forearms. (12 RT 3394-3395)

The duffel bag was photographed on the front porch of 1050 Hunsaker (Exhibit 17C). (12 RT 3404)

Deputy Collins did not take any swabs or cuttings from the duffel bag for DNA analysis. Deputy Collins collected DNA samples from the shoes, Items 22-xx. (13 RT 3462-3463) He testified without objection that part of the left shoe was “very similar” to his recollection of the print in blood on the plastic bin top. (13 RT 3472-3473; 3476)

Among the trace evidence he collected at the autopsy were numerous

blond hairs. (13 RT 3479; 3483-3484)<sup>23</sup> There were also hairs adhering to the balaclava. It was possible that trace evidence could “communicate from the inside of the [duffel] bag to the mask” which was received “inside out.”<sup>24</sup> (13 RT 3482-3483)

Jason Kwast testified that this shoe or another shoe with the same tread pattern made the shoeprint on the container, because the general pattern of the sole was generally the same as the pattern in the print on the lid. (13 RT 3491; 3494-3495)

Lead Detective Jason Barnes<sup>25</sup> responded to 1901 Hunsaker Canyon Road at approximately 7:00 p.m. on the evening of October 15, 2005.<sup>26</sup> Criminalist Taflya arrived at approximately 8:50 or 9:00 p.m.<sup>27</sup> (13 RT 3575-3577) Detective Barnes said it took him about “approximately ten minutes and 22 seconds” to walk from the double-wide to the location of the van. (13 RT 3590-3591)

Criminalist Taflya saw blood on the floor and the walls near Ms. Vitale’s body. An overturned plastic storage bin lay by the front door. (7 RT 1928-1929) There was an apparent shoe print in blood on top of the

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<sup>23</sup> These hairs were not analyzed. (13 RT 3486, 3500-3501)

<sup>24</sup> See Supplemental Forensic Examination Report, Brent E. Turvey, M.S.

<sup>25</sup> 8 RT 2255.

<sup>26</sup> The crime scene log shows Barnes on scene at 1957 hours (7:57 p.m.) and entered the residence with Detectives Pate and Santiago at 2006 hours (8:06 p.m.).

<sup>27</sup> The crime scene log shows Taflya on scene at 2109 hours (9:09 p.m.).

plastic bin lid. (7 RT 1992)

In the hall bathroom he saw a blood swipe on the wall and contact transfers of blood on the shower curtain and the hot water knob. (7 RT 1937) On the walls and on objects in the room there were numerous fingermarks in blood; some with striation that he thought could from cloth, not fingerprints. (7 RT 1949) Blood transfer on the front door - near the door handle - looked like it had been made by a bare foot. (7 RT 1988)

The blood spatter indicated that Ms. Vitale was low to the ground when most of the injuries were inflicted. (8 RT 2055) The assailant would have gotten very bloody during the course of the struggle. (8 RT 2064) However, in his opinion, nobody operated the shower after the blood smears were left on the bathtub faucet and the shower curtain, because the smears would have been diluted or washed off. (8 RT 2059)

Because all of the bloody fingerprints he observed had fabric patterns, including the ones on the shower curtain, Taflya thought that the assailant probably wore gloves. (8 RT 2067-2068)

Kim Curiel got up at 8:30 a.m. She fed the animals, made tea, and began grading student essays. While she was working, Scott came in the front door. He smiled and said he had a beautiful walk. She noticed some superficial scratches on his nose that were bleeding. He said he fell while trying to find the waterfall in the stream near the house, and got whacked by a bush. He sat down beside her and put his arm around her, as he often did. She put antibiotic ointment on his nose. (10 RT 2489-2854)

Kim did not pay attention to the time that morning and could only

give a rough estimate. (11 RT 2925-2926) After grading papers, she went to The Spirit Store, a costume shop in Lafayette, with her husband and the children to get things for Halloween. The store receipts showed a purchase at 12:36 p.m., and another at 12:44. Working backward, Kim thought they were at the store for “about an hour,” and that it was a twenty-five minute drive to the store. (10 RT 2861-2862) Thus, in her estimate, Scott returned from his walk at about 10:45 a.m. (10 RT 2866)

Fred Curiel, Kim’s husband, was certain that Scott came back at precisely 9:26 a.m. because he had checked the time on his pager. (11 RT 3004; 3007; 3050) The Curiels were in the car by 10:20; he was sure because he had checked his pager at 10:16. Prior to arriving at The Spirit Store, he checked his pager again at 10:51. (11 RT 3048) 9:26 was the same time he told police in his initial interview on October 20th. (11 RT 3010, 3014, 3050.) He had also testified to the same time frame at the preliminary hearing. The reason he kept checking the time on his pager was that he had a lot to do and felt pressed for time. (11 RT 3017) Although he had initially told police, back in October of 2005, that they spent an hour at The Spirit Store, he now believed they had been there for an hour and forty minutes, given the times stamped on their purchase receipts. (11 RT 2950)

At about the same time that the police were beginning their examination of the crime scene, Petitioner called his friend Robin Croen, then went to Robin’s house with his girlfriend Jena Reddy. Robin noticed a few scratches. and Petitioner said he had tangled with a branch that morning

on his walk. (9 RT 2370-2372)

Esther called Petitioner at the Croens and told him the main canyon road was sealed off; there was talk that someone had been killed; and police were at the Horowitz' residence, so he would be unable to come home until later. (9 RT 2374-2375)

Petitioner and friends all started speculating about what happened. Petitioner knew that Mr. Horowitz was a criminal defense attorney, and wondered if there was a connection. (8 RT 2579-2580) A little later, Scott remarked that on his walk that morning he had seen a person he did not know, and now wondered if he may have crossed paths with a killer. (9 RT 2376)

#### Credit Card Fraud: Motive for Murder?

On October 13, 2005 (2 days before Ms. Vitale's death) Karen Schneider, who lived at 2001 Hunsaker Canyon Road, noticed that her credit card statement showed unauthorized charges from "Specialty Lighting." (9 RT 2486; 2498) She notified her bank and emailed "Specialty Lighting." (9 RT 2500) She soon learned that the orders were to be shipped to Scott's mother, Esther Fielding, at 1050 Hunsaker Canyon Road. (9 RT 2502) The purchases were billed to Schneider's credit card, but the invoice did not contain her correct address of 2001 Hunsaker Canyon Road; rather, the address given for Schneider was 1901 Hunsaker Canyon Road, the address of Daniel Horowitz and Pamela Vitale. (9 RT

2504)<sup>28</sup>

On Sunday, October 16<sup>th</sup>, Karen Schneider called a meeting of all of the residents of Hunsaker Canyon Road. At the meeting, there was considerable speculation about the murder. Some thought it might be Horowitz' neighbor Joe Lynch. Others suggested that perhaps the killing was somehow related to Mr. Horowitz' law practice. (9 RT 2507-2509)

Karen Schneider accused Esther of placing the orders as a way of obtaining restitution for veterinary medical expenses she had incurred after Schneider had run over Esther's dog, Jazz, a couple of weeks earlier, because the shipping address was 1050 Hunsaker Canyon Road. (9 RT 2489-2490, 2504, 2510) Esther denied any involvement in the orders but could not explain why her name was on the papers. Esther took the documents then left with Fred Curiel. (9 RT 2511)

Since the charges had been made over the internet, Fred and Kim Curiel decided they should examine all of the computers in the house, including Scott's. (10 RT 2879) At 2:00 a.m., they woke Scott up and accused him, but he denied involvement; he suggested perhaps someone

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<sup>28</sup> Jackie Jahosky, the owner of SpecialtyLights.com (8 RT 2273), testified that on October 13, 2005 her company received three orders that caused her concern because (1) they had billing information that was different than the shipping information, (2) they were large orders, and (3) they were to be shipped by next day air. (8 RT 2278-2279) The email address was Esther\_Fielding@yahoo.com, but the order was purportedly placed by Karen Schneider, the credit card holder. The shipment was to be sent to Esther at 1050 Hunsaker Canyon Road. (8 RT 2286.) The person who placed the order gave a contact number of (925) 962-0829 (Esther Fielding's number). The order was to be billed to Karen Schneider at 1901 Hunsaker Canyon Road, telephone **(925) 283-8970. This address and telephone number were Vitale's.** The phone number was unlisted. (8 RT 2287; 10 RT 2877.)

had broken into the house and used his computer. (10 RT 2882-2883)

Later that day they confronted Scott again, and told him that the fact that Pamela's address and phone number were on the charge might implicate him in her murder, especially since her phone number was unlisted. (10 RT 2886-2887)

Scott continued to deny any wrongdoing. He told them that on his walk on Saturday morning, while he was heading toward the barn, a woman with long straight brown hair and large glasses driving a white four-door sedan had stopped and rolled down her window, and they spoke to each other. She unexpectedly reached out and grabbed his arm and said "you've got to believe." (10 RT 2887) Kim told Scott this description of the woman and her car sounded like Vitale, and asked if he knew her; he said he did not, but he was worried that because she had grabbed his arm, she could have his DNA under her fingernails. (10 RT 2887) He rolled up his right sleeve and showed them the fingernail marks. (10 RT 2890)

Once Fred Curiel became suspicious that Scott was responsible for the fraudulent credit card orders, Esther started worrying that the Curiels might ask her and Scott to leave. She told Scott if there was anything to do with the fraud in his room he should get rid of it. (11 RT 3097) She did not see what, if anything, he collected in response to her suggestion. (11 RT 3099.)<sup>29</sup>

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<sup>29</sup> Scott told his girlfriend Jena that people in the house were accusing him of credit card fraud. He put some papers, a bag of clothes, some CDs, some books, and some shoes into his backpack, as well as Boy Scout papers, absinthe bottles, mementos, and clean clothes, and asked her if she could hold on to it, which she did. (9 RT 2585, 2587-2588, 2673.)

Still later that day (Monday), Scott called Fred and Kim. He admitted that he stole the Schneider's credit card and placed the orders, and that he wanted to set things right. (10 RT 2893-2894)

On Tuesday, October 18th, Fred called Thomas Croen, Robin's father. Fred wanted to examine Robin's computer to see if there was anything that would connect Robin with Scott in regard to the fraudulent credit card order. (9 RT 2468) Thomas agreed. While waiting for Fred he looked at the computer himself. He found references to websites for hydroponic equipment and emails between Scott and Robin. (9 RT 2470) He went Robin went to an attorney who later contacted the authorities and arranged immunity for Robin. (9 RT 2472-2473)

Robin admitted discussing how to grow marijuana, and said it was Scott's idea to buy the materials with other people's credit cards. (9 RT 2349) Scott suggested that they could pay for the things they needed to grow pot with other people's credit cards. About a month before the Vitale murder, Scott used a credit card number belonging to another neighbor, John Halpin, to order a marijuana "vaporizer" from VaporWareZ. (9 RT 2355-2356; 2358-2359)

Scott wanted to talk with Robin on Monday but Robin had orchestra rehearsal. (9 RT 2385-2386) On Tuesday the 18th, Scott told Robin he wanted to tell Fred Curiel that he had used other people's credit cards, but wanted to take the full blame and clear Robin's name. Scott said he was afraid of being linked to the Vitale killing and hoped that admitting to the fraud would help show he had nothing to do with that. (9 RT 2388) He

also said that in any event, he had an alibi, because he was seen at the house after his walk and had spent the rest of the day with other people. (9 RT 2462)

On the evening of Wednesday, October 19th, Robin testified at a special hearing before Superior Court Judge William Kolin, who issued the search warrant for the Curiel property. (9 RT 2392) Detective Barnes, the lead case agent, submitted an affidavit but did not testify at this hearing.

Barnes' affidavit incorrectly stated that one or more of the Specialty Lighting address used 1901 Hunsaker Canyon Road (the Horowitz/Vitale's address). Barnes suggested that perhaps Scott went to 1901 Hunsaker to get the item(s) that would have thus been delivered. (3 CT 730.) Later on it became apparent that Barnes had it wrong; no order listed 1901 Hunsaker as the shipping address; which was actually 1050 Hunsaker Canyon Road, Road, where Scott and Esther lived. (8 RT 2304)

Jackie Jahosky, of SpecialtyLighting.com, sent an email regarding the order, stating it was necessary to call and verify credit card information. Ms. Jahosky got a call from a male who sounded young, from phone number (925) 284-0142.<sup>30</sup> She told the caller that the order would not be shipped at all, because of the problem with the credit card. The caller replied, "Okay, that's fine." (8 RT 2297-2298) An hour and a half later, the same person called again to ask if the merchandise could be sent to the billing address instead. She repeated that the order would not be sent at all because the credit card company declined the charges. He said, "Okay, that's fine." (8 RT 2300)

On Friday, October 14th, apparently after calling Specialty Lighting, Scott left a message for Robin saying that their order had not gone through,

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<sup>30</sup> (925) 284-0142 was the Curiel's number. (11 RT 2942)

but he was going to try to find a way to make it work. (9 RT 2364) Robin stressed that at no time did he and Scott have any conversations suggesting that one of the ways to accomplish the credit card scheme would be to hurt people. (9 RT 2364) They never discussed going into people's houses. (9 RT 2381)

\_\_\_\_\_ One email, from Robin to Scott, was dated September 18, 2005, with the subject heading, "gardening," said "compile a list of as many different growing guides as you can, we will compare tips and tricks and the like. Email me the list of sites." It was signed, "Peace." (8 RT 2152-2153)

There were two emails from SpecialtyLights.com on October 12 and 14, 2005, and from FutureGarden.com on October 13, 2005. The first order listed the "Ship To" name as Esther Fielding, but the "Bill To" name as Karen Schneider. The billing address was 1901 Hunsaker Canyon Road; the shipping address was 1050 Hunsaker Canyon Road. The second order had the same billing and shipping information as the first. The third and fourth orders showed "Bill To" John Halpin, 1701 Hunsaker Canyon Road. (8 RT 2154-2158) All of these emails were addressed to Esther\_Fielding@yahoo.com, with an alias of Karen Schneider. (8 RT 2161)

From the Curiel home, the officers went to an area nearby where there was an old Toyota van. (9 RT 2318)<sup>31</sup> The van looked like it had been there a long time; the windows were damaged, the front window was

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<sup>31</sup> The van belonged to Esther Fielding. It had sat in the woods for several years, and she had planned to have it towed away. (11 RT 3100-3101.)

broken out, the tires were flat, and there was vegetation growing around it. Inside the van police observed papers, files, and debris, all affected with water damage and covered with dust. Behind the driver's seat was a duffel bag. (9 RT 2318-2319) The bag stood out from the other items in the van because it was newer-looking. Inside the bag was a dark pullover; a dark balaclava; and one glove. (9 RT 2321; 2333) Attached to the duffel bag was an airline tag bearing Scott's name. (12 RT 3399)

Petitioner was arrested in the afternoon or evening on Wednesday, October 19, arrested at the home of Marcus Miller-Hogg, Kim Curiel's brother. (10 RT 2718-2722)

\_\_\_\_\_ Scott is five feet six inches tall and weighs 110 pounds. (14 RT 3917)

\_\_\_\_\_ Scott and his girlfriend, Jena Reddy, had been friends for years and started dating a couple of months prior to his arrest. Their relationship became sexual in September of 2005. (9 RT 2557-2559)

He was her best friend, she could talk to him about anything. She trusted him with her problems, and they would talk about school and how things were going. (10 RT 2643) When Scott was angry or upset, he did not lose his temper or fly into a rage. (10 RT 2676-2677)

She saw him naked on the evening of Saturday, October 15th, and did not notice any bruises, cuts or abrasions. Scott told her that he got the scratches on his arm during his walk, on his way home. He said he encountered a man and a woman in a car. The male driver stopped to talk to him and the lady reached over to grab his arm and left scratches. (10 RT

2657)

On the evening of Thursday, October 20th, Esther Fielding's sister arrived and took her to Bolinas. (11 RT 3135) The next day Jena and her mother took Petitioner's backpack to Esther. (11 RT 3136; 3138) Inside the backpack were scraps of paper with credit card numbers; a date book; an unopened box of gloves; a bag with two pairs of pants and three shirts; a pair of Scott's shoes; movies, empty absinthe bottles; and a computer hard drive. The papers had Karen Schneider and John Halpin's names on them. (11 RT 3141) Esther "panicked" and burned the papers and the gloves in the wood stove in her sister's house. (11 RT 3145)

Esther later consulted an attorney. She gave the attorney the remaining items, and he turned over the shoes to the District Attorney. Esther was shortly thereafter arrested on a charges of being an accessory. (12 RT 3178) After spending a night in custody, she was released on the condition that she testify against Scott at his trial. (12 RT 3181)

On Sunday, October 23, John Halpin returned home after several weeks in New York. (9 RT 2522)<sup>32</sup> Before his trip, he noticed that his Visa credit card bill was partially torn, but figured it may have happened in the postal sorting machine. He heard about the Vitale murder while in New York. (9 RT 2523) Once home, after talking to Karen Schneider, he checked his credit card statements and found some fraudulent charges. (9 RT 2525) There was one to Future Gardens and one to VaporWare. (9 RT

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<sup>32</sup> All of the residents of Hunsaker Canyon Road received their mail at a cluster of mailboxes situated at the beginning of the road into the canyon. (8 RT 2103)

2531) The items were to be shipped to Esther Fielding, 1050 Hunsaker Canyon Road. (9 RT 2534)

In court, Halpin was shown five slips of paper that he did not recognize, but one had his name, address, zip code, phone number, and birth date, and Visa card account information. (9 RT 2536-2537) Another had an online brokerage account and password. (9 RT 2539-2540) Also written were account numbers and PINs for two brokerage accounts; PayPal account; e-Bay username and password; and Southwest Airlines account. (9 RT 2544)

David Curiel found the papers in Petitioner's dresser drawer months after Petitioner's arrest. The police had searched the drawer, then Esther and Kim cleaned out the dresser, but when David moved into that room (about a month after Petitioner's arrest) he too cleaned it and vacuumed the drawers, even taking each one out. Several months after that, he stuffed some gloves into the top left drawer. (10 RT 2786; 2791) The next day, he opened the drawer, looking for some scratch paper, and on top of his gloves there were some papers with Petitioner's writing. They were neither torn nor wrinkled. (10 RT 2792-2793; 10 RT 2809-2810) David also found a piece of paper with the words, "knockout/kidnap; question; keep captive to confirm opinions; dirty work; dispose of evidence and cut up and bury." (10 RT 2797) He and Fred turned the papers over to the police. (10 RT 2800)

A fingerprint examiner developed latent fingerprints on the papers Curiel found in the dresser drawer. Seven of the prints were identified as

Scott's. (12 RT 3309-3310) Nine other prints belonged to persons other than Scott. (12 RT 3327) The papers that had Scott's fingerprints had John Halpin's name on them. No prints attributable to Scott were found on the papers with other people's names or information on them. (12 RT 3318)

Defense Case

The defense called seven character witnesses and recalled Deputy Collins and Detective Fawell to clarify some small points. (14 RT 3851-3929)

## 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, "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, Sec. 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. Wainwright (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 fell 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.

The foregoing statement of facts demonstrates that trial counsel's

assistance was ineffective. Crucial, exculpatory evidence was not presented to the jury as a direct result of counsel's failure to investigate the facts of the case and petitioner was prejudiced thereby. "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 [reversing district court and granting habeas petition based on finding that counsel's cursory investigation of three potential alibi witnesses constituted ineffective assistance] [internal quotations omitted].

The Ninth Circuit reversed defendant's conviction, holding that the failure to investigate "cannot be construed as a trial tactic" in Evans v. Lewis (9th Cir. 1988) 855 F.2d 631, 637. The Ninth Circuit reversed a death penalty case for counsel's ineffective failure to investigate and present mitigating circumstances in Hendricks v. Calderon (9th Cir. 1995) 70 F.3d 1032.

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.

Trial counsel's failure to sufficiently investigate the facts and available defenses was demonstrably prejudicial, when considered in light of the exculpatory evidence proffered herein. But for this constitutional error, a result more favorable to petitioner would have resulted. Any confidence in the justness and correctness of the verdicts is undermined, and reversal is warranted.

Petitioner was denied his right to effective assistance of counsel as a result of trial counsel's failure both to adequately investigate and to present persuasive defenses available; to wit, that much of the evidence was not only inconsistent,

but rather pointed to another perpetrator.

Counsel also failed to sufficiently attack the validity of the scientific evidence provided by the prosecution, by re-testing of crucial items of evidence; testing items that have not been analyzed to date; presenting expert testimony on Petitioner's behalf, or through sufficient cross-examination. Trial counsel overlooked or failed to recognize compelling evidence of contamination, and therefore did not present this to the jury. Trial counsel did not challenge the information by filing a motion to dismiss pursuant to Penal Code section 995. Nor did trial counsel request critical pinpoint ("special") jury instructions. Whether considered independently or in their totality, these failures to adequately investigate, confront or present a defense to the most damning evidence against Mr. Dyleski fell below the standard of care, resulting in prejudice.

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

Trial counsel failed to investigate or present many of the most troubling inconsistencies in the prosecution's case that indicated Mr. Dyleski was not the perpetrator. This failure to investigate or highlight for the jury many significant holes in the prosecution's case fell below an objectively reasonable standard of conduct and prejudiced Mr. Dyleski.

Judicial evaluation of a counsel's performance must be highly deferential to different strategic choices. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, *supra*, at 690. However, this presumption disappears when counsel fails to conduct sufficient investigation:

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. . . .

Id. at 690-91.

Similarly, 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 (finding counsel's failure to investigate or present any mitigating evidence at the penalty phase of a death penalty case was objectively unreasonable). However, it must be shown that "counsel knew or should have known that further investigation was necessary . . ." People v. Williams (1988) 44 Cal. 3d 883, 937.

Here, trial counsel failed to investigate or adequately present a panoply of crime scene evidence that would have challenged the allegation that Petitioner killed Ms. Vitale - all of which should have been readily apparent to a competent attorney - and this failure resulted in a variety of crucial, exculpatory evidence not being presented to the jury. "A defense attorney who fails to investigate potentially exculpatory evidence ... renders deficient representation." In re Edward S. (2009) 173 Cal. App. 4th 387, 407. 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.

The crime scene evidence indicated that the perpetrator was known to Ms. Vitale, was familiar with and comfortable in the Horowitz/Vitale home, and did not feel rushed for time. To not be rushed for time suggests knowledge that nobody would show up at an inconvenient moment. For example, somebody placed a neatly folded pair of her glasses covered with blood on top of the large television set. 7 RT 1937. A person with bloody hands also seemed to have

straightened up the home, placing a bloody mug in the kitchen sink, and picking up an empty bowl and placing it on the kitchen counter. 7 RT 1934, 1947. There is also evidence that the took a shower after the murder. 7 RT 1936.

Furthermore, there is evidence that someone with bloody hands left the home and then re-entered, possibly with the use of a key. 7 RT 1927; (See also Exhibit C1, Turvey Supplemental Report, at 2.) In contrast, there was no evidence presented that Petitioner ever stepped foot in this home. Moreover, even if one accepts the prosecution's assessment of the timing of the killing and the time that Petitioner returned home, Mr. Dyleski would still have had a very short time frame in which to have committed the murder. See 15 RT 4048, 4053, 4058, 4061-66.<sup>33</sup>

The evidence indicating that the perpetrator was comfortable in the home and was not pressed for time was apparent from the crime scene photos. The conflict between this evidence and the facts pertaining to Mr. Dyleski should have immediately alerted counsel that further investigation into the crime scene might result in exculpatory evidence. However, based on a thorough review of the records and files herein, it appears that defense counsel did not take any steps to further investigate these troubling items of evidence or to obtain any sort of expert

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<sup>33</sup>It is notable that although defense counsel attempted to assert a alibi defense based on the time stated by Fred Curiel (See 15 RT 4109-4110), counsel made no attempt to refute a key factual basis of the prosecution's time estimate: the length of time it would take to walk from the Horowitz/Vitale home to the Dyleski home: "We had Detective Barnes walk from the area of the scene to the area of the van, that's about ten minutes. And I had him walk, not run." 15 RT 4058. Present counsel is informed and believes that ten minutes is a significant underestimate of the amount of time it would take to walk or run the distance between the homes. However, present counsel has been unable to confirm this belief as we have honored Mr. Horowitz's admonishment to our predecessor appellate counsel that counsel and his agents are "forbidden from coming on my property." (Exhibit D, Letter from Daniel Horowitz to Philip Brooks, dated March 15, 2008.)

opinion as to the relevance of these items.<sup>34</sup>

Petitioner's family engaged the services of Brent Turvey, MS, a crime scene analyst and forensic science expert, to analyze the crime scene evidence in this case. (See Exhibit C, Forensic Examination Report, by Brent Turvey, MS (hereinafter "Turvey Report").) Mr. Turvey analyzed the crime scene photos, as well as the investigative reports, and a variety of other materials, in order to assess the crime scene investigation, forensic examinations, and related expert testimony. Forensic Examination Report, at 1. Mr. Turvey concluded that:

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.

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<sup>34</sup> Indeed, defense counsel briefly alluded to these issues in her closing argument. However, she used these facts to argue against the finding of a special circumstance based on a theory that Mr. Dyleski was intending to burglarize Ms. Vitale's home, not that it showed Mr. Dyleski's actual 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, there's nothing missing at all, nothing consistent with the burglary." (15 RT 4140-41.)

Notably, this argument did not actually contradict the prosecution's theory of guilt in the case, as the prosecution argued that Mr. Dyleski may have gone to the Horowitz / Vitale home to seek revenge for the killing of his dog, if he mistakenly believed that it was the home of Karen Schneider, who was actually responsible for the dog's death. (15 RT 4026-27.) Thus, trial counsel did not effectively present the exculpatory crime scene evidence.

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

(Exhibit C, Turvey Report, at 2.)

Had trial counsel investigated the nature of the crime scene evidence or employed a crime scene analyst, as Mr. Turvey suggests, she could have provided highly exculpatory testimony that the available evidence was simply inconsistent with Mr. Dyleski as the perpetrator.

Present counsel engaged Dr. Michael Laufer, a medical doctor and expert witness who has testified in a variety of areas, including accident reconstruction, mechanisms of injury, analysis of human tissue injuries, such as lacerations resulting from impacts with other objects, analysis of forces and movements as they relate to the likelihood of certain sustained injuries; injuries caused by projectile ballistics; the physics of human bone fractures and ligamentous injuries; the age and mechanisms of injury resulting in contusions and hematoma; and in the forensic reconstruction of events leading to non-fatal and fatal human injuries.<sup>35</sup> (Exhibit B, Laufer Declaration.) Dr. Laufer looked at the trial testimony

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<sup>35</sup> Dr. Laufer is a medical doctor licensed in the State of California and the State of Nevada. He graduated from the University of Colorado in 1980, with a dual major in Molecular, Cellular and Developmental Biology and Bioengineering, with honors, including membership in Phi Beta Kappa and Tau Beta Pi (Engineering Honor Society). He graduated from the Stanford University School of Medicine in 1985, completed a residency in Emergency Medicine and a postgraduate fellowship at Stanford in Emergency Medicine / Trauma / Pre-Hospital Care.

Since March of 2000 to present, he has been the Medical Director and Instructor for the California EMS (Emergency Medical Services) Academy; and from November 2005 to present, the Medical Director for the Palo Alto Fire Department.

He is registered with the American College of Forensic Medical Examiners as an expert in Emergency Medicine and Mechanism of Injury Reconstruction and has previously qualified as an expert witness in Santa Clara, San Francisco and Los Angeles Counties in matters of accident reconstruction, and testified in multiple matters as they relate to mechanisms of injury. (Exhibit B, Laufer Declaration.)

of Dr. Brian L. Peterson, Dr. Peterson's autopsy report; and digital photographs of the autopsy and the crime scene. Declaration of Michael Laufer, M.D., at 2. Dr. Laufer's conclusions confirm those of Mr. Turvey's that the assailant was someone who was familiar with and comfortable in the home.

However, defense counsel did not engage the services of an expert in crime scene or injury reconstruction, nor did she cross-examine any of the law enforcement investigators who testified on the relevance of these facts, indicating that counsel had failed to recognize their obvious exculpatory nature. (See, e.g., cross-examination of Alexander Taflya, criminalist with the Contra Costa County Sheriff's Crime Lab, 8 RT 2060-68.)<sup>36</sup> Generally, "whether certain witnesses should have been more rigorously cross-examined . . . [is] normally left to counsel's discretion and rarely implicate[s] inadequacy of representation." People v. Cox (1991) 53 Cal. 3d 618, 662 (overruled on other grounds).

Similarly, whether the defense should have called an expert is normally considered trial strategy. People v. Bolin (1998) 18 Cal. 4th 297, 334 (rejecting a claim of ineffective assistance of counsel based on defense counsel's failure to obtain a defense expert as the petitioner did not provide any evidence that such an expert would have provided exculpatory evidence if called). However, such an argument may be the basis of a finding of ineffective assistance of counsel if the defendant identifies "exculpatory or impeachment evidence that counsel could have revealed by further questioning of prosecution witnesses (or examination of

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<sup>36</sup> In Ms. Leonida's cross of Mr. Taflya, she only asked him about whether he wore protective clothing while he collected evidence; what evidence he collected; that there was a significant amount of blood spatter at the scene; that the perpetrator did not seem to have gone through Ms. Vitale's purse, and finally that the perpetrator was wearing gloves throughout the incident. Cross-examination of Alexander Taflya, criminalist with the Contra Costa County Sheriff's Crime Lab, 8 RT 2060-68.

defense experts) and that would have produced a more favorable result at trial . . . supported by declarations or other proffered testimony establishing both the substance of the omitted evidence and its likelihood for exonerating the accused.” Id. at 334. Mr. Turvey’s report and Dr. Laufer’s declaration provide **specific** examples of the exculpatory nature of the crime scene evidence of which the jury was entirely unaware.

Mr. Turvey’s conclusion that “the offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide” is exculpatory and could have established reasonable doubt because there was **no evidence** that Petitioner had ever been to the residence, let alone felt comfortable and confident that nobody would be returning anytime soon. This conclusion is based on: Ms. Vitale’s eyeglasses were covered in blood yet neatly folded on the television; the offender apparently left a mug in the sink and a cereal bowl on the kitchen counter; the offender had contact with a bottle of water; spent time around the couch; left blood transfer on several areas in the shower, including the hot water knob, and presumably took a shower because “hairs in the [shower] drain were still moist.” (Exhibit C1, Turvey Report, at 5 - 6.) “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.” Forensic Examination Report, at 6. Each of these conclusions are exculpatory in nature, and indicate that someone with intimate familiarity and comfort with the scene, unlike Mr. Dyleski, was the perpetrator.

Moreover, in his supplemental report, Mr. Turvey revisits the blood patterns on the external door to the home, finding that it was likely that the

perpetrator used a key to re-gain entry into the home mid-attack. (See Exhibit C1, Turvey Supplemental Report, at 2-3.) Mr. Turvey concludes:

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 C1, Turvey Supplemental Report, at 2 (emphasis added).)

This supplemental finding is highly exculpatory as there is no indication that Mr. Dyleski had any access to a key to the residence. However, although Mr. Taflya testified that there was a blood swipe on the exterior of the door, there was no testimony provided that there was blood apparent on the exterior deadbolt, and trial counsel failed to cross examine on this issue. 7 RT 1927; 8 RT 2060-68.

Dr. Laufer's report independently corroborates Turvey's findings. For example, Dr. Laufer found that "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 B, Laufer Declaration (emphasis added.) He continues, "The assailant was apparently comfortable in the manufactured home; the apparent blood in the

bathroom shower supports the foregoing . . .” Declaration of Michael Laufer, M.D., at 3.

Notably, Dr. Laufer’s finding that the injuries were the result of a “protracted struggle” suggests that the incident took a significant length of time. This finding also tends to exonerate Petitioner because, even accepting the prosecution’s timeline of events, a petitioner would only have had a few minutes in which to commit the killing.<sup>37</sup> However, the prosecution’s assessment of time is highly speculative, as no medical expert provided any testimony as to the estimated time of death.

Thus, if Ms. Leonida had investigated the inconsistencies in the crime scene evidence, which were apparent from the crime scene photos and which Ms. Leonida herself referred to in reference to the lack of evidence of burglary, she would have been able to present highly exculpatory and compelling evidence that the facts known about Mr. Dyleski were simply inconsistent with the crime scene evidence. As Mr. Turvey concluded “the defense failed to adequately investigate or examine the physical evidence in this case.” This failure to investigate apparently exculpatory evidence or to present it to the jury fell below an objectively reasonable standard of conduct. “A defense attorney who fails to investigate potentially exculpatory evidence. . . renders deficient representation.” In re Edward S. (2009) 173 Cal. App. 4th 387, 407.

Moreover, as evidenced by Mr. Turvey’s report and Dr. Laufer’s declaration, defense counsel’s failure to investigate the crime scene likely resulted in prejudice to Mr. Dyleski. “[I]n evaluating prejudice, we must compare the

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<sup>37</sup> In his closing argument, Mr. Jewett estimates that Petitioner was in the home for a total of fifteen minutes, which would include the actual struggle, as well as time to clean himself off, and do some light housework by placing dishes in the sink. 15 RT 4058.

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 (9th Cir. 2008) 529 F.3d 834, 863 (internal quotations omitted) (overruled on other grounds).

Defense counsel's only argument regarding these inconsistencies in the crime scene was that the evidence at the scene contradicting any inference of burglary since there was no evidence of anything taken. This argument is not one of innocence, but rather relates to the special circumstance finding. Had trial counsel consulted with a crime scene analyst or accident reconstruction expert, she would have understood that the physical evidence at the scene provided a great deal more exculpatory information than argument that the perpetrator did not burglarize the home. Rather, the physical evidence provided critical exculpatory clues into the relationship between the perpetrator and both the victim and the crime scene.

Any or all of this exculpatory evidence could have provided the reasonable doubt that was otherwise lacking in the defense case, and may have tipped the balance in Petitioner's favor. Indeed, the above analysis raises troubling questions. Where would Petitioner have obtained a key to the home? Why would he have re-entered the home mid-attack? How did he know that Mr. Horowitz would be gone for a sufficient length of time to feel comfortable taking time to put dishes in the sink and shower? Why would he have put dishes in the sink in the first place? How does the finding that the struggle was “protracted” fit with the small window of time available for Mr. Dyleski to have committed the crime? These open questions form the basis of a finding of reasonable doubt, and if trial counsel had

presented these troubling questions to the jury, they may not have been able to convict Mr. Dyleski . “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 (finding that counsel’s cursory investigation into three potential alibi witnesses and the failure to put them on the stand was ineffective assistance) (emphasis added).

Evidence that the crime scene was incompatible with Petitioner as the perpetrator is especially probative in light of the evidence that defense counsel did present: that Mr. Dyleski had a peaceful character that was inconsistent with the charges of murder,<sup>38</sup> and that he had an alibi for the likely time of the murder, albeit a contested one. See 15 RT 4109-4110. Notably, defense counsel did ostensibly attempt to argue that Mr. Dyleski was innocent, and thus her failure to argue that the physical evidence at the crime scene was inconsistent with his guilt was ineffective assistance of counsel.

B. Trial Counsel Failed to Investigate or Present Critical Evidence Implicating Another Individual as the Perpetrator of the Crime, which was in Trial Counsel’s Possession in Advance of Trial.

Trial counsel provided ineffective assistance of counsel by failing to investigate, develop and present evidence that a third party may in fact have been the perpetrator. Here, there were a number of individuals who were potentially the true guilty party; and in the case of Mr. Horowitz, Ms. Vitale’s husband, the evidence of potential guilt was very compelling. The failure to present persuasive evidence of third party culpability may be considered ineffective assistance of

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<sup>38</sup> The only evidence trial counsel offered was character witness testimony. See Statement of facts, defense case, supra.

counsel. See In re Valdez (2010) 49 Cal.4th 715, 733 (finding that counsel was not ineffective on the particular facts at bar because significant evidence ruled out the third party as a potential perpetrator and the defendant had confessed to counsel); Sanders v. Ratelle (9th Cir. 1994) 21 F.3d 1446, 1457 (holding that trial counsel's 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. Belmontes v. Ayers (9th Cir. 2008) 529 F.3d 834, 864-66 (counsel provides deficient performance if she fails to provide the trier of fact with the most compelling evidence in her possession).

The standard for admitting evidence of third party culpability is the same as for other exculpatory evidence: it must be relevant, pursuant to Evidence Code section 350, and its probative value must not be "substantially outweighed by the risk of undue delay, prejudice, or confusion," pursuant to Evidence Code section 352. See People v. Hall (1986) 41 Cal.3d 826, 833 (rejecting the rule that evidence of third party culpability is only admissible if there is substantial proof as to the probability of guilt). 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 the instant case, there was a variety of evidence that directly and circumstantially implicating Mr. Horowitz in the death of his wife. This evidence included physical evidence linking Mr. Horowitz to the scene of the crime; evidence Mr. Horowitz was prone to fits of rage and had a history of abuse and domestic violence against Ms. Vitale; accusations by individuals that Mr. Horowitz had confessed to framing Mr. Dyleski; evidence that Mr. Horowitz and

Ms. Vitale were facing financial and marital issues as a result of the home construction, and that just days before her death, a new problem had arisen about which she was frightened to tell Mr. Horowitz; and that in the days following Ms. Vitale's death, Mr. Horowitz's demeanor implied a consciousness of guilt. This evidence was either in the possession of, or readily available to defense counsel. However, it appears that this compelling evidence of third party culpability went largely uninvestigated, and was not presented to the jury in any way.

In Lisker v. Knowles (C.D. Cal. 2009) 651 F. Supp.2d 1097, the court found that trial counsel was ineffective in failing to investigate and present compelling evidence that another person committed the murder. The court explained:

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 defense counsel ostensibly pursued a defense of innocence, and because there was a variety of compelling evidence available to her that implicated another individual, specifically Mr. Horowitz, it was ineffective assistance of counsel to make no attempt to present this compelling, exculpatory evidence to the jury.

1. Physical Evidence that the Perpetrator Was Known to Ms. Vitale and Was Comfortable in the Horowitz/Vitale Home Implicates Mr. Horowitz.

Much of the physical evidence at the crime scene implicates the husband, Mr. Horowitz, in the crime. As discussed above, the crime scene itself was

inconsistent with an attack by a violent stranger; a variety of physical evidence at the scene indicated that the perpetrator knew Ms. Vitale, and was familiar with and comfortable in the home. Mr. Turvey, an expert in crime scene analysis, found that “[t]he offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide.” (Exhibit C, Turvey Report, at 5.) For example, the perpetrator seems to have straightened up during or after the commission of the crime, by placing a coffee mug in the sink and a cereal bowl nearby. 7 RT 1934. The crime scene photos show a bloody thumbprint on the inside of the bowl, implying someone with bloody hands picked up the bowl while it was empty. 7 RT 1947. It defies credulity that a stranger would spend time tidying up the home of the person they have just killed by picking up an empty bowl and placing it by the sink.

As Mr. Turvey explained, “Time spent at the scene with the body would increase the offender’s exposure to the possibility of discovery in direct relation to the homicide. These are not the actions of a stranger offender concerned about being discovered . . .” (Exhibit C, Turvey Report, at 5.) Moreover, in addition to picking up dirty dishes, there is also evidence that the perpetrator may have taken a shower. It seems inconceivable that any stranger perpetrator, and specifically Mr. Dyleski, would have known that Mr. Horowitz would be gone all day, particularly on a Saturday.<sup>39</sup>

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<sup>39</sup> The facts suggesting the perpetrator took his time in the home, including possibly taking a shower, were particularly troubling to Ms. Hill, Pamela’s sister. She stated in her interview that Mr. Horowitz said the perpetrator must have been watching the house, but she noted that even if the perpetrator was watching, he would have no way of knowing when Mr. Horowitz would return:

“[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?”

Furthermore, the mug that was placed in the kitchen sink, which contributed to Mr. Turvey's findings that the perpetrator was comfortable in the home, was found to have saliva that matched Mr. Horowitz's DNA. Turvey's Report, at 5.

Perhaps the most compelling piece of physical evidence indicating Mr. Horowitz may have been the perpetrator was Mr. Turvey's finding that the perpetrator likely used a key to re-enter the home mid-attack. (See Exhibit C1, Supplemental Report, at 2-3.) This finding was based on an analysis of the very apparent blood stains that were found on both the inside and outside of the door. Turvey wrote:

**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 C1, Turvey Supplemental Report, at 2 (emphasis added).)

Although theoretically, someone other than an occupant of the home may have access to a key, evidence that someone with bloody hands used a key to access the home, likely mid-attack, is very compelling circumstantial evidence that Mr. Horowitz may in fact have been the perpetrator. On a related note, Dr. Laufer determined that the superficial injuries on Ms. Vitale's back may have been done with the straight side of a key. (Exhibit B, Laufer Declaration, at 2.) The prosecutor took every opportunity to argue that these marks were some type of ritualistic and/or Gothic "carvings" and that items in Petitioner's possession (e.g. a bumper sticker with the message "Separation of Church and Hate") that also had straight lines were evidence of guilt.

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(Exhibit A, Hill Interview, at 40.)

Dr. Laufer also concluded that the evidence indicated that Ms. Vitale knew the perpetrator, as described above. “The injuries establish that 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.” Laufer Declaration, at 2.

Trial counsel apparently was unaware of the recorded interview of Ms. Vitale’s sister, Tamara Hill, who had to seek out the police, along with her husband, Phil Hill.<sup>40</sup> Dr. Laufer’s insight that Ms. Vitale “may have tried to ‘negotiate’ an end to the altercation” is uncanny insofar as Ms. Hill describes her sister’s marriage. When they fought and he tried to storm off, she would be the one to follow him and “try to get him to stay. And say, “No, no, no, no. No, no, no. Don’t leave! Don’t leave, we have to talk this out. No, no, no, no. And uh, so there might have been a pursuit, and just trying to convince him to not leave. Or not get in the car.” (Exhibit A, Hill Interview, at 68.)

All of this information was readily available to trial counsel.

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<sup>40</sup> There is a one-page report that both trial counsel and appellate counsel had stating that Mr. Hill contacted law enforcement and suggested that his wife be interviewed regarding prior instances of domestic violence between his sister-in-law and Mr. Horowitz. Mr. Hill apparently had a background in law enforcement. (See Exhibit E, Police Report by Det. Goldberg, dated Nov. 3, 2005.)

When the undersigned contacted trial counsel to ask if she had watched the recorded interview of Tamara Hill, Ms. Leonida stated that she watched “everything” and read “everything.” She stated that she had Mr. Ed Stein, her defense investigator contact Ms. Hill and conduct a follow up interview. However, in a follow up conversation with Mr. Stein, he was unable to confirm this as true. Moreover, in trial counsel’s computer files, which were provided to present counsel, there are no notes relating to the interview of Tamara Hill, although there are notes documenting the contents of most of the other interviews (such as the Curiels, Jena Reddy, etc.). See, Declaration of Katherine Hallinan.

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 Mr. Horowitz and Ms. Vitale had a rocky relationship, that Mr. Horowitz was prone to fits of rage and violence, and that she had suffered prior domestic violence and abuse during their marriage, which seemed to have escalated as the building costs mounted and he prepared for a high-publicity homicide trial representing Susan Polk.

Ms. Vitale's sister, Tamara Hill, and her husband, Philip Hill, a former police officer, voluntarily went to the police station on October 18, 2005, to air their suspicions that Mr. Horowitz may have been involved in Ms. Vitale's death. (See Exhibit A, Hill Interview, at 1.) Mr. Hill had previously contacted law enforcement the day before, to express his suspicions. Ms. Hill, who described her relationship with Ms. Vitale as that of "best friends," (Exhibit A, Hill Interview, at 24) painted a picture of a very troubled and rocky relationship between Ms. Vitale and Mr. Horowitz. (See, e.g, Exhibit A, Hill Interview, at 19-24.) Ms. Hill explained that "either they're passionately in love, or it's a passionate rage. It's... it's one or the other."<sup>41</sup> (Exhibit A, Hill Interview, at 23.)

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<sup>41</sup> Ms. Hill described conduct on Mr. Horowitz part that closely resembles the so-called "cycle of abuse" that is typical of abusive relationships. See "Cycle of Abuse," available at [http://en.wikipedia.org/wiki/Cycle\\_of\\_abuse#cite\\_note-Dutton.26Golant-1](http://en.wikipedia.org/wiki/Cycle_of_abuse#cite_note-Dutton.26Golant-1) (last visited May 20, 2011). In the typical abusive cycle, there are four stages: the tension building stage; the incident of abuse; reconciliation; and calm.

Ms. Hill explains: "usually in these incidents, he would come back and be very remorseful. And probably say sorry. He might even start crying. . . . And so he continued to do it, but then had this pattern of coming back and being remorseful, and "I'm so sorry," and "I didn't mean to hurt you," and... you know. He had a kind of a pattern of explosion..." (Exhibit A, Hill Interview, at 25.) This behavior is typical of abusive relationships.

Ms. Hill said that Mr. Horowitz came with a lot of “baggage” and that he would act out in angry and abusive ways. She explained:

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 A, Hill Interview, at 20-21.)

Ms. Hill described incidents of rage on the part of Mr. Horowitz directed against Ms. Vitale, which would often escalate to involve 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.” ( Transcript of Interview with Tamara Hill, at 23.)

Ms. Hill recounted another incident where,

the toilet had overflowed or something, and . . . Pam had gone back asleep. 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. He was screaming 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 A, Hill Interview, at 23.)

In yet another incident, Mr. Horowitz reportedly told Ms. Vitale: “‘I just wish... you would die.’ And then [he] left.” (Transcript of Interview with Tamara Hill, at 21-22.)

Ms. Hill also reported that Mr. Horowitz was very jealous and suspicious. “He would accuse her – was very suspicious of her. This woman who would never ... and he would take anything and ... and ... and not trust her. And ... and she... it would wound her so deeply that – you know? ‘I would never do that. I would never do anything to hurt you.’” (Transcript of Interview with Tamara Hill, at

24.)

Although Ms. Hill, who lived out of state in Washington, reported incidents of physical abuse, such as shoving and throwing things at Ms. Vitale, as detailed above, she stated that she did not know how far the physical abuse actually went: “I think it was more, he’d be in this rage, and he may have come by her and used a hand to hit her arm, or might have been construed as him just getting her out of the way, rather than trying to assault her.” (Exhibit A, Hill Interview, at 23-24.) However, there was evidence, in trial counsel's possession, that indicated Mr. Horowitz may have hit Ms. Vitale on at least one occasion. Araceli Solis cleaned the Horowitz/Vitale home every other Thursday. (Exhibit F, Transcript of Interview with Araceli Solis (hereinafter “Solis Interview”), at 2). She told police on October 20, 2005, that approximately three or four months prior, Ms. Vitale called her and told her not to come and clean that day; she had been in an accident. (Exhibit F, Solis Interview, at 12.) When Ms. Solis returned the following week, Ms. Vitale had a black eye. “It was very black, and it looked very, very bad.” (Exhibit F, Solis Interview, at 13.) Ms. Solis’s account was apparently corroborated by Ms. Hill, who reported Ms. Vitale told her she had an accident where she hit her face with a door and broke her glasses.<sup>42</sup>

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<sup>42</sup> Ms. Hill reported:

She did break her glasses. Uh...She had an accident that she put her uh... They have a uh, a little storage uh... They got a storage shed there. And they have uh, workout equipment in there?... And there’s a treadmill in there, with handles or something that come out.

. . .And the way it’s wedged in there, apparently uh, the door doesn’t... You have to do something weird with the door to get into that space. And I know that [clears throat] about two months ago, and uh... she had... was rushing around trying to do something, and she came up and she hit that thing. . . .That corner of that handle. And it broke her glasses.

**That occurred in the middle of the summer.** And she...

While Ms. Hill experienced her brother-in-law's rage vicariously through Pamela, she also experienced it first-hand as his target. Years ago Mr. Horowitz represented her in a lawsuit against a physician involving allegations of sexual assault. (Exhibit A, Hill Interview, at 58.) After depositions had concluded, she was offered a settlement, but she decided that she did not care about the money, she wanted the doctor to have to answer in court for what he had done to her. "I wanted him on the stand. I wanted him to struggle and to answer to what he had done to me." (Exhibit A, Hill Interview, at 58.) Mr. Horowitz pressured her to settle, then exploded in a rage when she did not take his "advice."

And at the moment that 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. And uh, he had hurt me so much. . . 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 A, Hill Interview, at 58-64.)

Another potential witness never interviewed nor called to testify by trial counsel was a woman named Donna Powers, whom police interviewed in connection with Ms. Vitale's murder. She also recounted an incident where Mr. Horowitz exploded in a rage against her. (See Exhibit G, Transcript of Interview with Donna Powers (hereinafter "Powers Interview"), at 4.)

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She went to the emergency room. . . because she thought that the glass had gotten into her eye.... And she couldn't see. She was blinded. So the only thing I could say is I haven't her since that, and maybe, because those glasses were broken, these might have been glasses that she replaced those with. (Exhibit A, Hill Interview, at 43-44.) (Emphasis added.)

Ms. Powers was close friends with a woman named Brenda Abley, M.D., nee Lehman. (See Exhibit G, Powers Interview, at 4.) Dr. Abley knew Mr. Horowitz and Ms. Vitale through Dr. Abley's parents, the Lehmans.<sup>43</sup> (See Exhibit G, Powers Interview, at 28.) Ms. Powers believed that Mr. Horowitz and Dr. Abley were having an affair.<sup>44</sup> (See Exhibit G, Powers Interview, at 29.)

Ms. Powers was concerned that Brenda was abusing drugs and alcohol. (See Exhibit G, Powers Interview, at 10.) Sometime in May of 2005, Ms. Powers heard Brenda call in a refillable prescription for Valium and Vicodin to a pharmacy in Lafayette for Mr. Horowitz and Ms. Vitale. (See Exhibit G, Powers Interview, at 10-11, 14.) Knowing that Brenda was not Mr. Horowitz's or Ms. Vitale's doctor, Donna confronted Brenda. (Exhibit G, Powers Interview, at 11.) Brenda told Donna that Mr. Horowitz was under a lot of stress because of the Michael Jackson trial,<sup>45</sup> and that she wouldn't let a friend of hers be in pain. See

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<sup>43</sup>According to cell phone records, Mr. Horowitz placed a call to the Lehman household at 6:13 p.m. on October 15, 2005, mere minutes after calling the police to report finding Ms. Vitale's body. (Cell phone records provided to counsel in discovery.)

A police report written by Officer Barnes stated that two days after Ms. Vitale's death, while Mr. Horowitz was collecting some items of clothing from the home, "two subjects identifying themselves as Brenda Abley and Barbara Lehman arrived . . . after driving past the . . . security gate . . . Abley 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 H, Police Report, Det. J. Barnes, dated Oct. 24, 2005.)

<sup>44</sup>Ms. Powers believed Mr. Horowitz and Dr. Abley were having an affair because of the way Dr. Abley spoke about Mr. Horowitz, saying that she loved him (id. at 5, 34); that he was the only man she ever heard Dr. Abley speak of other than her ex-husband (id. at 34); that she saw them kiss on the lips (id. at 19); and that when Mr. Horowitz came to Dr. Abley's home, they spent time alone together in Dr. Abley's bedroom (id. at 29).

<sup>45</sup> Mr. Horowitz acted as a legal commentator during the Michael Jackson trial. As Mr. Ortiz reports, becoming a legal commentator was part

(Exhibit G, Powers Interview, at 11.)

Approximately two months later, on July 3, 2005, Mr. Horowitz called Ms. Powers out of the blue. (See Exhibit G, Powers Interview, at 6.) “Dan called me, 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 ever talk to her again, I’ll make sure you lose custody of your daughter.’” (See Exhibit G, Powers Interview, at 4.) Ms. Powers tried to explain that she was concerned about Brenda, because she believed she had a problem with drugs and alcohol. (See Exhibit G, Powers Interview, at 10.) When she mentioned that Brenda had called in the prescriptions for him and his wife, he “got extremely angry,” and it was at that point he threatened to take away her daughter. (See Exhibit G, Powers Interview, at 13.) “He didn’t know me from Adam. You know? He didn’t know me. I wasn’t a friend of his. And he called me up and he was angry . . . And he showed me a side of a human being, that... I mean he threatened me with my child. Who does that?” (See Exhibit G, Powers Interview, at 33.) Thus, there was a wealth of evidence provided to trial counsel that indicated that Mr. Horowitz had a significant problem with rage, that he was emotionally and physically abusive to Ms. Vitale, and that he may have been involved in an extra-marital affair.

The evidence that Mr. Horowitz was prone to fits of rage and anger and had a history of abusing Ms. Vitale is very compelling when viewed in light of the experts’ findings that Ms. Vitale’s killing was the result of rage or anger. As Dr. Laufer wrote: “The injuries are atypical of a burglary or robbery gone bad, and are

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of the “media plan” Mr. Horowitz and Mr. Ortiz devised to make Mr. Horowitz a celebrity attorney and thereby increase his earning potential. See (Exhibit I, Declaration of Rick Ortiz (hereinafter “Ortiz Declaration”), at 3.) Ortiz noted that Mr. Horowitz had become withdrawn from the home building process as his media cases, such as Scott Peterson and Michael Jackson trial. (Exhibit I, Ortiz Declaration, at 1.)

far more commonly associated with anger or rage.” (Exhibit B, Laufer Declaration at 1.) Mr. Turvey reached the same conclusion, stating that “the available evidence is not consistent with a profit motivation.” (Exhibit C, Turvey Report, at 3.) Rather, “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 C, Turvey Report, at 4.)

This evidence that Mr. Horowitz had problems with rage and anger, and that the killing was likely motivated by rage, is even more exculpatory when viewed in light of the evidence of Petitioner’s peaceful and non-violent demeanor. See 14 RT . . . If counsel had chosen to investigate or present 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 been sufficient to provide the reasonable doubt lacking in this case.

3. Evidence that the Marital Stress Was Building Right Before Ms. Vitale’s Death, as a Result of the Home Construction and the Related Financial Pressures.

The marital issues between Ms. Vitale and Mr. Horowitz became greatly exacerbated by the problems surrounding the construction of their home. (See Exhibit A, Hill Interview, at 26.) As is well known, for several years the couple was in the process of building a home. 8 RT 2084. The project was rife with difficulties from the start. Rick Ortiz was hired by Mr. Horowitz in March of 2002 to be the contractor for the building of the home.<sup>46</sup> (See Exhibit I, Ortiz

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<sup>46</sup> Mr. Ortiz was never contacted by anyone associated with the case, including law enforcement and Mr. Dyleski’s trial and appellate counsel. (See Exhibit I, Ortiz Declaration.) However, trial counsel should have known of Mr. Ortiz’s existence as several people reported that he may be a

Declaration, at 1.) According to Mr. Ortiz, the home had issues from the beginning because it was “unbuildable.” (See Exhibit I, Ortiz Declaration, at 1.) The original building plans were incomplete, and the home was too tall, did not have a fire, waste or water plan, among many other issues, which caused significant delays and increased the final construction costs. (Exhibit I, Ortiz Declaration, at 1.) Additionally, there were financial issues from early in the project. (Exhibit I, Ortiz Declaration, at 1.) Indeed, the very first check that Mr. Ortiz received from Mr. Horowitz bounced. (Exhibit I, Ortiz Declaration, at 1.)

However, many of the problems with the construction sprang from Ms. Vitale’s extreme indecisiveness. “She had difficulty making decisions, she altered elevations frequently after already being built, she changed materials, added custom features not in budget, made hundreds of smaller changes, ordered materials that took months to acquire and decided on a location that required significant . . . site improvements not in proposed budget.” (Exhibit I, Ortiz Declaration, at 1.) Her indecisiveness resulted in hundreds of thousands of dollars in lost time, and increased labor and materials. (Exhibit I, Ortiz Declaration, at 1.) This led to significant increases in costs, which strained the already over-burdened budget. As a result, Mr. Ortiz informed Mr. Horowitz and Ms. Vitale that the cost of completion would be \$600-800,000. (Exhibit I, Ortiz Declaration, at 2.) Because of the lack of funds, and the increase in costs as a result of the problems detailed above, Mr. Horowitz and Mr. Ortiz agreed that the building would be “construction grade,” meaning that only the basics would be completed, and the extras and luxuries would be added at a later date. (Exhibit I, Ortiz Declaration, at 2.) However, Ms. Vitale kept making costly changes and ordering expensive

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potential suspect who law enforcement should investigate, including Tammy Hill. (See Exhibit A, Interview Hill, at 16.)

materials well beyond the project's budget. (Exhibit I, Ortiz Declaration, at 2.) 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. (See Exhibit J, Change Orders to Date, dated June 1, 2004.)

Mr. Ortiz became very close to Mr. Horowitz and Ms. Vitale, and spent a great deal of time with them during the course of the construction. (Exhibit I, Ortiz Declaration, at 1). The problems with the construction of the home put a significant strain on the relationship. Mr. Ortiz witnessed them fighting regularly. (Exhibit I, Ortiz Declaration, at 2.) Mr. Horowitz withdrew from the process, while Ms. Vitale became more and more obsessed. (Exhibit I, Ortiz Declaration, at 2.) Ms. Vitale's health began to suffer. (Exhibit I, Ortiz Declaration, at 2.) She developed severe allergies and couldn't leave her home. (Exhibit I, Ortiz Declaration, at 2. When she did leave, she would do so only while wearing a mask, gloves, and cloth over her head.<sup>47</sup> (Exhibit I, Ortiz Declaration, at 2.)

Throughout this time, Mr. Horowitz was representing Pavlo Lazarenko, the former Prime Minister of the Ukraine, in a criminal case in the United States District Court for the Northern District of California. Mr. Horowitz told Mr. Ortiz that he was expecting a one million dollar bonus when Mr. Lazarenko was acquitted. (Exhibit I, Ortiz Declaration, at 3.) However, Mr. Lazarenko was convicted in May of 2004; hence, no bonus. Afterward, 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

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<sup>47</sup>This fact is very interesting when considered in light of the fact that Ms. Vitale was, according to Mr. Horowitz, supposed to attend the ballet with a friend that evening. See Police Report by Det. S. Pate, dated 11/01/2005 (p 242 of ALL.) Defense counsel has been unable to find any evidence that law enforcement ever identified or interviewed the friend with whom she was supposed to have attended the ballet.

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 I, Ortiz Declaration, at 3.) Because Mr. Horowitz had largely foregone his legal practice in order to pursue his career as a legal commentator, he had essentially little income coming in at that time, and without the anticipated bonus, there were no funds for the construction of the home. (Exhibit I, Ortiz Declaration, at 3.) At that time, Mr. Ortiz was already owed more than \$200,000. (Exhibit I, Ortiz Declaration, at 3.)

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 Union officials . . . He said it was the “mob” and they don’t “play.”

(Exhibit I, Ortiz Declaration, at 3.)

Mr. Horowitz used these threats, which Mr. Ortiz believed, to get Mr. Ortiz to sign a new modified contract, with Mr. Ortiz’s vacation home as collateral. (Exhibit I, Ortiz Declaration, at 3.) Mr. Horowitz then falsified a deed of trust, and recorded it, seizing Mr. Ortiz’s home. (Exhibit I, Ortiz Declaration, at 4.)

Thus, on October 15, 2005, Mr. Horowitz and Ms. Vitale were under a great deal of financial pressure, and were experiencing significant marital strife as a result.<sup>48</sup>

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<sup>48</sup> A man named Richard Sellers contacted the Contra Costa Sheriff’s Department on or about October 19, 2005. He reported that approximately 4 to 5 months before, Pamela had come to his home to view the tile in his home as she was considering using the same tile contractor, and he had provided Sellers as a reference. Ms. Vitale was accompanied by a man who she introduced as her husband, but upon seeing the news coverage

Ms. Hill confirmed that the home construction was placing a great deal of strain in the relationship:

So, several arguments over the last a 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 A, Hill Interview, at 28.)

Just before Ms. Vitale's death, a new crisis arose, and she was afraid to tell him. (Exhibit A, Hill Interview, at 28-29.) In one of their last conversations, just before the murder, Ms. Vitale confided to Ms. Hill that the workers started to install the flooring, but because it had been sitting in the basement for three years due to the many delays on the construction, the finish was ruined, and the flooring was unusable. (Exhibit A, Hill Interview, at 28-29.)

Tamara Hill: And she told me she 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.

Police Officer 2: And you never know if she actually told him about this or not?

Tamara Hill: I do not know. On Tuesday uh, I'm pretty sure she had not.

(Exhibit A, Hill Interview, at 29.)

Thus, there was evidence in trial counsel's possession that Mr. Horowitz was abusive towards his wife, both verbally and physically, that they were having

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associated with her murder, he realized that the man she had introduced as her husband was not Mr. Horowitz.

Mr. Sellers described the man as tall, 6'3" or 6'4", caucasian man who appeared well groomed and affluent. (See Exhibit K, Police Report by Det. C. Martin, dated Oct. 20, 2005.)

serious financial difficulties and personal strife over the home building, and that mere days before her death, Ms. Vitale had learned that they may need to replace tens or hundreds of thousands of dollars worth of building materials that had been ruined as a result of delays that were largely her fault. This is compelling evidence of a possible motive for Mr. Horowitz. Notably, Ms. Vitale was beaten with a piece of crown molding that was to be used in the construction of the home that was causing so much strife between Ms. Vitale and 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.

In the period immediately following Ms. Vitale's death, Mr. Horowitz's demeanor did not seem consistent with that of a grieving husband, and many of his actions seemed to indicate a consciousness of guilt. For example, Sgt. David Hoffman, first on the scene, testified at preliminary hearing that when he first arrived, he placed Horowitz in a patrol vehicle while they conducted a protective sweep, and Horowitz immediately told him his alibi: As he was getting seated in the patrol vehicle Mr. Horowitz told Sergeant Hoffman that he was with "a bunch of retired police officers that day" and that he was an attorney. PX 36.

When Mr. Horowitz was interviewed by the police the night his wife was found murdered, he handed over a receipt for Safeway, his last "errand" before

arriving home, unprompted.<sup>49</sup> See Video of Horowitz Interview, at 23:23.<sup>50</sup>

While being interviewed by the police, Mr. Horowitz did not show any obvious signs of shock or grief. See Video of Horowitz Interview. Mr. Horowitz made numerous phone calls, and similarly to how Sgt. Hoffman described him at the scene, he appeared very animated. See Video of Horowitz Interview, 21:00 - 21:37. In the video, he lays out his theory of the case many times over while speaking with people on the phone, in very similar language. See Video of Horowitz Interview, at 21:00 - 21:31. He says that he “could see the scene” and that he understands what happened, from spending a few minutes in the home before the police arrived. Id.

As he did from the inception, Ms. Hill also stated that Mr. Horowitz explained what he thought happened: “he just started laying out a scenario for us . . . And, ‘This is what I think happened.’ (Exhibit A, Hill Interview, at 39.)

Ms. Hill reported that Mr. Horowitz did not seem angry or enraged:

He wasn’t enraged .... haven’t seen him be angry over the death. Like, “I’m going to get this bastard too,” you know? I mean, I was like... “You know, we’re going to get this guy, and...” You know. . . I was just enraged that my sister was killed, and I’ve never have seen any anger with the death of her. I’ve seen crying. And I’ve seen uh... And uh, you know, sobbing I guess. He was say... I mean – you know – shaking and sobbing . . .and I’ve seen just laying it out. Like, “This is what I think happened.”

(Exhibit A, Hill Interview, at 48.)

His unusual demeanor was also exhibited in the video. While being

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<sup>49</sup>Notably, while at Safeway, Mr. Horowitz only purchased a few items, including salad and salad dressing. (Exhibit L, Safeway Receipt, dated Oct. 15, 2005.) 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 M, Police Report, by G. Schiro, dated Oct. 20, 2005.)

<sup>50</sup> The defense has not yet had the opportunity to have the video of Mr. Horowitz transcribed, but a copy of the disk is available upon request.

interviewed by the police, he received a phone call from Bob Massie, an attorney with whom he had breakfast that morning. In a very matter-of-fact voice, he says “Hi Bob, I’m here with two homicide guys. My wife was murdered.” Video of Interview of Mr. Horowitz, at 23:04.

Although Mr. Horowitz made many phone calls in the hours following the discovery of Ms. Vitale’s body, Mr. Horowitz did not call Ms. Vitale’s family to let them know of her death. He had his sister, Carol, call Ms. Vitale’s sister, Ms. Hill, at around 7:45, nearly two hours after Ms. Vitale was discovered. “I assumed that was because he was... couldn’t make that call.” (Exhibit A, Hill Interview, at 37, 79.) Ms. Hill then notified the rest of her family. However, in a TV interview with MSNBC, he claimed that when he was sitting in the police car, he was making phone calls to his family and to Ms. Vitale’s family, including her sister.<sup>51</sup>

Mr. Horowitz immediately began pointing fingers at potential suspects. After conducting the protective sweep, Sergeant Hoffman asked Mr. Horowitz for personal information about Ms. Vitale but Mr. Horowitz started talking about who he thought was responsible, and that Joseph Lynch - who “they had a history of problems with” - was supposed to come over that day with a check. (PX 46; PX 50) While in the police station that evening, he repeatedly tells people on the phone that he believes it was Lynch. Video of Interview of Daniel Horowitz at 22:05, 22:09. Ms. Hill also reported that he immediately indicated he believed it was Lynch. Hill at 49.

Finally, Ms. Hill reported that the day before she was interviewed by the police, Mr. Horowitz had pulled her into the bathroom and began making

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<sup>51</sup> See Interview with Daniel Horowitz, available at <http://v5.app.msn-int.com/watch/video/horowitz-speaks-out/6nzsodu> (last visited May 19, 2011).

statements as to why he was angry with his wife and how she had hurt him, which seemed to imply a consciousness of guilt. (Exhibit A, Hill Interview, 72-74.)<sup>52</sup>

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<sup>52</sup>He pulled me into the bathroom yesterday to talk to me.

PO2: Uhuh.

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?"

PO2: He had recently talked with Jan?

TH: Yeah.

PO2: And Jan had mentioned that to him?

TH: Yeah. And... and so he uh... I went into the bathroom, and... and he wanted me to confirm somehow that... that that was true.

PO2: Uhuh.

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. Like how am I supposed to do about this? What am I... How am I supposed to react to that?"

PO2: Uhuh.

TH: Well...

PO2: What did he say after that? In that... in that conversation? How much...

TH: He just... He said, "I just wanted to let you know, that really hurt me."

PO2: Hurt that you didn't tell him?

TH: No, that... that she might...

PO2: Or that she would have had...

TH: ...have had... That she might have gone to dinner with this guy. Or had phone... telephone calls and not told him.

PO2: He seemed kind of resentful of that?

TH: Totally.

PO2: Yeah.

TH: Oh, totally. It was like [unintell] he goes, "Yeah that really hurt. That really hurts me that she didn't... she [unintell]"

1:58:27.4

Thus, there was a variety of evidence readily available to defense counsel that showed that in the period immediately following Ms. Vitale's death, Mr. Horowitz acted in a manner that implied a consciousness of guilt.

5. 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. See People v. Cudjo (1993) 6 Cal.4th 585, 609; People v. Hall (1986) 41 Cal.3d 826, 833. Here, the direct and circumstantial evidence linking Mr. Horowitz to the crime was certainly capable of creating a reasonable doubt as to Mr. Dyleski's guilt, particularly in light of the fact that there were serious questions as to Mr. Dyleski's guilt. Why would a

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And I was like, "Where is this coming from? Why are you addressing that with me?"

PO2: Right.

TH: You know?

PO2: Were there any other issues that you...

TH: Right...

PO2: That's in the last few days since uh, this had happened, that he displayed – you know – resentment toward her? Or...

TH: He kept... he kept repeating to me – you know – uh, that that was her house.

PO2: Hmm.

TH: You know?

PO2: What did he say...

TH: And that he [unintell] not going to be a lawyer anymore 'cause uh... And I didn't understand that either though. The point of not being lawyer. "I...I... I can't be lawyer anymore. I can't do this, I can't do that."

PO2: Can't be lawyer?

TH: "I can't... I'm... I'm walking away from all of this." And, you know "That was her house, so you know. I... I... I don't need to make money." And... To me it's irrational. (Exhibit A, Hill Interview, at 72-74.)

young man with no history of violent behavior brutally murder a woman he has never met out of anger? Moreover, the physical evidence used to link Mr. Dyleski to the crime was “problematic at best.” (Exhibit C, Turvey Report.) If the jury had learned of Mr. Horowitz’s history of abuse and violence, the issues in the marriage, and the physical evidence implicating him, they may very well have found the utter lack of motive in Mr. Dyleski sufficiently troubling to obtain reasonable doubt.

Petitioner is informed and believes that trial counsel made little effort to investigate any evidence of third party culpability, in general, and Mr. Horowitz in particular. See Declaration of Katherine Hallinan. In a conversation with Ms. Leonida, counsel was informed that she had investigated “everything,” had watched all the taped interviews, and had her investigator Ed Stein interview the Hills and Ms. Powers. See Declaration of Katherine Hallinan. However, Mr. Ed Stein stated that he had no memory of interviewing the Hills, and had no idea who Ms. Powers was. See Declaration of Katherine Hallinan.

Moreover, in trial counsel’s computer files, which were provided to habeas 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, Jena Reddy, etc.). See Declaration of Katherine Hallinan. This implies that even if Ms. Leonida did in fact watch the videos of those interviews, as claimed, somehow she failed to recognize their worth. This failure to investigate or recognize the obvious exculpatory nature of the evidence implicating a third party in the crime was a failure to render effective assistance.

Further evidence that Ms. Leonida failed to investigate evidence of third party culpability is the fact that she did not make any contact with Mr. Ortiz, although several members of Ms. Vitale's family considered that he might be

involved with her death. (See Exhibit I, Ortiz Declaration, at 4.)

However, in addition to her failure to conduct further investigation, trial counsel failed to present the evidence of third party culpability that she did have in her possession. For example, Ms. Susan Polk, Mr. Horowitz's client at the time of Ms. Vitale's murder, provided law enforcement and Ms. Leonida with a declaration stating that Mr. Horowitz told her that he had framed Mr. Dyleski. (See Exhibit N, Declaration of Susan Polk (hereinafter "Polk Declaration"), at 13.) Mrs. Polk alleged that when she told Mr. Horowitz that she believed Mr. Dyleski was innocent and may have been framed, Mr. Horowitz responded: "I got him. I did a better job on him than they did on you. I got that little "fuck" and he's not getting out of this." (Exhibit N, Polk Declaration, at 13.) Mrs. Polk alleges that Mr. Horowitz also told her "that he had a lot of friends in prison, and Scott Dyleski wouldn't survive prison." (Exhibit N, Polk Declaration, at 13.) In addition, Ms. Leonida had in her possession most of the evidence that was documented above, including the interviews of Ms. Hill and Ms. Powers, and the physical evidence indicating it was not a stranger perpetrator.

In People v. Hamilton (2009) 45 Cal. 4th 863, it was found that the court's ruling limiting expert testimony on the issue of third party culpability was not error, because the evidence did not connect the third party to the crime and therefore had little probative value. Id. at 913-14. In that case, a clinical and forensic psychologist would have testified that the police should have conducted more investigation into the victim's husband, because he had a juvenile record, a Navy record that indicated "some events related to alcohol abuse," and a police record that indicated a prior instance of domestic violence against a previous wife. Id. at 913. The Court found that "[t]he proffered evidence regarding Terry Buchanan did nothing to connect him to the crime in any manner." Id. at 914.

Here, on the other hand, the evidence that could have been presented did connect Mr. Horowitz to the actual crime. There was physical evidence at the crime scene indicating the perpetrator was familiar with the home, was known to Ms. Vitale, and may have had a key; there was evidence that Mr. Horowitz had a history of violence against Ms. Vitale herself; and there was evidence that he admitted to framing Mr. Dyleski in the crime.

Notably, there may have been a variety of additional evidence directly linking Mr. Horowitz to the crime, however, it appears that law enforcement largely failed to investigate alternative suspects, including Mr. Horowitz. For example, there is no evidence that law enforcement investigated Mr. Horowitz's alibi; or that his vehicle was screened for evidence of potential blood. There is no evidence that law enforcement sought to obtain cell phone tower records, in order to pinpoint Mr. Horowitz's location throughout the day and either confirm or deny his alibi. There is also no evidence that they ever attempted to contact the "friend" with whom Ms. Vitale was allegedly supposed to have been going to the ballet that evening. Not only were these issues not investigated, but these failures on the part of law enforcement were never questioned by trial counsel through cross examination of law enforcement officers.

Trial counsel also failed to explore any of these topics through cross-examination of Mr. Horowitz, which comprised only two pages of transcript. (8 RT 2121-2122)

Moreover, there were a variety of other leads that were not investigated. For example, Mr. Ortiz was never contacted by police, although several persons suggested he may be the responsible party. (See Exhibit I, Ortiz Declaration, at 4; Exhibit A, Hill Interview, at 16-17.) An individual by the name of David Elder, who at the time of Ms. Vitale's murder was dating a girl by the name of Megan

Curtis, who lived on Hunsaker Canyon, reportedly confessed to Megan that he committed this crime. This was reported to law enforcement on October 21, 2005 by Michael Manter, a friend of Megan's. Notably, habeas counsel has determined through independent investigation that Mr. Elder's DNA is on file at the Durango, Colorado police department, and thus was easily available to law enforcement for testing. Ms. Leonida failed to point out these omissions by law enforcement to investigate alternative suspects.

Thus, Ms. Leonida had a variety of evidence available to her that directly and circumstantially implicated Mr. Horowitz in the murder of his wife. Her failure to present this evidence deprived the jury of crucial exculpatory information that brought Mr. Dyleski's guilt into question, and provided an alternative theory through which the jury could analyze the evidence. "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." Lisker v. Knowles, 651 F. Supp.2d 1097, 1121 (C.D. Cal. 2009) This severely prejudiced Mr. Dyleski by depriving him of his most viable defense.

C. Trial Counsel Was Ineffective for Failing to File a Motion to Set Aside the Information Pursuant to Penal Code section 995, and This Failure Fatally Prejudiced the Defendant.

Trial counsel's failure to file a motion to set aside the information, in light of the evidence presented at the preliminary hearing, was unreasonable, and caused prejudice to Petitioner. Trial counsel had a number of potentially meritorious issues she could have raised in such a motion, including the lack of evidence as to burglary and the related felony murder special circumstance allegation. Moreover, this failure was more egregious in light of the fact that the

charge of burglary and the special circumstance allegation were added to the information after the holding order had issued. 4 RT 680. Thus, the court made no probable cause finding as to the charge of burglary or special circumstance allegation. In light of the dearth of evidence supporting the charge of burglary, trial counsel's failure to file a motion to set aside the information was well below an objectively reasonable standard.

Furthermore, had such a motion been successful, the prosecution would have been unable to assert a theory of felony murder, and thus would have had to prove premeditation and deliberation to obtain a first degree murder verdict. See Jury Instructions 8.20, 8.21, 5 CT 1609-11. Moreover, the special circumstance was also added after the issuance of the holding order and was also based on the allegations of burglary. See Jury Instruction 8.81.7, 5 CT 1630. The special circumstance finding resulted in a sentence of life imprisonment without the possibility of parole. See Penal Code section 190.2(a)(17). Thus, trial counsel's failure to pursue a potentially meritorious motion to set aside the information highly prejudiced Mr. Dyleski, as it enabled a first degree special circumstance conviction, and thus was ineffective assistance of counsel in violation of petitioner's Sixth Amendment Right to Counsel.

A preliminary hearing is "designed to weed out groundless or unsupported charges of grave offenses and to relieve the accused of the degradation and expense of a criminal trial." People v. Superior Court (Mendella) (1983) 33 Cal.3d 754, 759. "Preliminary hearings and section 995 motions operate as a judicial check on the exercise of prosecutorial discretion and help ensure that the defendant is not charged excessively." People v. Plengsangtip (2007) 148 Cal.App.4th 825, 835 (internal quotations omitted). Penal Code section 995 states that an information "shall be set aside" if the defendant has been "committed

without reasonable or probable cause.” “Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.” Rideout v. Superior Court (1967) 67 Cal.2d 471, 474. 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. In the instant case, there was no evidence provided at the preliminary hearing from which a reasonable person could infer that there was any intent on the part of the perpetrator or Mr. Dyleski to commit burglary. For this reason, a 995 motion would have likely been meritorious if brought, and trial counsel’s failure to present a potentially meritorious motion was ineffective assistance of counsel.

The initial complaint against Petitioner contained only one count, Murder (Penal Code section 187), with a deadly weapon enhancement (bludgeon) (Penal Code section 12022(b)(1) e, and a special allegation that Mr. Dyleski was at least 16 years of age at the time of the offenses (Welfare and Institutions Code section 707(d)(1)). A preliminary hearing was held on February 14 - 17, 2006. After no argument by trial counsel, Mr. Dyleski was held to answer on the single count of murder. On March 1, 2006, an Information was filed, which added a special circumstance allegation of Felony Murder, alleging that the murder was committed during the commission of a residential burglary (Penal Code section 190.2(a)(17)); and a second count of first degree residential burglary (Penal Code section 459/460(a)). Information 3 CT 683.

Notably, trial counsel intended to file a 995 motion. See 3 CT 688, Minute Order of the Court, Readiness Conference, March 17, 2006 (“the Court sets the following dates. April 28, 2006 at 9:00 a.m. for 995 Motion). However, trial

counsel did not file a 995 motion. See 3 CT 689, Minute Order (“Court states that today is the time and place for 995 Motion. Dep. P.D. Leonida informed the court previously that she would not be filing a 995 Motion. . . . 995 Motion is dropped.”). Her failure to actually file said motion was ineffective assistance of counsel, having no conceivable strategic reason.

There were a number of issues that trial counsel could have raised in a 995 motion. Most glaring is the sufficiency of the evidence as to the burglary count, and the special circumstance felony murder allegation. Because these charges were added after the court issued its holding order, no judge had reviewed the evidence to ensure that there was support for these charges. Additionally, there was insufficient evidence as to the commission of the murder. For example, the prosecution relied greatly on the Y-STR evidence, as this was the only physical evidence ostensibly linking Mr. Dyleski to the scene of the crime. However, Y-STR, as Mr. Harmor conceded at the preliminary hearing, is a better tool for exclusion, than inclusion. In the instant case, no statistical analysis accompanied the results of the Y-STR testing conducted by the Serological Research Institute (SERI). Gary Harmor, a SERI Forensic Serologist, admits that Y-STR is a better test for exclusion than inclusion - i.e. it can reliably determine that a given DNA sample does *not* come from a particular person, but it cannot reliably determine that a given DNA sample *does* come from a particular person. Therefore, the only ‘data’ that he can offer regarding the Y-STR profile which he developed from the crime scene evidence is that it was not found in a database of 3,561 profiles.<sup>53</sup> In other words, the Y-STR findings cannot be considered evidence of Petitioner's guilt.

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<sup>53</sup> Citing Reporter’s Transcript of Preliminary Hearing, RT 585:8-13; RT 582:23-583:6.

This highly questionable evidence was never challenged despite the availability of Penal Code section 995 review, on the ground that Petitioner was held to answer on far less than competent evidence. Further, there was no testimony by a forensic examiner as to the time of death. Because of the potential alibi of Mr. Dyleski, the issue of time was critical. Ms. Leonida's failure to raise this issue as a means of showing a complete lack of evidence on the murder charge was ineffective.

Moreover, the failure to file a 995 generally precludes review of any error at the preliminary hearing by pretrial writ or by appeal from a judgment of conviction. Penal Code section 996. Thus, Ms. Leonida's failure to bring such a motion largely precludes any subsequent counsel from addressing any error that might have occurred in the proceeding. Furthermore, had such a motion been brought and been unsuccessful, trial counsel could have brought a pretrial writ, and if that had been successful, prejudice would have been presumed. People v. Coleman (1988) 46 Cal.3d 749, 773. On appeal after trial, prejudice is not presumed, and thus to obtain reversal, a defendant must show that error at the preliminary hearing resulted in prejudice. See People v. Cabrera (2007) 152 Cal.App.4th 695, 701. Thus, trial counsel's failure to bring a 995 motion cannot be considered a reasonable strategic decision, and it prejudiced the defendant as it denied him the opportunity to argue as to the lack of evidence of both murder and burglary. was ineffective assistance.

D. Trial Counsel Was Ineffective for Failing to Suggest Potential Pinpoint Jury Instructions to Address Defense Theory of the Case.

Trial counsel rendered ineffective assistance of counsel for failing to request an instruction to pinpoint the specific theory of the defense case. Generally, a defendant is entitled, upon request, to a jury instruction that pinpoints the specific theory of the defense, and explains to the jury how the evidence of

that defense may relate to the prosecution's burden. People v. Earp (1999) 20 Cal. 4th 826, 896. "A trial court must give jury instructions that pinpoint the theory of the defense, but it can refuse instructions that highly specific evidence as such." Id.

In the present case, the defense did not request any special instructions on any matter. See Proposed Jury Instructions, 5 CT 1482-1568. For example, counsel failed to request Caljic 4.50, an alibi defense instruction. Federal Courts have held that if requested, the failure to give the alibi instruction is reversible error per se. See United States v. Zuniga (1993) 6 F.3d 569, 570. This is true even if the alibi evidence is "weak, insufficient, inconsistent, or of doubtful credibility." Id. The court states that "[a]n alibi instruction is critical because a juror, unschooled in the law's intricacies, may interpret a failure to prove the alibi defense as proof the defendant's guilt." Id.

However, California courts have held that the court does not have a sua sponte duty to instruct on an alibi defense, and it is sufficient if the jury is instructed using the standard instructions as to reasonable doubt and burden of proof. See People v. Pimentel (1979) 89 Cal.App.3d 581, 585. Moreover, the California Supreme Court has rejected a finding of ineffective assistance of counsel on the basis of defense counsel's failure to request such an instruction. People v. Alcala (1992) 4 Cal. 4th 742, 805. In Alcala, the Court found that because the standard reasonable doubt and burden of proof is believed to be sufficient, there can be no prejudice. Id.

Here, although counsel's failure to request an alibi instruction may not be sufficient grounds for a finding of ineffective assistance of counsel, it is indicative of trial counsel's overall failure to pursue a variety of exculpatory evidence, or to ensure that this evidence was presented effectively to the jury. Indeed, the fact that

trial counsel did not attempt to suggest a single special instruction, while the prosecution requested several, is indicative of the lack of effort expended towards pursuing a defense in this case. When viewed cumulatively, this error in conjunction with the many other failures on the part of defense counsel resulted in prejudice to the defendant.

## II.

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 (finding appellate counsel following proper procedures was not ineffective); Smith v. Murray (1986) 477 U.S. 527, 535. Thus, as when assessing the performance of trial counsel, when alleging that appellate counsel was ineffective, a petitioner must show that the performance was objectively unreasonable and that there is a reasonable probability that, but for appellant counsel's error, petitioner would have prevailed on appeal. Smith v. Robbins, supra, 528 U.S. at 285.

Here, appellate counsel was ineffective for failing to allege potentially meritorious defenses, specifically the ineffective assistance of trial counsel; for asserting arguments that pre-supposed Mr. Dyleski's guilt; and for failing to properly advise Mr. Dyleski as to how to pursue potentially meritorious defenses through a habeas petition. These failures denied Mr. Dyleski his due process rights, and fell below a reasonable standard of conduct, resulting in severe prejudice to Mr. Dyleski.

A. Appellate Counsel Provided Ineffective Assistance of Counsel in Failing to Allege that Trial Counsel Was Ineffective for Failing to Bring Motion to Set Aside the Information.

Appellate counsel provided ineffective assistance of counsel for his failure to raise trial counsel's failure to bring a motion to set aside the information. (See argument IC, *supra*.)

B. Appellate Counsel Was Ineffective for Failing to Address Errors in Jury Instructions.

Appellate counsel was ineffective for failing to address critical errors in the jury instructions. This failure prejudiced the defendant by denying him the opportunity to pursue a number of potentially meritorious defenses. Errors in jury instructions are some of the most often successful types of claims asserted on appeal. "[O]f the many and varied contentions of trial court error we are asked to review, nothing results in more cases of reversible error than mistakes in jury instructions." People v. Thompkins (1987) 195 Cal.App.3d 244, 252. Thus, appellate counsel's failure to address the errors in jury instructions in the present case is all the more prejudicial, as such error is more likely than many types of error to result in a reversal.

The prosecution requested, and received over defense objection, a special instruction on unanimity, which stated:

In a prosecution for murder, it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution so long as each juror is convinced beyond a reasonable doubt that the defendant is guilty of murder as that defense is defined by these instructions.

5 CT 1503.

This instruction, particular when viewed in conjunction with the other instructions on murder, was unnecessary and very confusing. It is unclear if it refers to different factual theories, i.e. different motives or factual scenarios; felony murder versus malice aforethought; different theories of malice; or first

degree versus second degree murder.

C. Appellate Counsel Provided Ineffective Assistance of Counsel in Opening His Brief with an Argument that Presupposed Mr. Dyleski's Guilt.

In light of the many issues raised in this petition, and the insufficiency of the evidence as to Mr. Dyleski's guilt, appellate counsel was ineffective for opening his brief with an argument that presupposed Mr. Dyleski's guilt. In the Petition for Review submitted to the Supreme Court of California on April 27, 2009, appellate counsel asserted as his initial claim that Penal Code section 190.5(b) is unconstitutionally vague, as it creates a presumption that the greater sentence be imposed and it fails to describe the factors the court should consider. However, this argument presupposes that Mr. Dyleski is guilty. By opening his brief with an argument that presupposes guilt, appellate counsel prejudiced Mr. Dyleski.

D. Appellate Counsel Rendered Ineffective Assistance of Counsel for His Failure to Advise Mr. Dyleski of Potentially Meritorious State Habeas Claims that He Learned of in the Courts of His Representation.

Although appellate counsel has no duty to investigate potential grounds for collateral attack, because appellate counsel in the instant case was privy to information that indicated such grounds existed, he had an ethical obligation to advise Mr. Dyleski as to how to pursue such claims. His failure to do was ineffective assistance of counsel and resulted in delays: on the part of Mr. Dyleski in seeking habeas counsel and therefore in the filing of this petition. Moreover, it significantly reduced the amount of time available to habeas counsel for investigating potential meritorious grounds for post-conviction relief, and significantly curtailed the development of the evidence presented herein. Moreover, throughout this period of unnecessary delay, Mr. Dyleski has been incarcerated, while potentially meritorious grounds for collateral relief went un-

investigated and unrepresented.

Both the federal and state constitutions recognize and guarantee a defendant's right to petition for a writ of habeas corpus. United States Constitution, Art. I, sec. 9, cl. 2.; California Constitution, Art. I, sec. 11. However, there is no federal right to the assistance of counsel in habeas proceedings. In California, if a petitioner has made a prima facie showing that he is entitled to relief and the court issues an order to show cause, the court must appoint counsel for any unrepresented, indigent defendant. Cal. Rules of Court 4.551(c)(1)-(2).

Appointed appellate counsel in noncapital cases has no duty to investigate potential grounds for a collateral attack on the judgment. In re Clark (1993) 5 Cal.4th 750, 783, n. 20. However, if, in the course of acting as appellate counsel, counsel learns of facts outside the record that would support a petition for writ of habeas corpus, counsel has an ethical obligation to advise his client of the means available to pursue that relief. *Id.* Here, appellate counsel did learn of facts outside the record that could potentially support habeas relief. Specifically, appellate counsel had in his possession as of May 10, 2009, the report prepared by expert crime scene analyst, Mr. Turvey, identifying a number of potentially fruitful areas for post-conviction relief.

Mr. Turvey identified a number of critical issues, including improper collection of evidence by law enforcement, potentially exculpatory physical evidence that was not examined, that physical evidence was incompatible in several critical respects with a finding that Mr. Dyleski was guilty, that the DNA evidence in the case was highly problematic, and that trial counsel failed to sufficiently examine or investigate the physical evidence in the case. (See Exhibit C, Turvey Report, at 2.)

Moreover, Mr. Turvey identified a number of areas where expert analysis

and testing was needed. For example, he found that the DNA results in the case were “problematic at best” and raised “the specter of potential fraud.” *Id.* at 7. He stated that trial counsel erred in failing to examine these issues through the testimony of a DNA expert, and he recommended an independent DNA analyst should be hired to reassess the DNA evidence in the case. *Id.* Mr. Turvey further criticized defense counsel’s failure to hire a crime reconstruction and bloodstain patter analyst to evaluate the prosecution’s theories, a digital evidence expert, or a crime scene analysis expert. *Id.* at 7-8. Thus, Mr. Turvey identified a number of potential areas of investigation for a future habeas petition, including failures of trial counsel, errors in the prosecution, and potential expert analysis to be conducted in the future.

Mr. Turvey’s report was based on materials he received “[b]etween October of 2008 and March of 2009 . . . from, or at the direction of,” appellate counsel. See *Id.* at 1. Mr. Turvey sent his report directly to appellate counsel on May 10, 2009. Thus it is reasonable to assume that appellate counsel was aware of the contentions contained within it. Mr. Turvey’s report should have alerted appellate counsel to a number of potentially meritorious defenses that could be explored through a state habeas petition, including ineffective assistance of trial counsel.

However, appellate counsel failed to advise Mr. Dyleski of these potentially meritorious defenses or how to pursue such defenses. Rather, when the U.S. Supreme Court denied certiorari on May 24, 2010, appellate counsel informed Mr. Dyleski that the next step in the process was a filing of a federal habeas. (See Exhibit O, Letter from Philip Brooks to Scott Dyleski, dated May 26, 2010.) In a letter dated June 27, 2010, appellate counsel discouraged Mr. Dyleski from contacting a habeas attorney, because it would be so costly and “[t]herefore,

I think it is worthwhile to ask the federal court to appoint counsel for you before attempting to retain someone privately. I can help you to put together a motion to the federal court for the appointment of counsel, to be filed along with the federal petition.” (See Exhibit O1, Letter from Philip Brooks to Scott Dyleski, dated June 27, 2010.) Appellate counsel prepared the federal habeas corpus forms for Mr. Dyleski to file pro per, and he explained “I have filled out everything necessary to raise all of the federal Constitutional grounds that I raised in the California state appeal, so that if you want to go ahead and get your federal habeas corpus petition filed you can just sign and date the forms where necessary and send them off. Instead of writing out the legal arguments over again, I have just put, “see accompanying petition for review,” and you can send the federal court a copy of the petition for review that I filed in the California Supreme Court along with the other papers.” (See Exhibit O2, Letter from Philip Brooks to Scott Dyleski, dated February 5, 2011.)

If Mr. Dyleski had taken Mr. Brooks’ advice and foregone his opportunity to file a state habeas, he would have been prevented from ever raising any issues not raised on direct appeal in federal court, including all collateral issues and all novel issues presented herein, as a result of the “total exhaustion” rule. See Rose v. Lundy (1982) 455 U.S. 509. Moreover, although he could have attempted to bring a state habeas claim asserting collateral or heretofore unasserted issues at a later date, he would have had to overcome California’s timeliness standards, which requires a state habeas petition to be filed without “substantial delay.” In re Robbins (1998) 18 Cal 4th 770, 780; In re Clark (1993) 5 Cal.4th 750, 765 n.5.

As a result of appellate counsel’s erroneous advice, Mr. Dyleski and his family made no attempt to contact a habeas attorney or pursue any sort of state

habeas claim. Mr. Dyleski's family initially contacted present counsel did not contact counsel until two months before the federal habeas deadline was to expire. (DECLARATION) At that time, Mr. Dyleski sought counsel simply to review the federal habeas petition already prepared by appellate counsel. (DECLARATION) After only a brief review of the appellate briefs and record, counsel was immediately aware of a number of potential state habeas issues, including most glaringly the allegations of ineffective assistance of trial counsel made herein. (DECLARATION)

Appellate counsel's failure to advise Mr. Dyleski as to the existence of state habeas relief and how to pursue potentially meritorious collateral issues, and his advice that Mr. Dyleski should only renew the direct appeal claims through a federal habeas claim, was a violation of his ethical obligation to inform his client of how to pursue any potential habeas claims that he observes in his preparation of his direct appeal. In re Clark (1993) 5 Cal.4th 750, 783, n. 20. This failure resulted in significant delay by petitioner in seeking aid in filing a habeas petition. This, in turn, left current counsel with less than two months to obtain organize, and review the voluminous records and documents associated with this case, investigate potential defenses, consult with experts on these issues, and prepare this current petition before running afoul of the federal habeas one-year statute of limitations.

As a result of this delay resulting from appellate counsel's erroneous advice, habeas counsel has had to significantly curtail the potential avenues of investigation. For example, counsel did not have sufficient time to:

1. Contact critical witnesses to obtain additional information and statements. For example, counsel has attempted to contact Mr. Philip Hill and Ms. Tamara Hill to further question them regarding

the content of their interview conducted October 18, 2005. (Exhibit A, Hill Interview.) Notably, although Mr. Hill accompanied Ms. Hill to the police station on that date in order to make a statement to the police, the Hills had to leave, and the police never obtained a statement from him. (Exhibit A, Hill Interview, at 85 (“... apologize to Philip for... ‘cause ... we didn’t get a chance to talk to him and we’d love to talk to him either this afternoon or tomorrow.”).) Habeas counsel has been unsuccessful in reaching the Hills and would require additional time in order for an investigator to locate them.

2. Consult with experts and obtain additional analysis or retesting of critical physical evidence. Experts that habeas counsel would need to consult include:
  - a. DNA Analyst to analyze and test the many items of physical evidence that went un-tested in this case. (Exhibit C, Turvey Report, at 2-3.) Mr. Turvey identified ten potentially exculpatory items of physical evidence that were never tested. (Exhibit C, Turvey Report, at 2-3. If habeas counsel had additional time, they could have pursued testing and analysis of these items.
  - b. DNA Analyst to re-analyze the “problematic” DNA testing that was already performed. (See Exhibit C, Turvey Report, at 5.) As Mr. Turvey explained, “the DNA results used to associate Scott Dyleski to this crime are problematic at best, and require an independent DNA Analyst for analysis and interpretation.” (Exhibit C, Turvey Report, at 5.) He

continued “[t]he flawed methodology and subsequent false testimony are beneath best practice, and raise the specter of potential fraud. An independent DNA Analyst must evaluate this possibility.” Habeas counsel did consult with such a DNA Analyst, a Dr. Edward Blake. Dr. Blake informed us that the items of discovery relating to the DNA evidence that we had received from trial counsel were insufficient to allow for any re-testing or re-analysis, and that there was insufficient time to obtain the items needed and conduct any re-testing and analysis of the DNA evidence. (See Exhibit P, Letter from Dr. Edward Blake, dated April 28, 2011.)

- c. Statistical DNA Analyst to review the statistics used to assess the confidence interval for Y-STR DNA results to determine the accuracy of the testimony on that evidence.
- d. Crime reconstruction and bloodstain pattern analyst to evaluate the physical evidence. (See Exhibit C, Turvey Report, at 7. Turvey explains “[t]his would have also been crucial for establishing alternate theories of the crime and refuting witness testimony.” (Exhibit C, Turvey Report, at 7.)
- e. Cell phone tower expert to assess Mr. Horowitz’s cell phone records to confirm his alleged whereabouts throughout the day of Ms. Vitale’s murder.

Thus, there was a variety of potential avenues for investigation that

habeas counsel was unable to pursue for the purpose of this petition because of the short time frame in which they were operating as a result of appellate counsel's failures.

### 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. Trial counsel failed to investigate and pursue exculpatory evidence and viable defenses available to Petitioner - that could have established his innocence - despite having the material described herein in her possession.

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: May 23, 2011

Respectfully submitted,

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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 applies to mixed petitions, and only allows a petitioner to return to state court to exhaust claims raised in the federal petition.
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 3 out of 5 volumes 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. 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, Jena Reddy, etc.)
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.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on May 23, 2011, at San Francisco, California.

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KATHERINE HALLINAN

DECLARATION OF SARA ZALKIN

I, Sara Zalkin, hereby state and declare:

1. I am one of Mr. Scott Dyleski's post-conviction attorneys. Ms. Katherine Hallinan is my co-counsel.
2. Ms. Hallinan was contacted by Ms. Esther Fielding, Scott's mother, in mid-February 2011.
3. At that time, Esther requested that Ms. Hallinan review the federal habeas materials prepared by Mr. Philip Brooks, Scott's appellate attorney.
4. Esther, Ms. Hallinan, and I first met on February 28, 2011.
5. Esther advised 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. Hallinan and I explained to Esther that Mr. Brooks' advice mischaracterized the state of the law. We explained the interaction of state and federal habeas procedure, 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. 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 2009, 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.
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11. 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.

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case. However, we were unable to locate the autopsy report or crime scene photos in the materials provided to us by Mr. Brooks. I 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.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on May 23, 2011, at San Francisco, California.

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SARA ZALKIN

PROOF OF SERVICE

The undersigned declares:

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

On the date set forth below, I caused a true copy of the within:

PETITION FOR WRIT OF HABEAS

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

Mail \_\_\_ Overnight mail \_\_\_ Personal service \_\_\_ Fax

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on May 23, 2011, at San Francisco, California.

\_\_\_\_\_