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**FILED**

JUN - 2 2006

K. TORRE, CLERK OF THE COURT  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF CONTRA COSTA  
BY: *[Signature]*  
DEPUTY CLERK

8 SUPERIOR COURT OF CALIFORNIA  
9 COUNTY OF CONTRA COSTA

10 THE PEOPLE OF THE STATE OF CALIFORNIA

No. 5-060254-0

10

11

v.

MOTION FOR HEARING REGARDING  
ADMISSIBILITY OF DOG SCENT EVIDENCE

12

JUNE 19, 2006 • 9:00 A.M.  
DEPT. 2

13

SCOTT EDGAR DYLESKI,  
DEFENDANT.

14

**INTRODUCTION**

15

Defendant hereby requests that the court conduct a hearing pursuant to Evidence Code  
16 section 402 regarding the admissibility of dog scent evidence in this case.

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At 7:30 a.m. on the day after Pamela Vitale was found dead in her home, Deputy Roberts, of  
18 the Contra Costa County Sheriff's Department, brought his tracking canine, Freddy, to the crime  
19 scene, Canyon Road, in an effort to track the path taken by the assailant after the  
20 crime. Freddy led a team of police officers directly to a cabin located at

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.. Once inside, Freddy "alerted" to a bucket in the bathroom which contained clothing floating  
22 in red-tinted water.

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24

1 Over the course of the following week, several dogs were enlisted in efforts to locate a  
2 suspect's trail, look for evidence, and identify the smell of the perpetrator at various locations.  
3 During that same time period, a large number of human searchers combed the area, looking for  
4 evidence. Additionally, evidence was collected and removed from the crime scene so that all of the  
5 dog scenting efforts after Freddy's were based on gauze pads being rubbed on evidence that had  
6 been gathered, removed, handled, and returned to the area. Dogs were made to smell the gauze pads  
7 and placed at various locations to determine whether they could pick up the perpetrator's scent.

8 Unsurprisingly, given the immense amount of human interference with the evidence and the  
9 area around the crime scene by that time, the dogs that followed Freddy were unable to reach a  
10 consensus regarding the location of the perpetrator's odor. They "followed" the scent in opposite  
11 directions, bypassed routes they had previously taken, and generally wandered around while their  
12 human handlers attempted to assign meaning to their contradictory actions.

13 Prior to admitting evidence of any of these dogs' labors, this court must be satisfied that there  
14 is a sufficient scientific basis for drawing an inference from the dogs' actions. Given the passage of  
15 time between the crime and the enlistment of the dogs' services, the questionable "scent transfer"  
16 technique employed by the dogs' handlers, and the conflicting actions of the dogs themselves, the  
17 burden of establishing scientific reliability in this case is a heavy one.

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19 **STATEMENT OF FACTS**

20 Pamela Vitale was found dead in her home at \_\_\_\_\_, in Lafayette, on  
21 October 15, 2005. Over the course of the following week, police officers conducted numerous  
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1 searches of the area around [redacted] [redacted].<sup>1</sup> They also brought dogs to several  
2 locations in the vicinity of [redacted] to attempt to find the scent of Ms. Vitale's  
3 assailant. Deputy Christensen, of the Contra Costa County Sheriff's Department, coordinated most  
4 of these searches.

5 **A. October 16, 2005**

6 On October 16, 2005, Deputy Roberts arrived at [redacted] at 7:30 a.m.  
7 with his dog, Freddy, to attempt to track the path taken by Ms. Vitale's assailant. Deputy Roberts'  
8 dog was presented a "potential piece of evidence from this case."<sup>2</sup> Freddy then led deputies to a  
9 cabin at [redacted] and "alerted" to a bucket containing clothing and red-tinted  
10 water in the bathroom.

11 Later that day, police officers used "cadaver canines" to look for evidence at [redacted]  
12 [redacted] and [redacted]. The dogs did not lead the officers to any evidence.  
13 They did, however, identify the presence of a cadaverous odor in the bathroom at [redacted]

14  
15 **B. October 17, 2005**

16 The day after Deputy Roberts and Freddy led officers to [redacted],  
17 Deputy Christensen organized a search of [redacted] and the surrounding area.  
18 He employed twenty-five searchers, as well as cadaver canines, and had them scour the area around  
19 the crime scene by dividing it into sections and assigning different search teams to search through  
20

21  
22 [redacted] is located at the top of a hill and the property encompasses the mobile home where  
the crime occurred, a large construction site (where a new house is being built), and a great deal of the surrounding  
land.

23 <sup>2</sup> This statement of facts reflects the contents of police reports and affidavits written by deputies of the Contra Costa  
24 County Sheriff's Department. Because the District Attorney has not yet provided a copy of Deputy Roberts' report,  
we do not know which piece of evidence was presented to the dog or how it was presented.

1 each section. Deputy Christensen also had search teams and cadaver dogs follow the trail of Officer  
2 Robert and Freddy from the previous day, searching for evidence along that route.

3 **C. October 18, 2005**

4 On Tuesday, October 18, 2005, Deputies Anderson and Brightbill brought additional dogs to  
5 in an effort to have them "locate a trail from the suspect." By that  
6 time, the crime scene had been processed by the Sheriff's Criminalistics Laboratory and the evidence  
7 had been removed, so Deputy Christensen asked the crime lab personnel to return with several items  
8 of evidence. Once the evidence was returned to i, Deputy Anderson  
9 rubbed two different items with gauze pads and placed the pads in plastic bags.

10 Deputy Anderson presented a plastic bag with a gauze pad to her dog, Trimble. Trimble then  
11 walked around the property, through a pedestrian gate, down a hill and 100 yards into the woods. At  
12 that point, Deputy Anderson announced that the dog had "lost the scent."

13 Deputy Anderson gave Trimble another chance to smell the gauze pad inside the plastic bag.  
14 This time, she started the dog at the pedestrian gate. Trimble did not follow the same path he had  
15 taken previously but walked in the opposite direction, through the construction site on the property  
16 and down the driveway. At that point, Deputy Christensen stopped the dog.

17 Deputy Christensen then had Deputy Brightbill give his dog, Merlin, the same gauze pad to  
18 smell that had been offered to Trimble. Merlin smelled the pad and walked to the pedestrian gate, as  
19 Trimble had. Merlin, however, did not walk down the hill from the pedestrian gate, but kept going  
20 along the fence, to a cattle gate on the south side of the property. The dog went through the cattle  
21 gate and continued to an abandoned mobile home. This was a different route than that taken by  
22 Trimble earlier. Deputy Brightbill nonetheless opined that he was certain that his dog was following  
23 the scent.

1 Deputy Brightbill returned to [redacted] and attempted to re-start his dog  
2 on a trail. This time, Merlin went through the pedestrian gate and, instead of taking the same route  
3 he had taken earlier, he followed a path similar to one that Trimble had taken.

4 Deputy Christensen then decided to take the dogs to places where neither of them had been  
5 before to see if they could "re-acquire" the scent from different locations. Trimble was taken to  
6 [redacted], south of the driveway leading to the residence at [redacted].

7 The dog went up [redacted], but passed the driveway leading up to the crime  
8 scene and instead took a fork in the road leading to [redacted]. The dog then  
9 actually went inside the cabin, ostensibly following the scent of the evidence from the crime scene.

10 Deputy Christensen also started the other dog, Merlin, on a trail next to [redacted].

11 Merlin also walked up to and entered the cabin.

12 Both dogs were then given the other gauze pad to smell.<sup>3</sup> Both dogs again entered the cabin  
13 at [redacted]. Deputy Anderson's dog then went into a cabin across the road.<sup>4</sup>

#### 14 **D. October 20, 2005**

15 On Thursday, October 20, 2005, Deputy Christensen was called in to coordinate the search of  
16 [redacted], where Scott Dyleski lived with his mother and nine other people.  
17 That search involved fourteen searchers, who thoroughly combed the area.

18 During that search, Sheriff's Deputy Kovar found a duffel bag inside a van that contained  
19 clothing that matched the description of the clothing the police were looking for. He brought this to  
20 Deputy Christensen's attention and Deputy Christensen had him bring the bag to the house at [redacted]  
21 [redacted] so the crime lab could take custody of it there. Deputy Kovar brought the

22 \_\_\_\_\_  
23 <sup>3</sup> Deputy Christensen's report does not reveal the location of the dogs when they were given the second plastic bag  
to smell but it appears to have been done outside of [redacted].

24 <sup>4</sup> The occupant of [redacted] told officers he had been taking care of the cabin across the way as  
well and opened it (at the officers' request) in order to allow the dogs inside.

1 duffel bag to the porch of \_\_\_\_\_, where other deputies held it until members  
2 of the crime lab arrived.

3 **E. October 21, 2005**

4 On Friday, October 21, 2005 – six days after the murder – Deputy Christensen returned to  
5 \_\_\_\_\_ to search for evidence again. Specifically, based on the discovery of the  
6 clothing in the van, Deputy Christensen thought that Ms. Vitale’s assailant had taken a specific route  
7 away from the crime scene; he wanted search teams and dogs to search that route. Deputy  
8 Christensen employed eleven people to assist in a thorough search of that area.

9 Deputy Christensen also had Deputy Anderson return with Trimble. They went to I  
10 \_\_\_\_\_, where it intersects with the trail leading to \_\_\_\_\_.. The dog  
11 was again given gauze to smell. This time, as Trimble went up I \_\_\_\_\_, he did not  
12 continue to \_\_\_\_\_ as he had on the 18<sup>th</sup> but, rather, went up the driveway to  
13 \_\_\_\_\_ (which he had passed on the 18<sup>th</sup>) and, from there, he followed a fire  
14 path to the van which had been found by officers the day before.

15 At some point, Deputy Anderson brought out her cadaver dog, which became animated at the  
16 door of the van.

17 Deputy Christensen then directed Deputy Anderson to “continue her trail”, specifically  
18 directing her to look for a trail between the van and \_\_\_\_\_.. Following  
19 Deputy Christensen’s request, Deputy Anderson and her dog walked along the fire trail from the van  
20 to the driveway of \_\_\_\_\_, then down the driveway to I \_\_\_\_\_  
21 itself.<sup>5</sup>

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24 <sup>5</sup> Based on the drawings accompanying Deputy Christensen’s report, it does not appear that the dog made any effort  
to enter the yard or house at \_\_\_\_\_ while following this “trail.”

1 At that point, Deputy Christensen ordered the handler to stop and to bring the dog to the  
2 residence at . . . . . Deputy Anderson took the dog to the rear of the house –  
3 a location the dog had not made any effort to get to on its own – and the dog wandered around the  
4 yard.<sup>6</sup> After walking around the area for some time, the dog went and sat near some sliding doors on  
5 the deck of the residence.<sup>7</sup>

6 The entire area surrounding the house at . . . . . was searched using  
7 cadaver dogs (as well as human searchers) and nothing of evidentiary value was found.

8  
9 **ARGUMENT**

10 **I. The Proponent of Evidence of a New Scientific Technique Bears the Burden of**  
11 **Demonstrating its General Acceptance in the Scientific Community**

12 The admissibility of expert testimony based on the application of a new scientific technique  
13 involves a three step process: (1) the reliability and general acceptance of the method must be  
14 established, (2) the witness furnishing such testimony must be qualified, that is must have sufficient  
15 expertise in the particular area about which he or she is testifying and may not have a bias or interest,  
16 and (3) the proponent of the evidence must establish that generally accepted procedures were  
17 followed in the particular case. (*People v. Kelly* (1976) 17 Cal.3d 24, 31; *People v. Leahy* (1994) 8  
18 Cal.4th 587.)

19 The test for determining the underlying reliability of a new technique was outlined in *Kelly*,  
20 *supra*. The technique from which the deduction is made must “be sufficiently established to have  
21 gained general acceptance in the particular field in which it belongs.” (*Id.* at 30. (emphasis

22 <sup>6</sup> Deputy Anderson opined that the dog wandered around the yard because there was a “pool” of scent there and the  
23 dog could not choose a direction. The report offers no explanation as to why the dog did not alert to this “pool” on  
24 its own and had actually bypassed the house and yard entirely moments earlier when “following a trail” from the  
van.

1 omitted.) In *People v. Leahy*, the court held that “general acceptance in the particular field to which  
2 it belongs” means there is “a consensus drawn from a typical cross-section of the relevant, qualified  
3 scientific community.” (*Leahy, supra*, 8 Cal.4th at 612.) “Ideally, resolution of the general  
4 acceptance issue would require consideration of the views of a typical cross-section of the scientific  
5 community, including representatives, if there are such, of those who oppose or question the new  
6 technique.” (*Id.* at 611.)

7 “The burden of showing general acceptance lies with the proponent of the evidence to show a  
8 ‘scientific consensus’, and that ‘if a fair overview of the literature discloses that scientists significant  
9 either in number or expertise publicly oppose the technique as unreliable, the court may safely  
10 conclude there is no such consensus at the present time.’” (*Leahy, supra*, 8 Cal.4th at 611 (quoting  
11 *People v. Shirley* (1982) 31 Cal.3d 18, 55).)

12 The fact that a particular scientific technique is used and has been used for a particular  
13 purpose does not establish acceptance of the technique for use in forensics. Many techniques have  
14 proven reliable for certain purposes outside of the courtroom but have been ruled inadmissible for  
15 forensic use. For example, hypnosis is well accepted by psychologists for use in research and  
16 therapy but is inadmissible as evidence in court. (*People v. Shirley* (1982) 31 Cal.3d 18.) Similarly,  
17 while a technique may be reliable in one application that does not mean that it is necessarily reliable  
18 in other applications. DNA technology was widely used in paternity testing before it was accepted  
19 as being reliable for forensic identification in criminal cases.

20 Here, if the prosecution seeks to introduce evidence of the dog identification conducted on  
21 October 18 and 21, 2005, he must establish that the means of scent transfer employed by the  
22 Sheriff’s Department is generally accepted in the scientific community *and* was conducted

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23 <sup>7</sup> Deputy Anderson opined this indicated that the scent trail led inside the residence. Again, she offered no  
24 explanation for the dog’s previous lack of interest in the residence.

1 appropriately in this case. (See *People v. Willis* (2004) 115 Cal.App.4<sup>th</sup> 379, 386; *People v. Mitchell*  
2 (2003) 110 Cal.App.4<sup>th</sup> 772, 791-92.)

3 In *Mitchell* and *Willis*, the Court of Appeal considered the use of a scent transfer unit (STU)  
4 to put the scent of an item onto a gauze pad. The STU is a vacuum type device which ostensibly  
5 takes the scent from an evidence item and places it on a gauze pad; it is used in order to avoid  
6 possible damage to the evidence by a dog sniffing it directly. (*Willis, supra*, 115 Cal.App. 4<sup>th</sup> at 384;  
7 *Mitchell, supra* 110 Cal.App.4<sup>th</sup> at 779.) In *Mitchell*, the Attorney General took the position that the  
8 STU did not require a *Kelly* hearing because it was based on the “obvious principle that scent travels  
9 in air.” (*Mitchell, supra*, 110 Cal.App.4<sup>th</sup> at 789.) The *Mitchell* court flatly rejected that argument.  
10 (*Mitchell, supra*, 110 Cal.App.4<sup>th</sup> at 789; see also *Willis, supra*, 115 Cal.App.4<sup>th</sup> at 385.) Among the  
11 concerns noted by both *Mitchell* and *Willis*, was the possibility of contamination or degradation of a  
12 scent. (*Ibid.*)

13 Here, although a scent transfer unit was not used, the method by which the scent was  
14 “transferred” gives rise to the same concerns. Prior to being rubbed with a gauze pad, the evidence  
15 items at issue were discovered by police officers, collected by crime lab personnel, stored at the  
16 crime lab (and possibly tested there), then brought back to the scene and rubbed with a gauze pad.  
17 Prior to admitting evidence of anything that happened as a result of this process, the prosecution  
18 must establish both that scent can be transferred to a piece of gauze from an item of evidence *and*  
19 that any scent which was thus transferred was not degraded or contaminated by the time the transfer  
20 took place.

21 **II. The Prosecution Must Establish a Foundation for the Admission of Dog Scent**  
22 **Evidence**

23 The Court of Appeal has addressed the scientific underpinnings of dog scent identification in  
24 two recent cases, *Mitchell, supra*, and *Willis, supra*. Those cases hold that before dog scent

1 identification evidence (whether the identification is of a person or a place) can be admitted, “a  
2 foundation must be laid from academic or scientific sources.” (*Willis, supra*, 115 Cal.App.4<sup>th</sup> at 386;  
3 *Mitchell, supra*, 110 Cal.App.4<sup>th</sup> at 791-92.) Through that foundation, the proponent of the evidence  
4 must establish: how long places and objects retain the scent of human beings; whether every person  
5 has a unique scent; whether a particular breed of dog is characterized by acute powers of scent and  
6 discrimination; and whether adequate certification procedures exist for the scent identification.  
7 (*Willis, supra*, 115 Cal.App.4<sup>th</sup> at 386; *Mitchell, supra*, 110 Cal.App.4<sup>th</sup> at 791-92.) The  
8 foundational requirements articulated in *Willis* and *Mitchell* are applicable to this case.

#### 9 **A. History of Dog Tracking Cases**

10 Prior to *Mitchell*, California Courts had discussed dog tracking in two cases. (See *People v.*  
11 *Malgren* (1983) 139 Cal.App.3d 234; *People v. Craig* (1978) 86 Cal.App.3d 905.) In *Malgren* and  
12 *Craig*, dogs were brought to the scene of a crime upon receipt of the initial dispatch call. (*Malgren,*  
13 *supra*, 139 Cal.App.3d at 237; *Craig, supra*, 86 Cal.App.3d at 910.) The dogs in both *Malgren* and  
14 *Craig* then immediately trailed from the crime scene to a location where a suspect was found. (*Ibid.*)

15 *Craig* and *Malgren* allowed evidence of dog tracking based on a foundational showing short  
16 of that required by *Kelly*:

17 We conclude that the following must be shown before dog trailing evidence is  
18 admissible: (1) the dog's handler was qualified by training and experience to use the  
19 dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been  
20 found to be reliable in tracking humans; (4) the dog was placed on the track where  
21 circumstances indicated the guilty party to have been; and (5) the trail had not  
22 become stale or contaminated.

(*Malgren, supra*, 139 Cal.App. 3d at 238.)

#### 22 **B. Current Law of Dog Scent Evidence**

23 In 2003, the Court of Appeal revisited the issue of dog scent evidence in the context of a dog  
24 scent identification line-up. (see *Mitchell, supra.*) *Mitchell* held that the trial court had erred in

1 relying on *Craig* and *Malgren* to allow evidence of dog scent identification. In holding that such  
2 evidence was subject to the requirements of *Kelly*, the *Mitchell* court criticized the “facile” approach  
3 of courts which had accepted as ““common knowledge that some dogs, when properly trained and  
4 handled, can discriminate between human odors””:

5       ... while agreeing ‘that no one knows exactly how or why some dogs are able to  
6 track or scent, or the degree to which they are able to do so’ we cannot ignore the  
7 California foundational requirement that scent identification evidence have a  
8 tendency in *reason* to prove a disputed fact. *Difficulty in understanding the precise  
nature and parameters of a dog’s ability to discriminate scents does not take this  
phenomenon out of the realm of science.*

9 (*Id.* at 790 (citations omitted, emphasis added).)

10       *Mitchell* also faulted the trial court for relying solely on the testimony of two dog handlers  
11 to establish a foundation, noting that “no effort was made to present information from any  
12 academic or scientific sources, let alone peer review journals, regarding these testimonial  
13 assertions.” (*Id.* at 791.) The court found this highly problematic in that it provided “anecdotal  
14 rather than scientific explanations” of the dog’s abilities. (*Id.*)

15       Finally, the *Mitchell* court was “concerned about the absence of any evidence that every  
16 person has a scent so unique that it provides an accurate basis for a scent identification lineup.”  
17 (*Id.*) The court found this claim was analogous to assertions made about DNA and thus required a  
18 *Kelly* foundation: “In contrast to the unsubstantiated claim of uniqueness here, the uniqueness of  
19 each person’s DNA as expressed by the statistical probability of a random match between two  
20 people was the subject of extensive litigation under *Kelly*.” (*Id.*)

21       In a case remarkably similar to the one at bar, the Court of Appeal recently confirmed that  
22 the foundational requirements set forth in *Mitchell, supra*, must be satisfied prior to admission of  
23 dog scent evidence. (*see Willis, supra.*) In *Willis*, the victim was murdered inside her car in a  
24 church parking lot. (*Willis, supra*, 115 Cal.App.4th at 381.) A dog handler arrived at the scene of

1 the crime approximately six hours after the police were called and used a scent transfer unit to  
2 transfer scent from the crime scene to gauze pads. (*Ibid.*) The gauze was then given to a dog to  
3 smell. After smelling the gauze pad, the dog “showed interest” in a vacant lot near the parking lot  
4 where the victim’s car was found, several apartment houses where the defendant had lived or spent  
5 time, and the defendant himself. (*Ibid.*)

6 In holding that this evidence was improperly admitted without an appropriate foundation, the  
7 *Willis* court distinguished between classic dog tracking and the type of dog tracking used in the  
8 present case: “A more difficult case is presented when the dog is not tracking a suspect but rather is  
9 given a scent from a gauze pad some length of time after an incident and is watched to see if the dog  
10 “shows interest” in various locales frequented by the defendant.” (*Willis, supra*, 115 Cal.App.4<sup>th</sup> at  
11 386.)

12 Before admitting evidence of a dog’s “interest” in places and people, the proponent of such  
13 evidence must establish the foundation for its admission:

14 The prosecution cannot rely solely on anecdotes regarding the dog's capabilities.  
15 Instead, a foundation must be laid from academic or scientific sources regarding (a)  
16 how long scent remains on an object or at a location; (b) whether every person has a  
17 scent that is so unique that it provides an accurate basis for scent identification, such  
that it can be analogized to human DNA; (c) whether a particular breed of dog is  
characterized by acute powers of scent and discrimination; and (d) the adequacy of  
the certification procedures for scent identifications.

18 (*Willis, supra*, 115 Cal.App.4<sup>th</sup> at 386; see also *Mitchell, supra*, 110 Cal.App.4<sup>th</sup> at 791-92.)

19 This case is indistinguishable from *Willis*. Here, as in *Willis*, the scent of the evidence item  
20 the dogs were “following” was allegedly transferred from the object to a gauze pad. Here, as in  
21 *Willis*, the dogs were made to smell the pad, and then taken to the defendant’s home, as well as  
22 several locations where officers suspected the defendant had been. Here, as in *Willis*, the dogs then  
23 allegedly showed an interest in those places.

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If anything, the facts of this case cast more doubt on the scientific reliability of the dog scent evidence at issue than those of *Willis*. In this case, the dogs were not brought in until almost a week after the crime, after the evidence had been collected and removed from the crime scene by human hands, each presumably carrying its own odor. By then, the area had been trampled and searched by dozens of officers, all potentially carrying or moving smells as they went along. The dogs did not show any interest in the van or house at \_\_\_\_\_ until six days after the crime had occurred – and then only after being brought there by law enforcement. Indeed, prior to the Sheriff’s Department showing an interest in \_\_\_\_\_, the dogs had all “followed trails” which took different paths, none of which ended at Scott Dyleski’s house.

Dated: June 2, 2006

Respectfully Submitted,



\_\_\_\_\_  
Ellen Leonida  
Attorney for Defendant

AFFIDAVIT OF SERVICE

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I, Ellen Leonida, declare that I am over the age of eighteen years, employed by the County of Contra Costa, State of California, and not a party to the cause described in the affixed document; my business address is 800 Ferry Street, Martinez, CA 94553.

On June 2, 2006 I served a true copy of the attached:

MOTION FOR HEARING REGARDING ADMISSIBILITY OF DOG SCENT EVIDENCE

Re: People v. Dyleski  
(Docket No. 5-060254-0)

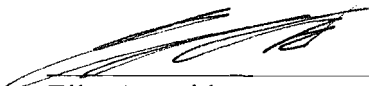
by placing said copy in a telephone facsimile machine and transmitting as follows:

Harold Jewett  
Deputy District Attorney,  
Contra Costa County  
(925) 957-2240

The telephone facsimile machine by which this was transmitted is located at 800 Ferry Street, Martinez, CA, and is served by the telephone number (925) 335-8001.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 2, 2006 at Martinez, California.

  
\_\_\_\_\_  
Ellen Leonida