IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SCOTT DYLESKI,

Petitioner,

v.

RANDY GROUNDS, Warden of the Salinas Valley State Prison, and MATTHEW CATE, Secretary of the California Department of Corrections and Rehabilitation,

Respondent.

_____/

NO.

[Contra Costa County 5060254-0]

PETITION FOR WRIT OF HABEAS CORPUS
PURSUANT TO 28 USC § 2254

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PETITION FOR WRIT OF HABEAS CORPUS

TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA:

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

I.

Petitioner is unlawfully confined and restrained of his liberty due to his commitment to the custody of the California Department of Corrections and Rehabilitation. He is currently incarcerated in Salinas Valley State Prison (CDC No. F46590), 31625 Highway 101, Soledad, California, 93960, by Matthew Cate, Secretary of the California Department of Corrections and Rehabilitation, and Randy Grounds, Warden.

II.

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

III.

Assisted by appointed counsel, Ms. Ellen Leonida, Deputy Public Defender, Contra Costa County, Petitioner was arraigned on the criminal complaint and entered a plea of "Not Guilty." Ms. Leonida represented him at all further Superior Court proceedings, including preliminary hearing, arraignment on the information and entry of "Not Guilty" plea, pretrial motions including a motion to suppress evidence, trial, and sentencing. Her

current address is 555 12th Street, Suite 650, Oakland, California, 94607.

IV.

Petitioner did not testify at his jury trial. He was convicted on August 28, 2006 of first-degree murder, and was sentenced on September 26, 2006. (5 CT 1729-1734; 15 RT 4300-4307.)

V.

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

VI.

Mr. Brooks raised the following in his brief to the First District Court of Appeal (A115725): (1) the trial court erred in denying the defense motion for change of venue; (2) the evidence was insufficient to support a conviction for burglary; therefore, the murder and burglary convictions must be reversed, and the special circumstance finding must be stricken; (3) it was error to instruct that evidence of a prior crime may be used as proof of motive and as part of a larger continuing plan, scheme or conspiracy; (4) the trial court erred in denying the defense motion for a *Kelly* hearing on Y-STR DNA; (5) items of evidence should have been suppressed because the search warrant was based on a recklessly inaccurate affidavit; (6) California Penal Code section 190.5 is unconstitutional; (7) the sentence of life without parole in this case is cruel and unusual punishment contrary to the Eighth Amendment to the United States Constitution.

The Court of Appeal affirmed the trial court's judgment in an

unpublished opinion filed April 27, 2009 (A115725).

VII.

Mr. Brooks sought review by the California Supreme Court, arguing that (1) Penal Code section 190.5(b) is unconstitutionally vague, and violates Petitioner's rights to due process of law; equal protection; and to be free from cruel and unusual punishment; (2) life imprisonment without the possibility of parole violates the Eighth Amendment because it constitutes cruel and unusual punishment; (3) the right to an impartial jury was violated because the trial court denied the motion for change of venue; (4) the Court of Appeal incorrectly applied the legal standards for a Kelly hearing on the statistical significance of Y-STR DNA analysis; (5) review is necessary in order to clarify the legal standards of a Franks hearing, which the trial court denied despite evidence that the search warrant was based on a recklessly inaccurate affidavit; (6) the evidence was not sufficient to support a conviction for burglary, therefore the murder and burglary convictions must be reversed and the special circumstance finding stricken; and (7) instructional error, to wit: that evidence of a prior crime could be used as proof of motive and as part of a larger continuing plan, scheme or conspiracy, violated his Sixth Amendment right to jury trial and Fourteenth Amendment right to due process of law, because the evidence had no probative value for this purpose.

The California Supreme Court denied review on August 12, 2009 (S173389).

VIII.

On November 2, 2009 Mr. Brooks filed a petition for writ of

certiorari and a motion for leave to proceed *in forma pauperis*. The United States Supreme Court denied certiorari on or about May 24, 2010.

IX.

Present counsel was first contacted by Ms. Esther Fielding, Petitioner's mother, in February of 2011, approximately three months before the one-year AEDPA deadline. (See Declarations of Katherine Hallinan and Sara Zalkin.) Ms. Fielding met with counsel, Ms. Hallinan and Ms. Zalkin, on February 28, 2011. At that meeting, counsel agreed to seek to compile the record and files and attempt to review the potential issues for habeas, to determine if there were issues worth pursuing.

Ms. Hallinan contacted Ellen Leonida, Petitioner's trial counsel, on February 28, 2011, who advised that the entire file was given to Mr. Brooks. 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 replied that he had provided the record to Scott in prison, and that Scott sent it to his mother, Ms. Fielding (who told counsel she had not received it). Mr. Brooks agreed to turn over everything in his possession, consisting of approximately ten boxes obtained from the public defender. Despite counsel's efforts, the whereabouts of the complete official record remain undetermined.

After coordinating transportation assistance and timing with Mr. Brooks, on March 24, 2011 the undersigned obtained the material, which included digital copies of 13 out of 15 volumes of the reporter's transcript, Volumes 3-5 of the clerk's transcript, and hard copies of Volumes 1 and 2 of the clerk's transcript. Counsel immediately began to organize and

review the voluminous materials, consisting of tens of thousands of pages of materials and at least 25 hours of video recordings.

Counsel met with Ms. Fielding again on March 29, 2011. At that time, counsel agreed to pursue habeas relief in state court. Although counsel remained concerned about time, having already identified many potentially meritorious issues, counsel agreed to proceed. This left less than two months in which to finish organizing and review the file, determine the issues, conduct further investigation, contact experts and have them review the evidence and provide declarations, obtain declarations from other relevant persons, and draft the petition.

Prior to receiving the materials from Mr. Brooks, Ms. Zalkin contacted Mr. Brent Turvey, an expert crime scene analyst, to discuss his opinion as to the possible viable habeas claims. Ms. Fielding had independently retained Mr. Turvey while the direct appeal was pending, and he had provided an initial report to Mr. Brooks. Ms. Zalkin also spoke with Dr. Michael Laufer, an expert in the fields of emergency medicine and injury reconstruction, to assess the medical evidence in this case. However, the autopsy report and crime scene photos were absent from the materials provided by Mr. Brooks. Ms. Zalkin learned that Mr. Brooks had provided those materials to Mr. Turvey, but had not retained a copy. Mr. Turvey was away teaching at the time. When he returned to his office in Sitka, Alaska, he made duplicates of the 45 or so disks, sent by Federal Express and received by counsel on or about May 1, 2011. After isolating the pertinent items, which consist of approximately 1000 photographs, counsel immediately duplicated and hand-delivered said material to Dr. Laufer,

mere weeks before the AEDPA deadline.

Ms. Hallinan contacted Ms. 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. Ms. Hallinan specifically asked her whether she watched the videotaped interviews of Mr. Horowitz, Ms. Hill, and Ms. Powers. Ms. Leonida stated that she watched "everything" and read "everything." She advised that Mr. Ed Stein, her investigator contacted Ms. Hill and Ms. Powers. However, when Ms. Zalkin and Ms. Hallinan spoke with Mr. Stein on May 18, 2011, he stated that he had not contacted either of them.

By happenstance, on May 3, 2011, Mr. Rick Ortiz contacted the webmaster of a website related to Mr. Dyleski's case (www.scottdyleski.org), finding it odd that he was never contacted by law enforcement or anyone working on this case. The webmaster forwarded this email to counsel on May 3, 2011. Counsel immediately followed up with Mr. Ortiz. This led to a great deal of information that counsel had heretofore not been privy to, including the scope of the problems related to the construction of a large new home, which was still under construction at the time of the murder. This resulted in further investigations into the evidence of third party culpability; the lack of such investigation by law enforcement and Ms. Leonida; and a variety of other issues. In the remaining three weeks before the AEDPA deadline, counsel drafted an initial petition that exceeded 100 pages, and included 16 exhibits.

X.

Petitioner first filed a Petition for Writ of Habeas Corpus in the

Superior Court of Contra Costa County on May 23, 2011. (05-11076-4.) Petitioner alleged violations of his rights to due process of law under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, and article I, section 15 of the California Constitution; and his right to the effective assistance of counsel both at trial and on direct appeal, under the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and article I, section 15 of the California Constitution. *See* Strickland v. Washington, 466 U.S. 668, 684-687 (1984).

Trial counsel's failure to investigate the facts of the case and present available meritorious defenses violated his Fifth Amendment right to due process of law and his Sixth Amendment right to the effective assistance of counsel, on the grounds that:

Trial counsel failed to develop exculpatory inconsistencies in the prosecution's theory of the case; failed to investigate or present critical evidence implicating Mr. Horowitz, the victim's spouse, even though she possessed this information in advance of trial, to wit: (1) physical evidence that the perpetrator was known to Ms. Vitale and was comfortable in the home implicates Mr. Horowitz; (2) evidence that Mr. Horowitz had a violent temper and abused Ms. Vitale in the past is particularly relevant and exculpatory, in light of the expert opinions that this was an anger killing; (3) evidence that marital stress was mounting right before Ms. Vitale's death, as a result of the costly and protracted home construction; (4) evidence that the behavior of Mr. Horowitz after his wife's death seemed inconsistent with that of a grieving husband and indicated consciousness of guilt; and

(5) the foregoing evidence available to trial counsel, implicating Mr. Horowitz in the death of his wife was sufficiently compelling that her failure to investigate and develop this evidence constitutes ineffective assistance of counsel.

Petitioner further argued that his trial counsel was ineffective in not filing a motion to set aside the information (pursuant to California Penal Code section 995); and in failing to request specific or "pinpoint" jury instructions regarding the defense theory of the case.

Petitioner also argued that his Fifth Amendment right to do process of law and his Sixth Amendment right to the effective assistance of counsel were violated by the failures of his appointed appellate counsel, Mr. Brooks, to wit: (1) to sufficiently review the record and recognize trial counsel's ineffectiveness, including the failure to file a motion to set aside the information (California Penal Code section 995); (2) to address instructional error; (3) to begin his brief with an argument that presupposed Petitioner's guilt (as it related to the constitutionality of the sentence of life without the possibility of parole as applied to a juvenile); and (3) to not advise Petitioner of potentially meritorious state habeas claims that he learned of in the course of his representation.

This petition was denied without prejudice on June 16, 2011. Petitioner was unaware of this denial for several weeks. The denial was not mailed until July 13, 2011.

Petitioner filed an Amended Petition for Writ of Habeas Corpus on August 12, 2011, which included the same grounds as those set forth above. This petition was denied on October 11, 2011 by the Honorable

Judge Zuniga (who had presided over Petitioner's trial in 2006) in a 34-page "Decision/Order."

On December 28, 2011, counsel filed a new petition in the First District Court of Appeal (A134128). The new petition was approximately 173 pages, and included 29 exhibits. Along with the grounds presented to the Superior Court regarding the Fifth and Sixth Amendment violations, the following grounds were added as to the claim of ineffective assistance: (1) the crime scene evidence indicates the perpetrator was not rushed for time, which indicates the perpetrator was acquainted with Ms. Vitale and is inconsistent with Mr. Dyleski's alibi; (2) trial counsel should have hired a crime scene expert to rebut the prosecution's analysis of the crime scene evidence; (3) failure to adequately investigate the crime scene prejudiced Petitioner; (4) Mr. Horowitz possessed that he should not have known if he was being truthful as to the events surrounding Ms. Vitale's death; (5) the prosecution accurately anticipated the obvious defense that defense counsel egregiously failed to pursue; (6) trial counsel failed to present manifest evidence of crime scene contamination; (7) trial counsel failure to seek exclusion of patently irrelevant, misleading and prejudicial evidence, to wit: artwork, writing, and a bumper sticker; and (8) trial counsel failed to object to unqualified expert opinion regarding fabric prints and the source thereof.

The Court of Appeal petition also presented the following grounds in support of Petitioner's claim that his Fifth and Fourteenth Amendment rights to Due Process of Law were violated by prosecutorial misconduct, which rendered his trial fundamentally unfair, to wit: (1) knowing presentation of false evidence; (2) manipulation of the "scientific

evidence"; and (3) improper comment on decision not to testify; (4) intentionally misleading the jury with irrelevant, inflammatory, and misleading evidence; (5) violating the "Golden Rule" by asking the jurors to put themselves in the shoes of the victim, an improper appeal to sympathy; and (6) the cumulative effect of these errors resulted in a fundamental miscarriage of justice that fatally prejudiced Petitioner, in violation of the Fifth, Sixth, and Fourteenth Amendment rights.

After informal briefing, the petition was summarily denied by order of July 2, 2012.

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

In addition to the grounds presented in the lower state courts, set forth above, the California Supreme Court petition included the following in support of Petitioner's claim that his Fifth and Fourteenth Amendment rights to due process of law were violated by prosecutorial misconduct, which rendered his trial fundamentally unfair: (1) the prosecutor wove an inflammatory and irrelevant "Gothic theme" which inflamed the passions of the triers of fact; (2) misrepresentation of physical evidence, to wit: the hall bathroom shower, "the glove," "that knife," and referring to presumptive test results as "blood; (3) referring to facts not in evidence; (4) repeatedly asking leading and otherwise improper questions. In addition to the

grounds presented in state court, set forth above, concerning the violations of Petitioner's Fifth Amendment right to due process of law and Sixth Amendment right to the effective assistance of counsel appointed on direct appeal, to wit: (1) failure to identify ineffectiveness of trial counsel for not exhausting all peremptory challenges, which prejudiced Petitioner in regard to appellate review of the pretrial motion for change of venue; and (2) said motion for change of venue was meritorious, and its denial was in error.

The California Supreme Court petition also included the claim that California Penal Code section 190.5 is unconstitutionally vague, favors life without the possibility of parole, and fails to provide specific criteria for the trial court to consider in its discretion, thus violating Petitioner's rights under the Fifth, Sixth, and Eighth Amendment, including the right to be free from cruel and unusual punishment pursuant to Miller v. Alabama, 132 S. Ct. 2455 (2012) and Graham v. Florida. 130 S. Ct. 2011 (2010).

As of the filing of the present petition, the California Supreme Court has yet to rule, and thus the claims presented herein remain unexhausted. However, in order to not run afoul of the AEDPA one-year deadline under 28 U.S.C. section 2244(d)(1)(A), Petitioner has filed concurrently a motion entitled "Request to Stay Proceedings and Hold Petition in Abeyance," pursuant to Rhines v. Weber, 544 U.S. 269, 275 (2005) and Hasan v. Galaza, 254 F.3d 1150, 1152, fn. 2 (9th Cir. 2001).

Meanwhile, counsel awaits a ruling from the trial court on a motion for post-conviction DNA testing, pursuant to California Penal Code § 1405, filed on June 11, 2012. (*See* Appendix.) This motion sought access to two items: one for testing (bloody paper towels from the kitchen trash at

the crime scene), and the other for retesting (sample of Item 3-10, foot swab collected at the autopsy). The District Attorney filed an opposition on or about July 16, 2012. (*See* Appendix). By unreported minute order of July 23, 2012, Judge Zuniga directed the District Attorney to provide all "'laboratory reports, underlying date [sic] and laboratory notes prepared in connection' with the DNA testing in the above case" by August 6, 2012. (*See* Appendix). Judge Zuniga granted the People's requested extension for compliance in an unreported minute order of August 2, 2012 (to August 20th); the order also specified that any reply be submitted by August 27, 2012, and that counsel would be notified "no later than September 24, 2012 as to whether a hearing will be necessary. Counsel filed a reply as specified. (*See* Appendix.) Upon inquiry, the Court informed counsel on October 2, 2012, that it had yet to make a decision, and postponed ruling to a date not beyond November 16, 2012. (*See* Appendix.)

XI.

The instant petition is being brought in this Court pursuant to 28 U.S.C. section 2254.

XII.

Since filing the May 23, 2011, petition, present counsel has diligently pursued the investigation and research of this case, as evidenced by the increased word count and number of exhibits attached to each new petition. (*See* Declarations of Katherine Hallinan and Sara Zalkin.)

XIII.

Petitioner herein relies on the record previously filed in his related direct appeal, as well as the exhibits included herewith. Petitioner accor-

dingly requests judicial notice of the transcripts, files, briefs, motions, and records in People v. Scott Dyleski, No. A115725. (Evid. Code § 452, subd. (d)(1), § 453, § 459.)

XIV.

Petitioner alleges that his right to Due Process of law under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, and article I, section 15 of the California Constitution was violated as a result of ineffective assistance of counsel at trial and on direct appeal, pursuant to the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, and article I, section 15 of the California Constitution. *See* Strickland v. Washington, 466 U.S. 668, 684-687 (1984). Petitioner also alleges that his right to Due Process of law under the Fifth and Fourteenth Amendments to the Federal Constitution, and article I, section 15 of the California Constitution were violated by egregious prosecutorial misconduct that so infected the trial as to render the proceedings fundamentally unfair. *See* Donnelly v. DeChristoforo, 416 U.S.637 (1974). Additionally, pursuant to the recent Supreme Court decision in Miller v. Alabama, 132 S.Ct. 2455 (2012), Petitioner asserts his sentence of life without the possibility of parole, to which he was sentenced at the age of 17, violates the Eighth Amendment's restriction on cruel and unusual punishment.

XV.

All of the information presented herein was either in the possession of trial counsel or was readily available to her, and was unquestionably exculpatory to Petitioner by implicating the husband of the

murder victim, Daniel Horowitz - who had motive, means, opportunity, and notoriety. This evidence is absent from the record, and therefore could not have been raised on direct appeal. The failure to present this evidence resulted in prejudice to Petitioner, because the identity of the perpetrator was the central issue in the case. The defense at trial was essentially that Petitioner did not commit this crime; someone else did, but defense counsel offered to explanation or evidence as to who else could have plausibly done it. By virtue of the discovery provided by the prosecution alone, trial counsel could have readily raised substantial doubt by showing that Ms. Vitale was the victim of a domestic homicide.

XVI.

Petitioner Scott Dyleski was wrongfully convicted in the October 15, 2005 murder of Pamela Vitale, wife of prominent attorney Daniel Horowitz. Petitioner contends that Mr. Horowitz is the true perpetrator, as addressed herein.

XVII.

The relevant facts pertaining to the murder are as follows:

A. Initial Investigation

Just before 6:00 p.m., on October 15, 2005, Mr. Horowitz reported his wife's murder from their Lafayette home. Mr. Horowitz was the last person to see her alive. (8 RT 2070-2123.)

Sergeant Hoffman, who was the first officer on scene, testified at the preliminary hearing but not at trial. The call came in just before 6:00 p.m., and he arrived minutes later. The residence was in a semi-rural area, situated at the end of a long driveway. The gate at the bottom of the

driveway was closed, so he requested that dispatch try to get a gate code. As the minutes ticked by, he manually opened the right side of the gate. When he reached the residence, he observed Mr. Horowitz pacing outside, talking on a cell phone. Anxious to secure the scene, Sergeant Hoffman led Mr. Horowitz to the back of a patrol vehicle. (1 CT 31-35.)

Sergeant Hoffman described Mr. Horowitz as "very animated." (1 CT 38.) As he was seated in the patrol vehicle, Mr. Horowitz volunteered that he had been "with a bunch of retired police officers that day." (1 CT 36.) Sergeant Hoffman noticed that Mr. Horowitz's shirt was wet near the left shoulder, and Mr. Horowitz explained that had knocked over the dogs' water bowl near the door and gotten his shirt wet; he also said that the two grocery bags located just outside the front door were his, that he had just brought home. (1 CT 36-37.)

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

The residence was cluttered. (*See* Exhibit A, Photos, at 17.) There were blood droplets "all over the front room, on pieces of furniture and on the wall and on the doors." (1 CT 43.) In addition to smeared blood and spatter on the inside of the front door, there were blood swipes on the outside of the door, and blood on the external dead bolt. (Exhibit A, at 2-5.) There was also blood on the ceiling. (Exhibit DD, Report of Officer Taflya (hereinafter "Taflya Report"), dated January 18, 2006, at 658.)

Next to the body were several pieces of molding and a large metal post -- probably building samples. (7 RT 1928; 8 RT 2085-2086.) A cardboard box was dented, as if someone fell into it. (8 RT 2054.) A small table between the living room and kitchen was dislodged several inches, based on carpet indentations; yet all but one of the framed photographs sat upright on the table. (7 RT 1930-1931; 7 RT 1944:19-27; Exhibit A, Photos, at 17.)

There were several small bloodstains on the couch and coffee table, and an odd, large blood drop on a piece of paper near the love seat. (7 RT 1997; Exhibit A, at 32-37.) A purse sat undisturbed on the dining room table. (8 RT 2065-2066; Exhibit A, at 17.)

A large television had been pushed against the wall, blocking the door to the bedroom. (7 RT 1929; Exhibit A, at 16.) On top of it was a pair of bloody eyeglasses, neatly folded. (7 RT 1937; Exhibit A, at 15-16.) On a kitchen counter was a bloody water bottle with the cap and a paper cup of clear liquid nearby. (Exhibit A, at 18-19.) Two coffee mugs were in the sink, one with a broken handle and apparent blood, and there was a bloody bowl on the counter next to the sink. (7 RT 1998-1999; Exhibit A, at 20-24.) It appeared that the sink had not been run, as coffee grounds were undisturbed and there was no blood on the faucet handle. (15 RT 4055; Exhibit A, at 20-23.) There was apparent blood in the shower in the hallway bathroom: a bloody hand swipe on the shower wall, blood on the shower curtain, and blood on the hot water knob. (7 RT 1936; 7 RT 1978; Exhibit A, at 25-31.)

Sergeant Hoffman tried to obtain basic information about Ms.

Vitale from Mr. Horowitz, who was more concerned with accusing his neighbor/tenant Joe Lynch, who Mr. Horowitz said was supposed to come over that day to drop off a check. (1 CT 46; 1 CT 50; Exhibit L, Report of Sergeant Hoffman (hereinafter "Hoffman Report," Dated 10/16/05, at 449.)

Detective Barnes arrived at the crime scene just before 8:00 p.m. In his words:

> 1901 Hunsaker Canyon Road is a twelve plus acre piece of property located in a steep hilly area of rural unincorporated Contra Costa County. The property is accessed by an approximate ½ mile gated concrete driveway. At the base of the driveway is a four stall horse stable with a single apartment living space. At the top of the driveway exists two permanent residential structures, two permanent wood outbuildings and a travel trailer. One of the residential structures was a modular home ... occupied by [Horowitz and Vitale]. The second residential structure was a three level, six thousand plus square feet home which was under construction.... The two wood outbuildings were used as a tool storage shed and work out gym. The travel trailer was parked between the two homes and was being occupied by an employee who worked on the construction of the new home.
>
> (Exhibit O, Report of Detective Barnes, dated 10/24/05 (hereinafter "Barnes Report"), at 485.)

He continued:

> As I entered the residence and stepped over the blood soaked floor....I noted the victim's head hair appeared wet and blood soaked with several deep lacerations visible on her scalp. The exposed left side of the victim's face was deeply bruised around her left eye, nose and chin. I noted her exposed left hand to have similar deep purple colored bruising, lacerations and what appeared to be a broken left finger.
>
> ...
>
> Sergeant Hoffman walked us north through the living room of the residence, where Detective Pate and I...noted items of interest, including several short sections of crown molding which were blood stained and broken, pieces of shattered clay pottery and

additional blood stains and splatter. ... Detective Pate located an open 'Crystal Gyser' [sic] water bottle on a counter top...covered in blood smears. Opposite that counter top was the home's kitchen sink ... On the counter top just outside the sink, I located a white colored bowl with what appeared to be blood smears on the interior and exterior. In the left portion of the equally divided kitchen sink, I located two coffee cups and one kitchen knife and what appeared to be discarded coffee grounds. I noted one of the coffee cups had a broken and severed handle and what appeared to be blood smears on the outside of the remaining unbroken portion of cup. The right portion of sink contained plates, which covered unknown items, a bowl and several pieces of eating utensil[s].

Sergeant Hoffman then directed our attention toward the bathroom at the north end of the residence....it contained a wooden vanity sink, toilet and tub shower combination with a shower curtain. I noted **the shower curtain was pulled to the left, concealing the water controls and shower head. Upon closer inspection, I saw what appeared to be slightly dried blood smears on the side wall, opposite the shower curtain, and on the left water control knob.**

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

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

...

While walking through the exterior grounds of the property, Sergeant Hoffman directed my attention toward a tow-behind travel trailer, which was parked between the modular home and the large home under construction. I was told this trailer was owned by Daniel Horowitz but was being lived in by an employee at the site who was identified as Anthony Roderick. I was told

> Roderick was ill and was staying with relatives... Detectives Garibay and Schiro were assigned to locate and obtain a statement from Roderick.
>
> (Exhibit O, Barnes Report, at 486-488.) [Emphasis added.]

B. Taped Interview of Mr. Horowitz the Night of the Murder

Mr. Horowitz was interviewed at the station off and on late Saturday night and into the early Sunday morning hours. **It is doubtful whether Petitioner's trial counsel reviewed the recording.** Her files contain notes and transcripts pertaining to the interviews of certain witnesses, but nothing on his. At a minimum, it was never introduced in court. The undersigned obtained the recording on videocassette from prior counsel, and had it digitized and transcribed. (*See* Exhibits B, B1, and B2, Horowitz Interview; *See also* Declaration of Katherine Hallinan; Declaration of Sara Zalkin.)

Neither the trial court nor the jurors heard any portion of the recording made of Mr. Horowitz at the Sheriff's station. The recording begins at approximately 9:00 p.m. on Saturday, October 15, 2005. Mr. Horowitz makes and receives many phone calls. Detectives come in and out of the room. Mr. Horowitz's friend, Andrew Cohen - who was a San Francisco Police Officer at the time - was allowed to visit. Mr. Horowitz acted confused about many basic details, such as what time he woke up, where he went when he left the house, and whether Ms. Vitale was awake when he left. He made numerous contradictory statements throughout the interview. It appears that neither law enforcement nor trial counsel made any attempt to clarify or confirm these inconsistencies.

From the start of the interview, Mr. Horowitz seemed evasive, and

was unable to provide direct answers to seemingly straightforward questions. The detectives ask Mr. Horowitz how he was feeling: "Uh, we want to start by letting you tell us your feelings right now. You know your internal..." (*See* Exhibit B, B1, and B2, Digital Recordings of Horowitz Interview (hereinafter "Horowitz Interview"), at 76.) Mr. Horowitz interrupts, ostensibly with a question for the detectives ("something I want to ask you first") before launching into a long narrative. (Exhibit B, at 76-77.) Notably, he did not ask the detectives any questions of the detectives, nor did he respond to their question about how he was feeling.

Outside the detectives' presence Mr. Horowitz expressed frustration over the crime scene investigation, since he already knew what happened. "I wish they would take the information from me though, so they could get a little bit more focused. They're doing crime scene shit, and I'm the one who knows the facts." (Exhibit B, at 66.) Yet, he seemed unable to answer their basic questions, for instance, what time he woke up, or what time his alarm was set for:

> PO: But you get up at 07:00?
> DH: I got up. The alarm clock in my bedroom. In the night drawer. On my side, by the air conditioner. There's two alarm clocks.
> PO: OK.
> DH: I got up when the first one went off.
> PO: OK.
> DH: Yeah. For that day?
> PO: Ball park. What time do you normally set them?
> DH: It's not normal if I'm not in trial [?] I don't know. Probably about 06:00.
>
> (Exhibit B, at 94.)

Oddly, he was also unable to state whether his wife was awake or not when he left that morning, although that would have been the last time

he saw her alive:

> PO: You don't remember talking to her this morning?
> DH: No. I don't. Oh well... well I did not talk to her this morning. Oh, you mean before I left? I don't remember. I don't remember. Usually, if I leave... I got up... I remember being on my [unintell]. Then I said, "I have to meet Bob Massi." If we're on the... Yeah, I'll feed the dogs. And then I'll come back and... and I'll get dressed and go. And... She'd get up maybe right after I left. I'm [unintell] she's kind of uh...
> PO: OK.
> DH: **I just don't remember if she was up. You know... I don't remember if I said good bye.** I don't think so.
>
> (Exhibit B, at 81-82.)

The detectives try again later on:

> PO: Was she up when you left this morning at 07:00?
> DH: I swear, it was like I was trying to remember. I don't think so. I think I left ... I don't remember ... But I don't think she was though. Tell you why with my logic...
>
> (Exhibit B, at 77.) [Emphasis added.]

Mr. Horowitz eventually tells the detectives that he fed his dogs at 7:00 a.m., then left at 07:30 for a breakfast meeting with Bob Massi. In a confused fashion, he went on to say: "And I realized it was 8:30, so I left then... To get to Lafayette a little early. At about 8:10, Bob called me 'Where are you? It's 8:00 ...You can ask Bob...." (Exhibit B, at 56; Exhibit B2 at 151, 176.)

In another phone call Mr. Horowitz says that he "rushed out" that morning. (Exhibit B, at 60.) But to the detectives, he says "I worked at my computer. And I was a little bit lax." (Exhibit B, at 95.) Evidence at trial established that his computer was shut down at 7:50 a.m. (8 RT 2237-2239.)

In another phone call, Mr. Horowitz said that he "met Bob Massi at 08:15, **after shopping at Safeway.** And then I left there

probably...sometime around 9:00." (Exhibit B, at 65.) This was the only occasion Mr. Horowitz said anything about a morning trip to Safeway. Instead, his bags of groceries were displayed at the crime scene, and a Safeway receipt issued at 5:39 p.m. (8 RT 2031. *See* Exhibit A, Photos, at 55.)

> DH: OK. So then as of my leaving home, I was in the office after Bob Massi.
> PO: Where's the office at?
> **DH: Lafayette.**
> PO: OK.
> DH: So, from 09:40 to about quarter to 11:00. And Rick Mosier showed up. My investigator.
> PO: Yeah.
> DH: And we met from 11:00 until 2:00, 2:30. And I always call Pamela then. And she didn't respond.
> PO: And where are you... [unintell]
> DH: I don't remember specifically, 'cause it's sort of like random when I'd call her. And she wasn't responding. And I went to the bank, and this and that. And then about... I think it must have been [unintell] whatever time it was when I drove up to the house. And I knew she's supposed to go to the ballet but her car's outside of the house..
> PO: And do you know what time she was supposed to go do that?
> DH: No, but earlier. She would have been gone like 4:30, 5:00....
> PO: OK.
> DH: And she'll take the car. And I saw her car parked there, and I knew.
>
> (Exhibit B, at 77-78.)

This was the only time Mr. Horowitz said anything about a Lafayette office. Although Mr. Horowitz told Sergeant Hoffman on scene that he was "with a bunch of retired police officers that day," there was no follow-up investigation to account for his whereabouts. (1 CT 36.)

Mr. Horowitz repeatedly claimed that he knew something was wrong when he came home and his wife's car was still there. (Exhibit B at 62; Exhibit B at 76-77; Exhibit B1 at 135.) Yet, based on cell phone records

(and corroborated by a report from Inspector Venable, discussed below), there is no activity on her cell phone at all on October 15, 2005. If she had plans for dinner and the ballet with a friend, and never showed up, one would expect that friend to attempt to make contact to find out why she never showed up. Nor did Mr. Horowitz mention receiving any calls from the "family friend" who was supposed to be with his wife, or calling this person when he claimed he could not reach her. Critically, from the records provided to counsel, it appears that law enforcement never investigated these inconsistencies, nor attempted to make contact with whomever Ms. Vitale was supposed to attend the ballet that evening.

To the detectives, Mr. Horowitz equivocated as to how concerned he was that his wife had not answered his calls nor called him that day. (Exhibit B, at 77.) An email dated November 21, 2003 tells a different story, when Mr. Horowitz wrote "Pamela: I have been trying to reach you for about an hour. Is anything wrong?" (Exhibit EE, Emails, at 682.)

Mr. Horowitz attempted to cast suspicion away from himself, pointing the finger at his neighbor, Joe Lynch.. For example, he spoke of Mr. Lynch at least twenty times in the hours after the murder. (*See, e.g.*, Exhibit B, at 59, 61, 64, 66-69, 73, 75, 79, 82, 86, 100, 104, 118-119; Exhibit B1, at 131-133, 135, 137-139; Exhibit B2, at 147, 19, 151-152, 156-157, 161, 167, 171-172, 174-175, 178, 192.) "But here's the problem: If he didn't do it, ... who would come to my door early in the morning, and kill my wife?" (Exhibit B1, at 139.)

Among his contradictory statements, Mr. Horowitz told Sergeant Hoffman that Mr. Lynch was expected to "drop off" a check, but later said

that maybe Mr. Lynch "came up" to pick up a check. (*See* Exhibit L, Hoffman Report, at 449; Exhibit B, at 83.) Notably, in an interview conducted concurrently with Mr. Horowitz's interview, Mr. Lynch adamantly denied that he was coming to drop off a check, and in fact insisted that although he was owed money, Mr. Horowitz would have had no way to know that. (*See* Declaration of Katherine Hallinan.)

Furthermore, Mr. Horowitz and Mr. Lynch had a complicated financial relationship, and Horowitz stood to gain financially should Lynch be taken out of the picture. Mr. Lynch is a veteran, who by all accounts suffers from mental health and substance abuse issues. (Exhibit P, Report of Detective Pate, Dated 11/1/05 (hereinafter "Pate Report"), at 505-510.) Mr. Horowitz had purchased Mr. Lynch's property from him .

The sale involved an unusual arrangement, whereby Mr. Horowitz paid less than market value for the property ($350,000). (Exhibit P, Pate Report, at 507.) However, Mr. Lynch was allowed to remain on the property rent-free for five years, after which he would have the option of paying a rent of $600 per month, to be deducted from the $100,000 that Mr. Horowitz owed him, or move and receive $100,000. In fact, there is evidence that the couple was "shopping" that property as a potential rental for their friends and maybe even Ms. Vitale's son, Mario, prior to the murder. (See Exhibit EE, Email Exhibits, at 685-687.)

Another bizarre detail is that Mr. Horowitz told the detectives that Ms. Vitale had obtained a restraining order against Mr. Lynch, but Mr. Horowitz told her it was better not to serve it and thereby "set him off." When the detectives inquire when that occurred, Mr. Horowitz first says

"last year" but then says "maybe a month ago" or a couple of months. The declaration, authored by Mr. Horowitz, was dated June 15, 2005, about four months before the murder. (Exhibit FF, Restraining Order, at 704.) Furthermore, he claimed that his wife wrote it, but he may have helped, yet this is contradicted by the fact that Mr. Horowitz himself apparently signed the declaration, which is written in the first-person, indicating his authorship. The last paragraph reads "I have phrased this declaration in personal terms but most important to me is that he stay away from my wife, Pamela." (Exhibit FF, Restraining Order, at 704.) Yet, Mr. Horowitz insists that he would be the target of Joe Lynch's rage - not Pamela. Moreover, it is particularly bizarre that someone would go to all this trouble to obtain a restraining order but then deem it prudent to *not* serve it out of concern that it would "set off" the intended subject. (Exhibit B, at 104-105; Exhibit FF, Restraining Order.) In addition, this declaration avers that a neighboring couple, the Bradleys, also "sought a restraining order from this court." (Exhibit FF, Restraining Order, at 700.) However, there is no such activity listed on the Superior Court website. (Exhibit SS, Search of Contra Costa Court Website.)

Notwithstanding whatever concern the restraining order was sought to address, Mr. Horowitz told detectives that his wife preferred that he not lock the door when he left, because he would forget things and disturb her. (Exhibit B, at 81, 107; Exhibit B3, at 148.) This makes no sense, because if he locked the door, that implies he would have keys in the event he forgot something and had to go back inside. This also makes no sense in light of the declaration of Rick Ortiz (the contractor from March,

2002 until December, 2004), which states that Mr. Horowitz and Ms. Vitale were extremely security-conscious. Ms. Vitale was so concerned about intruders that even when she expected Rick, when he knocked, she would call him from inside the home to confirm it was really him at the door. (*See* Exhibit K, Declaration of Rick Ortiz (hereinafter "Ortiz Declaration"), at 439.) Moreover, Mr. Ortiz reports that they were installing a state-of-the-art security system in their new home, complete with panic buttons in every room, an actual panic room, high-tech, motion-detecting surveillance cameras, and biometric locks. Ms. Vitale was so concerned about her safety that Mr. Horowitz routinely locked the door even when he just went out to feed his dogs. This is corroborated by a number of emails from Mr. Horowitz himself, regarding the planned security system, and an email to his wife (dated January 4, 2005) in which he mentions having "all lights on" whenever she "might feel vulnerable" when he is away. According to an undocumented source, Ms. Vitale was assaulted or attacked many years ago in a parking garage. (Exhibit B at 81; Exhibit EE, Email, at 688.)

Repeatedly, Mr. Horowitz mentioned that his dogs kept escaping from their pen, and it was a problem that could have sent Joe Lynch into a rage. (Exhibit B, at 92; Exhibit B1, 124-125.) Mr. Horowitz specifically said that construction worker Anthony Roderick told Pamela the day before the murder that the dogs had escaped again. (Exhibit B, 114-115.) This statement could have been impeached by a Sheriff's Report discovered to trial counsel. In fact, Mr. Roderick had called in sick to the job site and spent Friday and Saturday elsewhere. (Exhibit B at 58-59; Exhibit M, Report of Deputy Santiago, dated 11/15/05 (hereinafter "Santiago Report"),

at 455-456.) According to Mr. Ortiz, during his two years as the contractor on the new home, he had never known the dogs to get loose of their pen. (*See* Exhibit K, Ortiz Declaration, at 439.) Moreover, the detectives mention that the dogs were nowhere to be found. (Exhibit B, at 92.)

Mr. Horowitz may have insisted the dogs were loose, or even set them loose himself, in order to manufacture a motive for Mr. Lynch to come by the house in a rage.

Mr. Ortiz was never investigated as a suspect, even though he showed up on the property two weeks before the murder, took pictures, and had a verbal confrontation with Ms. Vitale (who came out wearing a mask and gloves as she had begun to do for her allergies). She told him to leave or she would call the police, and she called Dan while he was leaving. (*See* Exhibit K, Ortiz Declaration, at 442.) Mr. Horowitz claimed that Mr. Ortiz "stole hundreds of thousands of dollars from us and did shoddy work," yet dismisses the thought that he would have any motive. (Exhibit B at 85; Exhibit B2 at 162-64.) Quite possibly, Mr. Horowitz was concerned about what Mr. Ortiz would say, given his inside knowledge of the marital stress caused by the protracted construction and consequent expense. However, numerous other people mentioned Mr. Ortiz as a possible suspect, including Tammy Hill, Ms. Vitale's sister. (Exhibit C, Transcript of Interview of Tamara Hill (hereinafter "Hill Interview"), at 210-215.)

Horowitz's insistence that Mr. Ortiz was an unlikely suspect is also consistent with his plan to set up Joe Lynch, and thereby divest himself from any further financial obligations derived from the land purchase. The detectives even said that they did not want to "get fixated on Joe" who was

"being extremely cooperative." (Exhibit B2, at 157.)

Throughout the video, Mr. Horowitz is confident that he had figured out many of the relevant details of the crime. As the recording begins, he is talking on his cell phone, saying: "I've pretty much figured out the time and manner and everything else. I just don't know who." (Exhibit B, at 57.) He was "analyzing the time of death." (Exhibit B, at 61.) Later on, Mr. Horowitz tell his police officer friend, Andrew Cohen: "It was such a sharp blow to the head. Did someone just come by a random person? ... But the guy showered ... He only touched one knob .... He could have showered in the house after he killed. It wasn't planned." (Exhibit B2, at 170-171, 180.) Mr. Horowitz also said: "I was pretty good at not fucking with the crime scene. I was very good about it. I was very good." (Exhibit B2, at 173. *See also* Exhibit B, at 111.)

A box of clothes that Mr. Horowitz wore when feeding the dogs was found knocked over and bloody. However, when explaining what he used these clothes for, Horowitz had difficulty describing what items of clothing it contained, as well as what size jeans he wears, even though he said he wore those clothes every day:

> PO2: OK. The clothes. Your ranch clothes. Could you describe what...would have been contained within that day?
> DH: No. And it probably would have been a sweatshirt. Probably would have been a pair of jeans. It depends.
> PO2: Well, what size jeans do you wear?
> DH: 32, I think, Levi's. And usually a 31. Maybe 31. Maybe a 34. And uh, I don't think they would have been black. They probably would have been blue.
> PO2: Huh?
> PO: When was the last time you wore those clothes?
> DH: Every day....

C. Investigation in the Days Following the Murder

Early Sunday morning, October 16, 2005, detectives returned to the crime scene. "At 0730 hours Sheriff's K-9 Deputy Roberts and his K-9 'Freddy' arrived on scene. The Sheriff's K-9 was presented a potential piece of evidence from this case which resulted in a track which led to the home occupied by Gerald Wheeler, at 1571 Hunsaker Canyon Road." (Exhibit O, Barnes Report, at 490.)

Later that day detectives conduct a "walk through" with Mr. Horowitz:

> . . . Mr. Horowitz saw a one gallon milk container on the kitchen counter top. This seemed to spark [his] interest as he began walking briskly through what he described as being Pamela's normal morning routine. [He re-enacted] the removal of the milk from the refrigerator and pointed out a missing box of cereal from the top of the refrigerator. Mr. Horowitz then pointed out a bowl and spoon which was stacked atop several other dishes in the right portion of the equally divided kitchen sink.
>
> **Mr. Horowitz then walked directly to the master bedroom where he pointed out that the bed had not been made.** Mr. Horowitz told us Pamela's normal routine [was] to wake up, turn on the lap-top computer which had been on top of the coffee table and eat her breakfast. ... [B]ased on the fact the milk had been left on the counter ... and ... the bed was not made, he believed Pamela had been assaulted shortly after waking up Saturday morning. Mr. Horowitz then checked ... the master bedroom and indicated it appeared as it was when he left....We then followed Mr. Horowitz to the north end of the home where he entered the hall bathroom. **Mr. Horowitz then became visibly upset upon seeing the blood stains present in the shower. Mr. Horowitz commented on the fact that he believed the suspect had showered prior to leaving the residence after the homicide. ...**
>
> Prior to leaving I asked Mr. Horowitz to walk us through the sequence of events which took place when he discovered Pamela on the previous evening. Mr. Horowitz walked out the front door and began

> physically walking through how he discovered Pamela. Mr. Horowitz walked across the front porch, approaching the front door. While doing this he described that he had seen smears which [he] recognized as being blood on the front door. Mr. Horowitz the[n] reenacted how he opened the door, discovered Pamela lying on the floor and dropped the bags of groceries and his brief case. He then knelt down and appeared as though he was feeling for a pulse with his right hand. After a few seconds, Mr. Horowitz rose to his feet and walked through the living room to the telephone which was on the couch. Mr. Horowitz told us he called 911 from this telephone and then dropped the receiver, knowing Police would respond to the open line. Mr. Horowitz then walked back to the front door. ...
>
> Mr. Horowitz again knelt in the area where Pamela had been discovered and again reenacted how he attempted to find a pulse on Pamela. [He] again rose to his feet and said, 'at this point I knew she was dead.' Mr. Horowitz walked out the front door of the residence and turned facing the front door, where he knelt to both knees and motioned as though he was making a telephone call. Mr. Horowitz told us, from this location, he used his cellular telephone to call Sheriff's Dispatch on a direct line. Mr. Horowitz the[n] rose to his feet and told us he never re-entered the home after making the second call.
>
> Mr. Horowitz then gathered several items of clothing from the master bedroom and placed them in a sport duffle bag....
>
> (Exhibit O, Barnes Report, at 490-492.) [Emphasis added.]

Although Mr. Horowitz "pointed out" to Detective Barnes "that the bed had not been made" during the walkthrough, in the recording Mr. Horowitz said twice that the bed *was* made. (Exhibit B at 80, 90.) Notably, the first officers on scene reported that the large television blocked the doorway to the master bedroom until they moved it aside to conduct a security sweep. Crime scene photographs depict that with the television in that position, the bed would be concealed. (Exhibit A, Photos, at 16; Exhibit L, Hoffman Report, at 449.)

XVIII.

The facts pertaining to the arrest of Petitioner Scott Dyleski, are as follows:

Two days before the murder, neighbor Karen Schneider noticed an unauthorized credit card purchase. She spoke with the vendor the following day, and learned that her name was on the "bill to" section; the billing address was 1901 Hunsaker Canyon Road (that of Horowitz and Vitale), but the recipient was Esther Fielding, at 1050 Hunsaker Canyon Road. (9 RT 2498-2504.)

Ms. Schneider's husband was away, and she did not feel safe. A nephew came to stay with her, but she decided to go visit her husband. At approximately 5:56 pm. on October 15, 2005, Mr. Horowitz called the police to report the murder. The Schneiders heard about the murder later that night. (9 RT 2505-06.)

Ms. Schneider returned home on Sunday, October 16th, and convened a neighborhood meeting in order to alert her neighbors to a possible connection between the credit card fraud and the murder. (9 RT 2507-2508.) Ms. Schneider attempted to prevent Ms. Fielding and the Curiels from attending, but they learned of the meeting through others. (9 RT 2508; 2 CT 444-445.) Speculation was rampant. The safety of the community was threatened. (9 RT 2507-2509.) Ms. Schneider explained that:

> People were very upset that there were people living there that weren't really a part of the community, and didn't come to road meetings, we didn't know them.And that made people uncomfortable because, you know, it's the kind of neighborhood where everybody kind of knew what everybody was doing and where they lived

> and what their name was, and that kind of thing. And since the Curiels moved in there were a number of people we didn't know.
>
> (9 RT 2509.)

Esther Fielding and her 16-year old son, Scott Dyleski, were among other long-term guests at the Curiel home (1050 Hunsaker Canyon Road). Toward the end of the meeting, Karen Schneider announced that she wanted to discuss something that involved Esther. Esther thought Karen was referring to a recent event where Karen accidentally hit Esther's dog while driving, and became emotional (because in her mind Karen did not take any responsibility when the dog was put down). In fact, Karen's concern had to do with the use of Esther's name and address in the fraudulent charge to Karen's account, which she thought was perhaps retaliation by Esther over the dog. (9 RT 2510-2511.)

Hours later, at 2 a.m., Esther and the Curiels woke Scott to confront him about the credit card charges, but he denied involvement. (10 RT 2883.) Although it later became apparent that he had committed the credit card fraud, Scott was a teenager who had never been in any sort of trouble before. (10 RT 2670.) Esther was worried that if he was to blame, Fred might evict them, as they were living in the Curiels' home rent-free. (11 RT 2927, 3096-3097.) Between the murder and the credit card fraud, the atmosphere in the Curiels' home was tense. In the days that followed, the Curiels continued to pressure Scott, telling him he could be implicated in her murder based on the use of her address and unlisted phone number on the fraudulent purchase order. (10 RT 2886-2887.)

At the preliminary hearing, Fred Curiel testified that when he

explained this to Scott, "it seemed to dawn on him now that this was not just a computer, I mean it might get mixed in with the murder, and there seemed to be genuine concern at this point, and he seemed a little upset." (1 CT 382.) Fred testified that he then told Scott that he had nothing to worry about because "there will be DNA under her fingernails." (1 CT 383.)

Ms. Curiel then told Scott it was critical for him to remember everything he did that Saturday morning, October 15th. Scott had gone for a walk. When he returned, he had scratches on his nose; he said he fell and got scratched by a bush. Kim Curiel asked Scott whether anyone had seen him walking and could corroborate his story. (1 CT 383.) Scott said that he did encounter a woman in a car. His description of her sounded very much like Ms. Vitale. Continuing his tale, Scott said that the woman stopped to speak with him, grabbed his arm, and said "You've got to believe." (10 RT 2887.) Scott repeated this story to everyone, including his friend, Robin Croen (9 RT 2389); his mother, Esther (11 RT 3122); his girlfriend, Jena Reddy (9 RT 2588); and Hazel McClure and Michael Sikkema, who also lived with the Curiels. (10 RT 2757-2758.) Scott was concerned that his DNA could be in the Horowitz home, because he had handled their mail as part of the credit card scheme. Knowing that he did not commit the murder, Scott made up this story, believing that if he was investigated as a suspect, he would readily be cleared, and that would deflect attention away from the credit card scheme. (*See* Exhibit H, Declaration of Scott Dyleski, at 416-417.)

On Monday, October 17th, Scott called Robin Croen, the other party to the credit card scheme, wanting to meet and talk in person, but Robin was busy. On Tuesday, October 18th, Fred Curiel contacted Tom Croen, Robin's father, to express his concern that both boys were involved. They searched Robin's computer and found incriminating emails. Because of the strange statements by Scott, Fred told Tom that he was worried that he was connected to the murder. (9 RT 2467-2468; 9 RT 2471.) Mr. Croen immediately retained counsel, who contacted law enforcement. (13 RT 3581.) On Wednesday, October 19th, Robin testified about the credit card plan, Scott's odd tale of the woman on the road, and the scratches on Scott's face. (*See* Exhibit BB, Transcript of Skelton Hearing (hereinafter "Skelton Hearing"), at 583-597, 600.) At the end, Robin added:

The witness: I would like to say one thing. On Tuesday, I forgot to say this before, but when he was talking to me, and he said that if this – if this murder hadn't happened and if all this attention wasn't around there, then the [credit card] plan would have continued working and there wouldn't have been any attention drawn to it. So I don't know, at least that one little nugget gives an impression that he wasn't involved with that.

Judge Kolin: With what?

The witness: With the killing.

Judge Kolin: Why would you say that?

The witness: Well, if you're trying to lay low, you don't go kill somebody to draw attention to yourself.

(Exhibit BB, Transcript of Skelton Hearing, at 624.)

Thus armed with information from the Croens, law enforcement arrested Scott in the early hours of Thursday, October 20, 2005 for the

murder of Pamela Vitale. A search warrant was contemporaneously served at the Curiel home. (13 RT 3581.)

XIX.

The following information was adduced at the preliminary hearing:

The prosecution called 23 witnesses, including law enforcement, criminalists and DNA analysts, the neighbors affected by the credit card scam, the Croens, and members of the Curiel household.

Homicide Detective Shawn Pate, who participated in the interview of Mr. Horowitz in the hours after the murder, testified as to Mr. Horowitz's account of that Saturday, notably foregoing any of the numerous inconsistencies. (1 CT 8-17.) For example, Pate said Mr. Horowitz woke up around 6:45, when in fact Mr. Horowitz was unable to state what time he woke up. (1 CT 10; Exhibit B, at 94.) After a meeting that ended around 2 p.m., Pate said, Mr. Horowitz "made a couple stops. He wasn't very specific . . ." (1 CT 11-12.) Pate also testified that after calling 911, Mr. Horowitz knelt down next to his wife and stayed with her until the police came. (1 CT 14.) However, Sergeant Hoffman, the first responding officer, testified that Mr. Horowitz was outside, walking between the cars talking on his cell phone when the officers arrived. (1 CT 34.) Detective Pate relayed that the television in the home had been pushed against a wall, blocking access to the master bedroom, and that Mr. Horowitz had said there were firearms in the bedroom, and Ms. Vitale had "drawn them in the past." (1 CT 15.) Pate testified after he spoke with Mr. Croen on October 19th, his investigation took a different direction that resulted in the arrest of

Scott Dyleski. (1 CT 17.)

Detective Lance Santiago testified that he spoke with another neighbor, Julie Partridge, who lived at 1801 Hunsaker Canyon Road, who stated that on October 15th, just before 6 p.m., she heard a vehicle drive up the Horowitz driveway, and then she heard a loud scream that sounded like a wounded animal. (1 CT 24, 26-27.) (This was Mr. Horowitz, as recorded on the 911 call.) Det. Santiago also testified about interviewing Fred Curiel on October 20th, who was very reluctant to talk, and then fell ill and collapsed. For most of the interview Mr. Curiel lay face down on the floor. (1 CT 28.)

Sergeant Dan Hoffman was the first officer to arrive on scene. (1 CT 31-51.) Dispatch notified him just before 6:00 p.m., and he arrived at the residence minutes later. (1 CT 2.) Upon arrival, he observed a small trailer residence, and a large home under construction; Mr. Horowitz was walking between two vehicle parked in front of the smaller home, talking on a cell phone. (1 CT 34.) Mr. Horowitz stated that his wife was inside the trailer and that she had been murdered. (1 CT 35.) Anxious to secure the scene, Sergeant Hoffman led him to a patrol vehicle. (1 CT 35.)

At the start of the encounter, mere minutes after reporting his wife's murder, Mr. Horowitz was "very animated." (1 CT 38.) As he was being seated in the patrol vehicle, he said that he had been "with a bunch of retired police officers that day." (1 CT 36.) Hoffman noticed that Mr. Horowitz's shirt was wet near the left shoulder, and Mr. Horowitz explained that he had knocked over the dogs' water bowl near the door and gotten his shirt wet; he also "wanted to make sure that [Hoffman] was

aware that the grocery bags were his, that he had brought those home." (1 CT 36-37.) In front of the door, was a dog bowl, two grocery bags, and a black leather case. (1 CT 40.) Hoffman described the scene inside, including the position and appearance of Ms. Vitale's body, the residence itself, which he described as cluttered, and the significant number of blood droplets all over the front room. (1 CT 40-43.) He recalled that the big-screen TV had been pushed all the way against a wall, blocking the bedroom door, which he moved in order to conduct a safety sweep of the bedroom. (1 CT 43-44.)

Mr. Horowitz said that he did not touch anything in home other than the telephone, to call 911, and his wife's neck, to check for a pulse. (1 CT 46-47.) Mr. Horowitz was transported to the Sheriff Department's facility in Martinez. (1 CT 48.)

According to Sergeant Hoffman, Mr. Horowitz said that he believed Joe Lynch was responsible, and claimed that Joe was expected to come by to drop off a check that day for $188. (1 CT 50.)

Defense counsel, Ms. Leonida, did not ask any questions of these witnesses that would suggest that she had watched the Horowitz interview. Nor did she develop any of the myriad inconsistencies, despite their obvious exculpatory value.

The next witness was Inspector Philip Venable of the Sheriff's Department. (1 CT 52-75.) He testified about the examination of the cell phones and computers seized from the Horowitz residence, although a computer expert from Alameda County actually conducted the investigation. Inspector Venable saw a conflict of interest because he had

worked on a previous case in which Mr. Horowitz was defense counsel. (1 CT 54-57.) The computer seized from the home - apparently used by Ms. Vitale - showed internet activity beginning at 7:49 a.m. on October 15th, and ending at 10:12 a.m. (1 CT 58-59.)

Inspector Venable examined the computers and hard drive from 1050 Hunsaker Canyon Road (the Curiel residence). (1 CT 62-74.) The hard drive, which belonged to Scott, contained lists of materials needed to grow marijuana, as well as orders placed with Specialty Lighting under Karen Schneider's name. (1 CT 70-73.)

Sheriff's Criminalist Alex Taflya described the crime scene. (1 CT 75- 121.) A shoe print in blood on a white plastic lid did not appear to have been made by any of the persons present. (1 CT 80-81.) Inside the door, Ms. Vitale was lying in a fetal position, and there was blood all around her, on the walls, and the back of the door; although there was a void with no blood in the carpet next to her. (1 CT 80-83.) A plastic storage container was knocked over; the television was displaced; a pair of bloody, but undamaged eyeglasses were folded and placed on the television; a laptop computer was open on the coffee table; and several boxes in the living room appeared to have on them bloody hand prints. (1 CT 82-86.) On one of the boxes, it appeared upon further inspection that what appeared to be a fingerprint "appeared to be a fabric print." (1 CT 86.) There was broken pottery around the living room, and several items related to the home construction had blood on them, including molding and a metal balustrade. (1 CT 86, 90.)

In the kitchen, Taflya noted a water bottle with bloody prints on it, a bloody bowl by and a bloody mug in the sink, and an open container of milk. (1 CT 91-92.) In the hall bathroom were apparent blood stains, including a hand print on the back of the shower stall and on the hot water knob. (1 CT 92.) The prosecutor, Mr. Jewett, led Taflya through numerous crime scene photos. (1 CT 96-102.)

On cross, Mr. Taflya testified that there was a bloody mark on a box that appeared to have been made by a garment with a cuff sleeve. (1 CT 109.)

On re-direct, Mr. Taflya testified that he did not see the sort of cast-off that would be expected if a long instrument was used to repeatedly hit the victim. However, based on the blood spatter, the molding found at the scene could have been used as a weapon. (1 CT 113-115.)

Deputy Joseph Moore observed the autopsy of Ms. Vitale by Dr. Brain L. Peterson. (Although Inspector Venable was aware of the potential conflict of interest since he had been involved in a case where Mr. Horowitz represented the defendant, this concern did not extend to Dr. Peterson, who had performed Felix Polk's autopsy, while Mr. Horowitz was representing Susan Polk at the time of the this murder. *(See, e.g.,* Exhibit JJ, San Francisco Chronicle, Autopsy Results at Odds With Polk's Defense.) Deputy Moore described a mark on Ms. Vitale's back that looked like a capital "T" with a line through it, or a capital "H" with the horizontal bar extending beyond the right vertical bar. (1 CT 122-123.) Deputy Moore also recounted Mr. Dyleski's arrest, and the search of the Curiel residence. (1 CT 124-139.) In Scott's room there was a CD box set

of the Velvet Acid Christ (a rock band), that included a pamphlet that had a symbol on it: "it has a single line down, has a perpendicular line slightly up from the – from the bottom line and it has a U that intersects it in the middle." (1 CT 128.) He was permitted to authenticate a number of drawings and writings seized from Scott's room, which contained violent themes. (1 CT 129-135.)

Reserve Deputy Frederick Kovar testified about the grid search of the area around 1050 Hunsaker that resulted in the seizure of a black duffle bag containing clothes from an abandoned van on the property. (1 CT 139-155.) Kovar said that the duffel bag was found behind the driver's seat, and did not exhibit the same weather damage as other items in the vehicle. (1 CT 150.) He removed the bag, and using his flashlight, observed dark clothing inside; he picked up a "balaclava type-thing," then put it back and called his supervisor. (1 CT 151.) He carried the duffel bag to 1050 Hunsaker, set it down on the porch, and waited until Eric Collins took possession. (1 CT 152.)

Criminalist Eric Collins testified about the numerous evidentiary items that he collected and processed, and his observations of Ms. Vitale. (1 CT 157 -193.) Her left hand was severely damaged, and two fingers appeared broken. (1 CT 158.) She had severe lacerations and contusions on her scalp and face, a fracture of the upper mouth, an abdominal stab wound (inflicted either at or subsequent to the time of death), and a superficial incision on her back shaped like an "H." (1 CT 159-161.) There was evidence of injury to her neck muscles that indicated the application of manual pressure, short of strangulation, and a small amount of blood

aspirated in her lungs. The cause of death was blunt force injury to the head. (1 CT 162.)

Mr. Collins collected fingernail clippings and swabs from Ms. Vitale's face, neck, hands, and her right foot, which was exposed due to a large tear in its sock. The foot swab was assigned evidence number 3-10. (1 CT 158-159.)

In processing Mr. Dyleski, Mr. Collins saw a few injuries, all superficial, such as a linear scratch on his right nostril; light bruising on his arm; and some abrasions on his leg. Collins obtained an oral swab from Mr. Dyleski for DNA testing. (1 CT 169-170.)

Mr. Collins also processed the duffel bag found by Reserve Deputy Kovar. The duffel bag bore an airline tag in Scott Dyleski's name. Items reportedly found inside the duffel bag included one black evening glove, a blue ski mask (or "balaclava"), a black shirt, and a black raincoat. (1 CT 171-173.) Mr. Collins conducted presumptive blood tests on the bag and enclosed items, and obtained positive results on some items. (1 CT 175-176.)

Mr. Collins also received several items provided by Esther Fielding, including clothing, a pair of shoes, alcohol bottles, and a computer hard drive. (1 CT 178-179.) The shoes reacted presumptively positive for the presence of blood. (1 CT 181.) He opined that an image of a shoe print found at the Horowitz residence appeared similar in pattern to the shoes obtained from Ms. Fielding. (1 CT 184.)

At no time did Mr. Collins perform any tests to confirm whether or not there was, in fact, blood on the items that reacted positively for the

presumptive presence of blood. (1 CT 188.)

John Halpin, another Hunsaker Canyon resident, testified about unauthorized purchases made with his credit card information. (1 CT 194-220.) The mailboxes are all grouped together at the end of the road. (1 CT 197.) In August of 2005, he found a Visa statement that had been torn. (1 CT 197-198.) When he learned what Karen Schneider had discovered, he found two unauthorized charges to his Visa in September and October (Specialty Lighting and Future Garden Support). (1 CT 199-202, 212.) Mr. Jewett showed Mr. Halpin notes seized from Mr. Dyleski's room, that had a variety of information such as his name, address, telephone number, date of birth, Visa card number, expiration date, and verification code; the PIN number for an investment account; his passwords for Amazon.com, Paypal.com and Visa.com; and his frequent flyer numbers. (1 CT 204-209.)

Karen Schneider also testified at the preliminary hearing. (1 CT 221-249.) Two weeks before the murder, she was driving on Hunsaker Canyon Road at the same time that members of the Curiel household were walking on the side of the road, and she accidently hit Esther's dog, Jazz. (1 CT 223.) A few days before the murder, Ms. Schneider was checking her bank statements online, and noticed three unauthorized pending charges. (1 CT 229-230.) On Friday, October 14, Ms. Schneider contacted the vendor, Specialty Lighting, and spoke with Jackie Jahosky. Ms. Jahosky provided Ms. Schneider with copies of the purchase orders, which Ms. Schneider took to the Lafayette Police Department. (1 CT 230-231, 234, 241.) The shipping address on the orders was in the name of Esther Fielding, of 1050 Hunsaker Canyon Road, but the billing address was 1901 Hunsaker Canyon

Road (the Horowitz/Vitale residence). Ms. Schneider's address was 2001 Hunsaker Canyon Road. Her husband was away. Frightened, she had a nephew come over Friday night, and left town to go visit her husband on Saturday. She learned of the murder that night. When she returned home on Sunday, she convened a road meeting for later that same day to announce the credit card fraud. (1 CT 233-237.)

At the end of the meeting Ms. Schneider confronted Esther, believing that Esther had charged her account to retaliate against her for hitting Esther's dog. (1 CT 237-239.) Ms. Schneider accused Esther of "trying to kill [her]." (1 CT 239.)

Tom Croen testified that his son Robin had been friends with Scott since childhood. (1 CT 249-258.) On October 18th, Mr. Croen received a message from Kim Curiel. He called and spoke with Fred, who shared his concern that Scott and Robin were using other people's credit cards to order marijuana growing equipment online. (1 CT 249-250.) Fred went to the Croen home to examine Robin's computer, on which emails between Scott and Robin were found, discussing the scheme. (1 CT 251.) Fred told Tom he was worried that there was a connection between the murder and the credit card orders. (1 CT 253.) The next day, the Croens met with legal counsel, who in turn contacted the authorities. Robin and Tom then testified about the credit card fraud, in exchange for immunity for Robin. (1 CT 254-255.) Mr. Croen relayed that he knew Scott well, and that in the weeks preceding the murder, Scott was friendly, and enthusiastic about his studies. (1 CT 258.)

Robin Croen testified about the credit card scheme, and about his

contact with Scott after the Vitale murder. (1 CT 259 - 300.) About a month before the murders, he and Scott hatched a scheme to order marijuana growing equipment with other people's credit cards. (1 CT 260 - 261, 265.) Scott told Robin that he was able to find people's credit card information. (1 CT 265.) The day before the murder, Scott called Robin and told him that there was a problem with the order, but he would find a way to take care of it, and everything would work out. (1 CT 266.)

On the night of the murder, Scott and his girlfriend, Jena, went over to Robin's house (another friend, Oscar Timms, was also there). (1 CT 272-275.) Robin noticed some scratches on Scott's face. (1 CT 275.) While Scott was at Robin's house, Esther called to say that there was police activity in the canyon related to a murder, and the police weren't letting anyone in or out. The teenagers speculated that it was at the Horowitz house, because it was the only one they knew of past Scott's; also, Scott knew that Mr. Horowitz was an attorney, so maybe "some criminal had a grudge or something like that and went up there." (1 CT 274-277.) This led to a conversation about serial killers and murderers. (1 CT 277-278.)

Scott called Robin on Monday, wanting to talk in person. (1 CT 283-284.) They met on Tuesday, and Scott said he was going to admit the credit card fraud to Fred and say that Robin wasn't involved, in order to try to separate himself from the murder. (1 CT 285.) Scott told Robin that he was afraid of being connected to the murder because his DNA might be found on her, since she grabbed him at some point. (1 CT 287.) Scott also said he would be fine, because he had an alibi for all day Saturday. (1 CT 289.)

Mike Sikkema and his family also lived with the Curiels, and he testified to his observations of Scott in the period before and after the murder. (1 CT 301-325.) In the three weeks before the murder, Scott's schedule changed. He began going on walks at unusual times, and seemed withdrawn. Mr. Sikkema thought he might have been using drugs. (1 CT 303-304.)

On the morning of the murder, Mr. Sikkema recalled seeing Scott return from a walk some time between 10:00 and 11:00 a.m.; he had gouge marks on his face and a strange look in his eyes; he went straight through to the bathroom and put ointment on his wounds, visited Esther in her bedroom, and then went to the living room and spoke with Kim Curiel. (1 CT 305-306.) Scott told Mike he walked into a bush. He was wearing a black t-shirt, black shorts, and black boots that Mike did not recognize. Mike said that Scott always wore black. (1 CT 307-308.)

Mike confronted Scott about the story he told that a woman who looked like Ms. Vitale grabbed his arm while he was out on a walk Saturday morning, and asked Scott if he was using drugs. Scott told him it was a hallucination. (1 CT 311-313.)

Marcus Miller-Hogg, Kim Curiel's brother, shared a close relationship with Scott. Around 2 p.m. that Saturday he called Esther. Scott answered the phone, and told Marcus that he had a bruised hand from falling on a hike; Marcus advised applying ice. (1 CT 327-329.) On Wednesday, October 19th, Esther and Scott showed up unannounced to Marcus's home, and Esther asked if Scott could stay with him until he went to stay with his father. Later that evening, police arrived and took Scott into

custody. (1 CT 332-333.)

David Curiel, Fred's brother, who also lived at the residence, testified to statements made by Scott in the period following the murder, and some papers he found in Scott's bedroom months after Scott's arrest. (1 CT 337-359.) David claimed that on October 18th, he overheard Scott talking with his girlfriend, Jena. David said that Scott "raised his voice and made a statement that once they find his DNA on her body, that the police were going to come after him." (1 CT 339-340.) When David took over Scott's room in November, he removed the drawers from Scott's dresser, emptied their contents, and vacuumed them. (1 CT 337, 344-345.) In January, the Curiels hosted a party. David did some additional cleaning and shoved a bunch of stuff in the drawers; the next morning, he opened the drawer and saw slips of paper he had never seen sitting on top of the stuff in the drawer, which contained writing he recognized as Scott's. (1 CT 347-48, 351.) Each piece contained people's personal information, including Mr. Halpin's. Written on one piece was a list that read, "knock out / kidnap. Question. Keep captive to confirm PINs. Dirty work. Dispose of evidence. Cut up and bury." (1 CT 352-353.)

Fred Curiel testified to the credit card fraud, and to events in the Curiel household after the murder. (1 CT 360-388; 2 CT 389 - 405.) He attended the road meeting on October 16, when Ms. Schneider confronted Esther. (1 CT 365.) Although Kim Curiel was the secretary of the association, they were not informed of the meeting until neighbor Ruby Krikorian called and told them. (1 CT 365-366.) Fred, a computer analyst, used the ISP address on the order form provided by Karen Schneider, and

determined that the order was placed from a computer in his home. (1 CT 368-370.) He excluded every computer in the home except Scott's (which he determined had been used to place the order). Scott claimed he had nothing to do with it. When Fred asked to examine computers belonging to Scott's friends, Scott did not want Fred to search Robin Croen's. On Tuesday, at the Croen's home, Fred found evidence confirming Scott's involvement in the scheme. (1 CT 377-378.)

On Tuesday afternoon, Fred and Kim spoke with Scott about the fact that he used Ms. Vitale's address on the order form: "'Can you see how this could be misrepresented or misconstrued to be related to the murder?' And . . . it seemed to dawn on him now that this was not just a computer." (1 CT 382.) Fred then told Scott he had nothing to worry about because there would likely be physical evidence from the real killer, like DNA, footprints, and hair. Kim told Scott it was very important he remember everything he did on Saturday morning, and asked if anyone saw him out walking. Scott said that a woman in a white car stopped, reached over, grabbed his arm, and said "You got to believe." He described her as a woman with brown hair and round glasses, like Ms. Vitale. (1 CT 382-383.) He then asked "What if my DNA is found?" Fred replied that if he wasn't there, his DNA won't be there, but that if it is, it means he was there, and he will go to prison. (1 CT 384.) Scott said that the clothes he wore on Saturday morning had not been washed; they could inspect them. (1 CT 387.)

On cross, Fred testified that on the morning of the murder, he saw Scott at 9:26 a.m., sitting on the couch in the living room with Kim while she graded papers; he was certain of the time because he was concerned about it - he and Kim had a lot to do that day, and he checked his pager just before he saw Scott. (2 CT 390-391.) Scott did not appear upset or sweaty; his clothes and hair were not wet; and he had no blood on him. (2 CT 397.) Fred was anxious to get going, but Kim wanted to finish grading papers. They left about 40 minutes later, at 10:20. (2 CT 403-404.)

Scott kept some items in an unlocked storage unit on the Curiel property, including sports equipment and clothing. (2 CT 392.)

Inspector Paul Peterson of the District Attorney's office met with Jena Reddy on October 25th and took possession of some items; on October 27th, he received other items through a law office that had reportedly been provided by Esther Fielding, which he gave to Eric Collins. (2 CT 407-411.)

Marjorie Fielding, Esther's sister, testified that in the days after Scott's arrest, Esther stayed with her at her home in Bolinas, which Marjorie shared with Joe Schultz. (2 CT 412-424.) On October 21st, Jena Reddy came to visit, and brought Esther a box of belongings and a red backpack that included bottles of absinthe, a book called mass murder, a small item (either a journal or address book), and clothes. Marjorie later watched Esther burn an unopened box of gloves and the small journal or address book. (2 CT 414-417.) Joe Schultz moved the rest of the items to their storage shed. (2 CT 418.) The following week, Marjorie insisted that Esther turn over the property to the police, including a pair of shoes wrapped in clothing. (2 CT 421-422.)

Mr. Schultz testified that he saw Esther burn a piece of paper with credit card numbers on it and a notebook; he himself burned a book called *Mass Murders*, because he did not want it in the house. (2 CT 425-429.)

Esther testified at length at the preliminary hearing. (2 CT 429 - 566.) Topics covered included how she and Scott came to live at the Curiel's after her divorce; how Karen Schneider had hit her dog; and Scott's classes at Diablo Valley College, including abnormal psychology. (2 CT 429-444.)

On October 15th, Esther went to work at 5 a.m., and returned around 12:30 p.m. She saw a scratch on Scott's nose, which he said was from a branch that hit him in the face. (2 CT 455-456.) That evening, they heard sirens, and learned from a neighbor that some sort of beating had happened, likely at the Horowitz residence, and called Scott at Robin's house to tell him. (2 CT 459.)

On October 16, Esther learned about the road meeting from a neighbor. After the meeting, Karen Schneider brought up the credit card situation and provided Esther with copies of the fraudulent orders. (2 CT 444-447.) That night, Esther was worried that Fred would kick them out of the house if he found any evidence of credit card fraud, so she told Scott to get rid of whatever he might have. (2 CT 461-462.)

Esther spent the morning of October 17 clearing brush and other materials from the land surrounding 1050 Hunsaker, along with others, including Joe Lynch. (2 CT 463.) They were in the vicinity of Esther's old van, which Esther had arranged to have hauled away in the coming weeks, once she finished clearing. As she and Joe walked back to 1050 Hunsaker,

she looked in the van to make sure there was nothing in it worth keeping. (2 CT 465.) Inside the van was a black bag; she reached in and pulled out a black coat, which she put back in the bag; she did not see any other items inside the bag. (2 CT 466-467.) Esther asked Scott about it, and he said it was old clothes. (2 CT 470.)

On October 18, Esther and Scott met with an attorney. Beforehand, Scott told her that he was worried about being connected to the murder, because a woman who might have been Ms. Vitale grabbed his arm and said "I can't believe this is happening," and that was why he'd been lying about the credit card fraud. (2 CT 481-484.)

On October 19, Esther took Scott over to Kim Curiel's brother's house, Marcus to stay with them for a while; she had intended to take him to his father's, but he said he was not able to take Scott at that time. (2 CT 494-497.)

On October 20, Esther went to stay with her sister, Marjorie. (2 CT 498.) On October 21, Jena and her mother came with some items of Scott's, which included some clothes and a pair of shoes Esther did not recognize. (2 CT 499-504.) Esther burned several of the items, including pieces of paper with credit card information, a red journal, and an unopened box of gloves, which she thought had to do with growing marijuana. (2 CT 508-512, 548.)

Mr. Jewett asked Esther whether Scott was interested in serial killers, like Jack the Ripper, which Esther denied, and he showed her Scott's artwork for identification. (2 CT 515-519.) Esther did say that about a month before the murder, she was concerned when she found some of

Scott's drawings that depicted respectively "a solitary figure in a crowd," a heart, and eyes with tears, and thought he might feel lonely and need to see a psychologist. (2 CT 560-561.) Mr. Jewett had Esther identify drawings by Scott, which she had never seen before, as being "similar in style" to Scott's artwork. (2 CT 563-4.)

On cross, Esther testified that she and Scott had lived in a makeshift structure on the Curiel's property, with no electricity or running water for four years, while waiting for the Curiel's house to be built. (2 CT 527-528.) She testified to Scott's many interests, like frisbee, guitar, and the boy scouts. (2 CT 526-527.) She also stated that she was on medication that affects her memory. (2 CT 531.)

On the day of the murder, Scott was not acting strangely, he did not appear nervous, and he was not sweating. (2 CT 540.)

Detective Cary Goldberg testified that he spoke with Jackie Jahosky of Specialty Lighting on November 15, 2005. She stated that on October 14, she spoke with a young man who called regarding the orders that had been placed using Karen Schneider's credit card information; she told him the credit card company had declined the charges. He called a second time and asked if she could send it to the billing address, 1901 Hunsaker Canyon. She said no, and told him to contact the credit card company. (2 CT 569-570.)

He also testified that he had a tape-recorded conversation with Esther, and she stated that when she asked Scott about the items in the van, and specifically the coat, he stated "It was old anyway, and I just left it up there." (2 CT 575.)

Gary Harmor, an expert witness in the area of forensic DNA who works at the Serological Research Institute (SERI), testified to the results of the Y-STR testing he conducted on items 3-10, the foot swab taken from Ms. Vitale, and 12-1, a DNA sample from Mr. Dyleski. (2 CT 578-601.) He determined that they were consistent at 17 markers, and that it was not a profile that was found in the limited database of 3,561 profiles, 1,276 of which were from Caucasians. (2 CT 582-587.) He received the DNA samples already extracted by David Stockwell, the criminalist with the Contra Costa Sheriff's Department. (2 CT 587-588.) When he received them, he found there was .022 nanograms in the sample 3-10, whereas Mr. Stockwell had found there to be about five times that much. (2 CT 589-590.)

Mr. Stockwell testified about his examination of item 3-10, and contamination issues therewith, and items associated with the duffel bag found in the van. (2 CT 602-670.) Among many of the samples obtained from Ms. Vitale's body that he analyzed for the presence of male DNA, the only swab that showed its presence was item 3-10, the foot swab. (2 CT 604-606.) Mr. Stockwell could not exclude Mr. Dyleski as a possible male contributor, with a statistical probability of 1 in 43,000 for Caucasians. (2 CT 609.) He then requested further Y-STR testing, in order to determine if there was only one male contributor. (2 CT 610-611.) As to the potential contamination, Mr. Stockwell stated that he was able to trace it to the kit, and not the evidentiary sample, meaning that it was unlikely that the actual sample had been contaminated. (2 CT 614.)

Mr. Stockwell also tested the items from the duffel bag (item 13-9) and the shoes (item 22-1). (2 CT 615.) Item 13-9-1, a stain taken from the exterior of the bag, showed a mixed profile of male and female DNA; Ms. Vitale was a match for the female, with a probability of 1 in 13 quadrillion for Caucasions; Mr. Dyleski could not be ruled out as a source for the male DNA, however, it only showed a probability of 1 in 560 for Caucasians; Item 13-9-2, another stain from the exterior of the bag, was also a mixed sample, but there was one allele that could not have come from either Dyleski or Vitale, meaning either there was a third contributor, or one of them must be excluded. (2 CT 618-619.) Stockwell tested four places on item 13-9-B, the glove, two exterior and two interior; the two exterior and one of the interior matched Vitale; the other interior showed a mixed profile of Vitale and two additional alleles that matched neither Ms. Vitale nor Mr. Dyleski; in other words, Mr. Dyleski was excluded as a contributor. (2 CT 619-620.) Item 13-9C, the balaclava, was tested in six places; four showed a single source that matched Ms. Vitale; one showed a single source profile that marched Mr. Dyleski, with a probability of one in 780 trillion for Caucasians. (2 CT 620-621.) The shirt, 13-9D, was tested in five areas, only one of which showed any DNA, that matched Dyleski only. (2 CT 621-622.) From the shoes, three stains showed DNA that came from a single-source female, that was determined to match Ms. Vitale. (2 CT 622.) However, Mr. Stockwell did not test any samples from inside the shoe to establish the wearer. (2 CT 625.)

On cross, Mr. Stockwell testified to the numerous problems with the testing of item 3-10, including a low amount of DNA insufficient to

meet the threshold and contamination (2 CT 625-647.) Mr. Stockwell also admitted he was rushed for time when conducting these tests. (2 CT 647.)

Mr. Dyleski was held to answer on the charge of murder, and all enhancements. (2 CT 680.) On March 1, 2006, the People filed an information which added a special circumstance of felony murder, residential burglary (Penal Code § 190.2(a)(17) - which carries a sentence of life imprisonment without the possibility of parole. (3 CT 683.)

XX.

The following statement of facts pertains to motions in limine and jury selection:

A. The Admissibility of Y-STR DNA Evidence.

Petitioner's trial counsel requested a hearing about the Y-STR DNA analysis, specifically: (1) if it was generally accepted in the scientific community; (2) whether proper procedure been followed in collection, storage and testing; and (3) whether the statistical analysis was generally accepted within the relevant scientific community, and if so, could it be applied reliably in this case. (3 CT 740-754.)

Y-STR analysis had not been reviewed by any California Court of Appeal. (3 CT 747.) The defense counsel exclusion based on the questionable relevance of testimony that the Y-STR profile developed was not found in a database of 3,561 male profiles:

> Absent any explanation of the statistical significance of the fact that the Y-STR profile at issue in this case did not appear in Mr. Harmor's database, the fact of its nonappearance is meaningless, though it may be potentially - and prejudicially - compelling to lay jurors. 3,561 is 'a big number' but ... could well be statistically insignificant. Interpretation of such a result requires a measure of the likelihood of that result. Furthermore,

> such likelihood with respect to the database population can be meaningfully extrapolated to the general population only if proper random sampling techniques were employed in generating the database population.
>
> (3 CT 753-754.)

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

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

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

The prosecution called Dr. Megan Shaffer, director of Reliagene, which began Y-STR testing in 2003. With autosomal STRs, the loci are independent of all the others so one can "multiply each particular location and the frequency of that allele to all the other frequencies," and obtain statistical probabilities that an unrelated person would have the same profile in the millions, billions, or quintillions. In contrast, Y–STR analysis only

looks at the Y chromosome, which is inherited, unchanged, from father to son. Every marker is "linked" so the product rule cannot be used. (1 RT 68-69, 72, 104.)

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

Dr. Jason Eshleman, molecular anthropologist, testified for the defense at the hearing as an expert in population genetics. (3 RT 816-822.) He explained the danger of oversimplification in genetic classification. For example, Caucasians from New York do not show the same traits as Caucasians sampled from other parts of the United States. (3 RT 842-845.) A figure that combines all of the people in a database - regardless of ethnicity - is "meaningless." (3 RT 848.) There was no consensus among population geneticists as to the reliability of determining frequencies of Y-STR profiles. (3 RT 876.)

Although the relevance of Y-STR testing to this case was questionable, the prosecutor was allowed to present it to the jury. (7 RT 1809-1830.)

B. Change of Venue

At trial, Petitioner moved for change of venue prior to jury selection. The written motion included some 302 exhibits showing that all the major print news services, all the national and local television networks, and many internet news services covered the case from the time of Pamela Vitale's death and throughout the investigation. Many evidentiary details

appeared in the news coverage including prejudicial photos of Petitioner, sympathetic photos of Vitale and Horowitz, photos of the crime scene, and many factual assertions, some of which were accurate and some of which was patently false.

Dr. Robert Ross was called by the defense as an expert witness in support of the defense motion for change of venue. (3 CT 908-969; 1 RT 198-279; 2 RT 280-330.) A political scientist at Chico State University, he qualified as an expert regarding media content analysis, survey research and design analysis. (2 RT 206-216.) He interpreted the results of a survey of Contra Costa residents regarding their exposure to the publicity about the case. This survey revealed that 89 percent of those polled had been exposed to publicity about the case and that approximately 60 percent of those exposed to such publicity harbored the belief that Petitioner was certainly or probably guilty.(1 RT 197-329.) After the pretrial hearing, the trial court denied the motion without prejudice, pending the review of the voir dire of the prospective jurors. (2 RT 414.)

Written and oral voir dire of the potential jurors called to serve in Petitioner's trial bore out the results of the public opinion survey, revealing that 82 percent of the available jurors had been exposed to the pretrial publicity surrounding this case. Additionally, eleven of the twelve sworn jurors who convicted Petitioner, and all four of the alternates, were exposed to pretrial publicity. When the jury was sworn, the defense had six peremptory challenges remaining. Of the 31 available jurors left in the jury pool, only six indicated that they had not been exposed to pretrial publicity regarding this case.

After jury selection, trial counsel renewed the motion for change of venue based on the voir dire of the jurors. The trial court again denied the motion, noting that the defense had not exhausted all of its peremptory challenges and admonishing Ms. Leonida that this failure would weigh heavily in any appeal of the denial of the motion for change of venue. (6 RT 1489.)

XXI.

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

Mr. Horowitz testified that he woke up around 6:00 a.m. on October 15, 2005. (8 RT 2103.) **He had coffee and placed the coffee cup in the sink.** (8 RT 2120.) Pamela was still asleep when he left before 8:00 a.m. (8 RT 2106-2107.) Notably, in his statement hours after the murder, Mr. Horowitz was decidedly uncertain about what time he woke up; what time he left; and whether his wife was awake or not. (Exhibit B at 81-82, 94.)

After a breakfast meeting in Lafayette, he went to his office in Oakland, ran errands, went to the gym, then went home. Pamela's car was still there, but he knew she had plans that evening with a friend. **There were "smears" on the front door.** When he opened the door, it was like "a photograph of a crime scene." He knew she was dead, but touched her neck just to make sure. He called 911 from the home phone, spoke with them briefly then left the line open. He again knelt down and touched her neck before going outside with his cell phone. (8 RT 2109-2117.)

Dr. Brian L. Peterson of the Forensic Medical Group conducted the autopsy on October 17, 2005. Ms. Vitale was 5'9" inches tall and weighed 178 pounds. The cause of death was blunt force head injury. (14 RT 3825.)

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

The stomach injury was either post-mortem or in the "agonal period" which precedes death. The agonal period can last for seconds or for years, depending on cause of death. (14 RT 3790-3791.)

> Q. Do you have any sense of that with respect to the injuries that you observed to the body of Ms. Vitale?
>
> A. My time interval for all of those injuries was minutes....from the time the injuries began to be inflicted until the time she passed away, minutes.
>
> Q. Okay. Thank you. Did you notice any injuries to her left shoulder?
>
> A. Okay. On the left, yeah, there's a large number of injuries here. There were injuries that extended from the shoulder to the hand. And the injuries on the upper arm were around the elbow, on the shoulder....scratches and bruises around the elbow - - or rather, an L-shaped pattern of abrasion. Some scratches on the left wrist....laceration on the left palm....compound fracture of the middle joint on the third finger, compound fracture of the closest joint on the index finger....bone that comes through skin.
>
> ***
>
> Q. Hypothetically, at the time Ms. Vitale was being beaten about the head with whatever this object was, at some point she put her hands on her head in an effort to protect herself and then the beating conduct continued. Would that be the

kind of position that her hand at least could have been in to cause the compound fracture of those left fingers that you...described?

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

(14 RT 3790-3792.)

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

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

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

The "Art Institute" mug presented a degraded mixture, primarily female, and a trace minor profile from one or more males. Ms. Vitale's

profile matched for the 9 STR loci examined, with an estimated random match probability in the billions. Mr. Horowitz could not be excluded. Mr Dyleski was excluded. (13 RT 3661.)

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

XXII.

The appellate court relied upon the following evidence presented against Petitioner at trial as evidence of his guilt; however, much of it was problematic:

A. Opportunity

Petitioner possibly had the opportunity to commit the crime, because he took a walk the morning of the murder, October 15, 2005, although his whereabouts were accounted for the rest of the day.

However, the issue of timing was contested. As detailed below, there was no medical investigation into time of death. (Exhibit G, Declaration of Michael Laufer, M.D. (hereinafter "Laufer Declaration"), at 395.) Instead, the prosecutor used evidence that activity on Ms. Vitale's computer stopped after 10:12 a.m. (8 RT 2245.) It was inferred that this must have been the time that the altercation began, with the time of death following shortly thereafter. (15 RT 4045-46.)

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

reporting his wife's murder, Mr. Horowitz says on the telephone that he left that morning at 7:30 a.m. (Exhibit B, at 57.) He makes the same claim twice to his friend Andrew Cohen. (Exhibit B2 at 151, 176.)

The Vitale computer was shut down at 12:27 a.m. on October 15, 2005 and powered on at 7:49 a.m., going immediately into Quicken (a financial program) and was then used intermittently until 10:12 a.m. It is worth noting that the Vitale computer was supposed to have powered on one minute before the Horowitz computer powered off, although Mr. Horowitz was unable to say if he had seen Ms. Vitale that morning.

However, the internal clock on the Vitale computer was password protected. Mr. Ritter looked at the time on the servers of websites accessed, and thus concluded that the the computer's clock was accurate plus or minus four minutes. (8 RT 2240-2242.)

The password protected internal clock on this laptop was the heart of the prosecution's theory that Ms. Vitale was alive until at least 10:12 a.m. (15 RT 4041-4042.) Defense counsel did not cross-examine Mr. Ritter or in any way challenge this evidence. (8 RT 2248.) There is no indication that a computer expert was ever consulted on this subject.

Trial counsel's failure to adequately investigate or contest the computer evidence used to establish the time of death is further questionable in light of a mysterious handwritten note by Mr. Jewett that was provided as part of discovery to trial counsel. (See Exhibit KK, Jewett Notes.) That note documents a phone call to Mr. Jewett from a Wendy Murphy: "Correspondent who worked w/ D. Horowitz. Said got e-mail from DH on 10/15 at ~ 3:00 pm re Polk case, but did not receive e-mail

until ~ 10/26 (?). Thought delay in e-mail suspicious. [E]-mailed him back. D.H. responded that was old e-mail." (Exhibit KK, Jewett Notes.) Thus, Ms. Leonida had evidence in her possession that there may have been something wrong with the computer evidence used by the prosecution to establish the most critical facts at trial, and she still failed to conduct any investigation into it.

On October 20, 2005, Fred Curiel told investigators that Mr. Dyleski was home at 9:26 a.m. on October 15, 2005, sitting next to his wife, Kim, on their couch, while Kim graded papers. (11 RT 3010, 3017. *See* Exhibit M, Santiago Report, at 460.) In her initial interview on October 20, 2005, conducted separately from Mr. Curiel, Mrs. Curiel reported that Scott had returned home from a walk at around 9:30 a.m. on the morning of the murder. (See Exhibit GG, Report of Deputy R. Fawell (hereinafter "Fawell Report"), dated October 31, 3005, at 707.) This would have made it **impossible** for Scott to have committed the murder according to the prosecution's time line. Mr. Curiel reported that he always remembers times, and he checked the time on his pager when he saw Scott. (Exhibit M at 461. *See also* 11 RT 3017.) It was undisputed that Petitioner had an alibi for the rest of that day following his early morning walk.

Later on, at approximately 10:20, Mr. Curiel and his family left for the Spirit Store for Halloween shopping. (11 RT 3020.) This time also would have made it **impossible** for Scott to have committed the crime, as it was undisputed that Scott had returned home prior to the time that the Curiel's left, and this would have only left an eight minute window between the time that Ms. Vitale was alive and the time that Mr. Dyleski's

whereabouts were accounted for the rest of the day. Mr. Curiel's preliminary hearing testimony was consistent with his initial statements. (2 CT 390-391.) Mrs. Curiel did not testify at the preliminary hearing.

However, at trial, Mr. Curiel's testimony changed. Although trial counsel specifically told Petitioner's counsel that she had "read everything and watched everything," this assertion is rebutted by the record itself. (See Declaration of Katherine Hallinan.) After the prosecutor's opening statement, trial counsel realized that Mr. Curiel's testimony was going to change. Mr. Ed Stein, investigator for the Public Defender's Office, contacted Mr. Curiel, who then contacted Prosecutor Jewett, and a discovery dispute ensued. (8 RT 2211-2226.) At first, Ms. Leonida insisted that she never received the information conveyed by Mr. Curiel to Mr. Jewett. Only when the prosecutor located a discovery acknowledgment for this specific content, signed by Ms. Leonida herself, did she apologize and concede that she did receive this discovery before trial. (10 RT 2704-2705; Vol. 4 CT 1441-1443.) Trial was already underway, and defense counsel was unaware and thus had not investigated critical discovery, relied on by the prosecution to discredit Scott Dyleski's alibi.

At trial, Mr. Jewett prevented Mrs. Curiel from stating when she believed Scott returned to the house. Instead, he asked her to estimate the length of time that different activities took throughout the morning; in this way, he prevented her from stating that she believed she had seen Scott at 9:30 a.m. (10 RT 2849.) Using the time on the Spirit Store receipt as a starting point, Mr. Jewett walked her back through her day, until she revised her previous statement and concluded that Scott had entered the house

around 10:45 a.m. (10 RT 2866.) Prior to Mr. Jewett showing her the receipt, Mrs. Curiel estimated that the purchases occurred at 11:30 a.m.; however, the receipt showed the time as 15:36, which was presumed to be in East Coast Time, and thus was an hour later than Mrs. Curiel had estimated. The time she originally gave, 11:30 a.m., would comport with her original estimate that Scott returned at 9:30 a.m. (10 RT 2858.) However, the defense never challenged the accuracy of the time on the receipt.

Even disregarding Mr. and Mrs. Curiel's original statements that Scott returned at 9:26 a.m. and 9:30 a.m. respectively, and assuming he returned at 10:45 a.m., the latest time stated by any witness, he would have had only 33 minutes - at most - to commit the crime, put dishes in the sink, shower or at least clean up in the bathroom, get home, change, and dispose of his bloody clothing, as the prosecution argued at trial.

As discussed further herein and in the accompanying Memorandum of Points and Authorities (Argument I(A)(2)) *infra*), the crime scene evidence indicated that the perpetrator spent quite a bit of time inside - time that would not have been available to Petitioner based on the limited time frame available for him to have committed the crime.

B. Injuries on Petitioner

There was testimony that Mr. Dyleski returned home on the morning of October 15, 2005 with recent scratches and "gouge marks" on his face, and his right hand and wrist were swollen. According to Mr. Dyleski, he fell and scratched his face on a bush during his morning walk. (10 RT 2735; 10 RT 2851-2852; 11 RT 3083.) However, Ms. Vitale had no

foreign DNA under her fingernails, as one would expect if she had scratched the perpetrator. (13 RT 3663.) Furthermore, Ms. Vitale, at 5'9" inches tall and 178 pounds, outweighed Mr. Dyleski by approximately sixty pounds and was several inches taller than him. (11 RT 2937-2938; 14 RT 3825, 3917.) In light of their disparate size and the protracted nature of the attack, one would expect significant injuries on Mr. Dyleski if he were the true perpetrator, yet the criminalist admitted his injuries were all superficial. (Exhibit G, Laufer Declaration, at 395. 1 CT 169-170.)

Thus, in order to have committed the murder of someone significantly larger than himself while sustaining minimal injuries, and for the victim to have no foreign DNA under her nails whatsoever, it seems nearly certain that it would have required a significant degree of surprise. The prosecutor argued in closing that Ms. Vitale was surprised by the killer. (15 RT 4041-42.) However, there was no sign of forced entry, and the prosecution never explained how Mr. Dyleski could have gained entry without force and surprised Ms. Vitale. (Exhibit DD, Taflya Report, at 655.) Although Mr. Horowitz reported that they routinely left their front door unlocked, which would account for the lack of forced entry, Petitioner submits this was a lie. According to Rick Ortiz, the door was always locked, and Ms. Vitale was very security conscious, to the degree that even when she expected him, when he knocked, she called him from inside to make sure it was really him before she would open the door. (*See* Exhibit K, Ortiz Declaration, at 439.) There also was an alarm in the residence. (See Exhibit A, Photos, at 7.) Moreover, they were installing a state-of-the-art security and surveillance system in their new home, which included panic

buttons in many rooms and high-tech cameras. (*See* Exhibit K, at 439.; Exhibit EE, Emails, at 678, 688.) Thus, it seems highly unlikely that the door would have been left unlocked to allow for the surprise attack, which would have been necessary for Petitioner, with his small stature, to accomplish this murder with only superficial injuries.

C. Other Statements

Scott told a story in the days following the murder that while he was out walking the morning of the murder, a woman in a car (whose appearance he described consistent with that of Ms. Vitale) had stopped to speak with him. He said she told him "You've got to believe," and she grabbed his arm and scratched him. (10 RT 2887.) Scott was fearful that his DNA might be found in the Vitale home because he had recently touched her mail when searching his neighbor's mail boxes to gain information for his credit card fraud. (*See* Exhibit H, Declaration of Scott Dyleski, at 416-417.) Since he had not committed the murder, Scott made up this story, thinking that if the police investigated his involvement in the murder, he would be cleared, and that would somehow deflect attention away from the credit card scheme. (*See* Exhibit H, Declaration of Scott Dyleski, at 416-417.)

D. Petitioner's Artwork, Writings, and Symbols

As discussed further below, in section XXVII(A), *infra*, and in the attached Memorandum of Points and Authorities (argument II(A), *infra*), the prosecution presented Petitioner's artwork and writings as evidence of his character for violence, and to argue that a symbol found in his writings was similar to the marks on Ms. Vitale's back. (*See* 7 RT 1743; 14 RT

3795; 15 RT 4004. *See* Exhibit Y, Example of Symbol Drawn by Mr. Dyleski.)

However, Scott's high school art teacher, Ms. Lane, testified that this art was similar to that her other students, and was fairly typical of teen artwork. (14 RT 3874-75.) Moreover, the presentation of this artwork was highly inflammatory and prejudicial, as it contained themes of mass murderers, swastikas, anti-Christian and/or Satanic beliefs, vivisection, Absinthe use, violence and hate. (13 RT 3512-27. *See also* 9 RT 2454-47; 10 RT 2685; 11 RT 3075-77.) Furthermore, the similarities between the injuries on Ms. Vitale's back and the symbols on Mr. Dyleski's artwork were minimal at best, yet by alleging such similarity, it permitted the prosecution to introduce further inflammatory artwork, as well as a bumper sticker that contained anti-Christian themes. (Exhibit Z, Bumper Sticker. 15 RT 4002.) Trial counsel never objected to this highly prejudicial evidence.

E. To-Do List

On January 29, 2006, the day after a party at the Curiel household (and several months after Petitioner's arrest), pieces of paper turned up in a dresser drawer in the room Scott had occupied before his arrest. (10 RT 2790.) A "to do" list read: "Knockout/kidnap;" "Question;" "Keep captive to confirm opinions;" "Dirty Work;" and finally, "Dispose of evidence and cut up and bury." (10 RT 2797.) Although law enforcement had thoroughly searched the dresser drawers, which the residents also later cleaned, these notes somehow just appeared in the top dresser drawer sitting on a pile of gloves. (10 RT 2809-10.) They were reportedly found by David Curiel, Fred's brother, who moved in on October 3, 2005, after returning from

Nevada. (10 RT 2777-2778.) Before Scott was arrested, David slept on the couch. (10 RT 2778.) Once David claimed that bedroom, he also thoroughly cleaned the dresser. (10 RT 2784-2786.) David said that he recognized the handwriting as Scott's. (10 RT 2797.) Yet, none of the latent fingerprints developed from that piece were Scott's. (12 RT 3317-18.)

F. Duffel Bag

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

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

Using a flashlight he saw a duffel bag behind the driver's seat. He opened the driver's side door and removed the duffel bag, which was partially unzipped and appeared to contain dark clothing. (9 RT 2319-2321.) After moving the items of clothing around in the bag, Mr. Kovar took the duffel bag to the residence and showed it to the detectives. He then set it down on the porch and stood by until the criminalist (Mr. Collins) arrived. (9 RT 2322-2323; 9 RT 2335.)

Mr. Kovar documented chain of custody on the duffel bag, but not for the individual items within the bag. (9 RT 2327; 9 RT 2331-2332.) **At**

the scene, no one mentioned a glove. The bag and its contents were photographed with the items haphazardly laid out on the porch of 1050 Hunsaker. However, this image only shows two items of clothing, not four items as later reported. (Exhibit A, Photos, at 56.) Esther Fielding testified that she saw the bag on Monday, October 17, and pulled out a trench coat, but did not see any other items inside. (11 RT 3106.)

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

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

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

The glove was inside-out and had "red stains on the fingers" that tested presumptively positive for blood. The balaclava was also inside out; Mr. Collins observed some "dark staining" when he turned it right side out that tested presumptively positive. The raincoat had apparent staining but

presumptive tests had negative results. (12 RT 3408-3413.)

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

i. Item 13-9: Black Duffel Bag

Two apparent blood stains (items 13-9-1 and 13-9-2) found on the exterior of the black duffel bag were tested. Both revealed a DNA mixture that consisted of a predominant female component and a trace male component. (Exhibit CC, Laboratory Report by D. Stockwell, 05-12813-38, Dated 2/7/06, (hereinafter "Stockwell Report") at 644.)

13-9-1 contained sufficient DNA to determine that Ms. Vitale was the likely source of the female DNA with odds of 1 in 13 quadrillion. (Exhibit CC, Stockwell Report, at 647-649.) Although Mr. Dyleski was found to be a potential contributor to the minor component, "the strength of

this inclusion is limited due to the limited profile." (Exhibit CC, at 647.) The probability associated with this minor profile was 1 out of 560 Caucasians.

Item 13-9-2 provided a "weak and degraded profile." Ms. Vitale was included as a potential contributor, but the strength of the inclusion was minimal. (Exhibit CC, at 647.) The statistical probability of an individual having such a profile was estimated as 1 in 98 Caucasians. (Exhibit CC, at 650.) No conclusion was reached as to whether Mr. Dyleski's profile was present, but at least one allele was foreign to him and to Vitale. (Exhibit CC, at 647.)

ii. Item 13-9B: Glove

A black glove reportedly found in the duffel bag was swabbed at four locations (two exterior and two interior – items 13-9B1 and 13-9B2; items 13-9B3 and 13-9B4, respectively). (Exhibit CC, at 644. 646-647.)

Ms. Vitale was the likely contributor of the DNA found in items 13-9B1, 2, and 3. The underlying statistical probability was 1 in 13 quadrillion. (Exhibit CC, at 647-649.)

13-9B4 was a mixed sample, in which Ms. Vitale was the likely female contributor, with a statistical probability of 1 in 100 billion. Mr. Dyleski was not a potential contributor. (Exhibit CC, at 647-649.)

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

iii. Item 13-9C: Balaclava

The ski mask ("balaclava") found in the duffel bag was tested in six areas, including four "bloodstains" and two "background DNA cuttings"

(Items 13-9C1-6). (Exhibit CC, at 645.)

Ms. Vitale was the likely source of the four bloodstains (13-9C1, 13-9C3, 13-9C4, 13-9C5), with a probability of 1 in 13 quadrillion. (Exhibit CC, at 648-49.)

Mr. Dyleski was the likely source of item 13-9C2, a "background" DNA sample taken from the mouth area, with a statistical probability of 1 in 780 trillion. (Exhibit CC, at 648-649.)

The final item (13-9C6) was a degraded DNA mixture. Neither Ms. Vitale nor Petitioner could be excluded as potential contributors, but there were alleles that neither shared. (Exhibit CC, at 648.)

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

Of the five stains collected from the shirt, only one yielded DNA results. With a probability of 1 in 780 trillion, Petitioner was the likely source. (Exhibit CC, at 648-649.)

Thus, although at first glance the bag seems highly damning, on closer inspection, the results are not what would be expected if the items were actually worn during the murder. Indeed, this evidence results in more questions than answers, such as, why is there such a limited amount of blood present? Why were these limited items retained, while whatever else the killer must have been wearing was successfully hidden or discarded?

G. Land's End Shoes

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

Importantly, upon additional examination and consultation, the

"consistent" tread pattern is in fact discernably dissimilar. Moreover, there is reason to believe that the shoes seized were of a different size than that which left the "tread pattern" on the white lid. Counsel are still investigating the "pattern evidence," including an apparent bloody shoe print on the left shoulder of the T-shirt worn by Ms. Vitale. It may be that the most "consistent" tread pattern is that of the shoes Mr. Horowitz provided to the detectives, which he had worn to the Sheriff's station. Indeed, according to a report by Mr. Kwast, turned over in discovery to Ms. Leonida, the tread pattern "did not align with the fine lines present in the arrowhead shape on the lid." Mr. Kwast acknowledged that "[a] different shoe" could also account for the dissimilarity. (*See* Exhibit UU, Report of Jason Kwast, Dated 12/14/05, at 765.)

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

Photographs reveal discrepancies in the appearance of these shoes between the time law enforcement obtained the shoes, and the time of DNA analysis.

Also, the chain of custody for these shoes was questionable. On Sunday night, October 16th, Petitioner had put a pair of shoes in a bag, and

left them at the home of his girlfriend, Jena Reddy. (9 RT 2585-88.) When Scott was arrested, Jena collected some of his belongings, including a pair of shoes, and gave them to Esther, Scott's mother. (9 RT 2585.) Esther left those shoes and other items with her sister Marjorie. (11 RT 3139, 3149-50.) They were later given to an attorney who had his investigator deliver them to the District Attorney. The inside of the shoes was never tested to establish whether they had even been worn by Mr. Dyleski.

At a minimum, the nature of the evidence is peculiar because the DNA sample linked to Ms. Vitale was found on the side of the shoe, not the bottom. Moreover, there was no visible blood on the shoes, and thus, necessarily, they must have been thoroughly washed, had they in fact been used in this bloody murder. And yet, confoundingly, the shoes are patently dirty, muddy and stained, and notably *unwashed*.

H. Foot Swab (Item 3-10)

Criminalist David Stockwell testified that the county lab received a number of items under laboratory case number 05-12813. Items 1-4 through 1-40 were collected from the crime scene; items 3-3 through 3-13 were collected during the autopsy. (13 RT 3616-3617.)

Mr. Stockwell initially screened items collected from the crime scene for the presence of male DNA, and found male DNA in various samples. (13 RT 3630.)

> Based on quantitative tests, I knew there was male DNA present on several objects. The one object I felt had sufficient quantity to try for a profile of a male donor was this item 3-10. So going into the test, I knew I had a mixture. The typing results bore that out. The primary donor to the foot swab of Ms. Vitale is female and ultimately matches [her] profile....It's the minor component that was male in origin.

Q. So in subsequent testing, then, were you able to develop at least a partial profile with respect to the minor component?
A. Yes. And with respect to a partial profile...not all of the genetic information that is actually present in the evidence specimen can be provided at the end of the testing results, and there are several reasons for this: One is that dilution - - or, excuse me, that ratioing factor was so great that I could not expect to see genetic types at every single locus from that minor contributor. So in a sense, what you see is what you get. You interpret what you see.

(13 RT 3631.)

Mr. Jewett specifically asked Mr. Stockwell if he received Item 12-1 - the reference sample from Mr. Dyleski - "prior to November 2 of last year." He emphasized this date twice. (13 RT 3628-3629.)

Q. And at the time you had received 12-1, had you already examined and obtained at least a partial DNA profile from item 3-10, the swab purportedly from the bottom of Pamela Vitale's foot?
A. In terms of timing, I knew that there was male DNA present on the bottom of the foot....However, the typing, the genetic marker types were elicited at approximately the same time.
Q. The same time as what?
A. As the evidence of the swab from the foot of Ms. Vitale was being analyzed. By that time, I had extracted and analyzed the reference sample from Mr. Dyleski.

(13 RT 3629.)

Approximately 1 in 81,000 African-Americans; 1 in 43,000 Caucasians; or 1 in 23,000 Hispanics would share the genetic profile of the minor component. Item 12-1, a swab from Petitioner, matched at all loci examined. Mr. Stockwell sent a sample of Item 3-10 to an outside lab (SERI), in order to verify that the typing results he obtained were in fact tied to a single male donor. (13 RT 3634-3635.)

Petitioner could not be excluded as a potential contributor to the minor male profile of Item 3-10. This profile was insufficient to upload to

the CODIS national database. (14 RT 3691-3692.)

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

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

Petitioner is currently awaiting ruling on his motion for access to item 3-10 in order to have it re-tested to determine whether the errors of contamination, saturation, and quantitation of this item resulted in any false or unreliable results.

These potential issues of contamination seem particularly relevant, when considered in the light of the perplexing nature of item 3-10. Although swabs were collected from all over Ms. Vitale's body, the only one that came back with any male DNA was a swab taken from the bottom of Ms. Vitale's foot, item 3-10. No foreign DNA was found under her fingernails, or in any of the other typical locations. It seems highly unlikely that if a killer's DNA were to be found on a victim's body, that it would be found on the foot, notwithstanding Prosecutor Jewett's argument, discussed below.

XXIII.

Petitioner's defense at trial was as follows:

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

XXIV.

Although defense counsel failed to recognize the potential third culpability defense raised herein, the highly experienced prosecutor, Mr. Jewett, sure did. Before trial, defense counsel moved to exclude the 911 recording wherein Mr. Horowitz reported the murder. (3 CT 756-762.) Mr. Jewett argued that:

> [T]here is no question that the husband of a deceased woman, last to see her alive, with his DNA inside the residence, including a broken cup, which has her blood on it, is going to be raised, whether the defense specifically brings out third-party culpability or not. [Para] The question of whether or not it's possible that Mr. Horowitz had anything to do with his wife's death is going to be implicated in the minds of the jurors....
>
> (1 RT 9; 3 CT 872-878.)

Mr. Jewett tries to account for inconsistencies in the evidence that seem to implicate Mr. Horowitz:

> ... Mr. Horowitz, despite his best recollection now, was in there for some period of time, and we can hear him moving around...I think it's a 12 minute tape and then it's done. [Para] Well, 12 minutes is a long time...He could have done a number of things that he may or may not remember now... .[Para] This tape also tends to show there are things going on in there that Mr. Horowitz - - they may well be, in one sense, innocuous things. Moving, for instance, a pair of glasses might be one of them or...the coffee cup, although the DNA on the coffee cup could well be from him having had coffee that morning before he left for work...
>
> (1 RT 10-11.)

***

> If Mr. Horowitz gets up here and says, 'I just went in, I checked Pamela, I called 911, I checked Pamela again, then I went outside and I remained outside thereafter on the cell phone,' that suggests - - people have no doubt for a moment, if assuming he says that, that he is going to, in his own mind, be telling the truth. [Para] But time may have done some interesting things in Mr. Horowitz's mind and those moments before six o'clock on October 15th of last year...(1 RT 11-12.)
>
> ***
>
> We are talking about her husband, the last person to see her alive. A person who was at the scene, who had blood on his clothing. (1 RT 17.)
>
> ***
>
> It is not possible, in the People's judgment, for this case to be tried without, at some level, some suggestion being made that there was some effort [to explore] a number of different avenues with respect to who was responsible....[Para] It absolutely defies credibility to even suggest that Ms. Vitale's husband is not going to logically be a person who is going to pop into a fact finder's mind.... Absolutely, positively without question, one person who - - at least one person who is absolutely going to pop in people's minds if Mr. Dyleski says, 'I wasn't there, I don't know anything about it. ...'' Mr. Horowitz is going to be one of those people .... [I]n many people's minds, he is at the top of the list....
>
> (1 RT 19-20.)

Ironically, these inconsistencies in the evidence that so blatantly implicate Mr. Horowitz that according to the prosecutor "whether the defense specifically brings out third-party culpability or not. [Para] The question of whether or not it's possible that Mr. Horowitz had anything to do with his wife's death is going to be implicated in the minds of the jurors...." were never raised by defense counsel at trial. (1 RT 9; 3 CT 872-878.)

There were actually three separate 911 calls. The first consisted

mostly of screaming. In the short interlude between the first and second calls, Mr. Horowitz exhibited a major change in demeanor. In the second, mere minutes after the first, he sounds calm, saying he was trying to "logic this out." The court granted the defense motion to exclude, finding the recording was more prejudicial than probative. (1 RT 23-26.)

Petitioner contends that Ms. Leonida told him she did not investigate Mr. Horowitz as a potential suspect because of his "notoriety" and to keep the 911 recording out of the trial. (*See* Exhibit H, Declaration of Scott Dyleski, at 418.)

If true, such strategy fell below professional standards and constituted ineffective assistance of counsel, as explained in the accompanying memorandum of law. Based on the mountain of information at her fingertips that would have presented a compelling case of innocence -- specifically pointing to Mr. Horowitz as the likely perpetrator-- this "strategy" was error of the highest constitutional magnitude. And as a result, Petitioner was denied a fair trial.

XXV.

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

XXVI.

Petitioner was denied effective assistance of counsel as a result of trial counsel's failure to adequately investigate and present compelling defenses available; to wit, that much of the evidence was not only inconsistent with his guilt, but in fact pointed to another perpetrator. Trial counsel failed to present facts necessary to Petitioner's alibi, and failed to rebut the prosecution's convoluted and speculative theories. Nor did trial counsel challenge the scientific evidence, although there were apparent issues with the chain of custody and contamination, or call any expert witnesses. Trial counsel failed to object to irrelevant and inflammatory evidence, and to damaging expert opinion that lacked foundation. Furthermore, the trial was infected by egregious prosecutorial misconduct prior to and throughout the proceedings, to which counsel failed to object. Whether considered independently or cumulatively, counsel's performance fell below the standard of care, and prejudice ensued.

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

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

1. Crime Scene Evidence Indicated the Perpetrator Was

Acquainted with Ms. Vitale, and Comfortable in and Familiar with the Home.

The crime scene evidence possessed by trial counsel indicated that the perpetrator was familiar with and comfortable inside 1901 Hunsaker Canyon Road. Petitioner was hardly acquainted with Ms. Vitale and had never been inside her home. (15 RT 4155.) However, he had seen her around the neighborhood and was familiar with her appearance. (*See* Exhibit H, Declaration of Scott Dyleski, at 417-418.)

Several things indicated the perpetrator's familiarity with and comfort in the home. There was no evidence of forced entry, which is a classic sign that a perpetrator was known to a victim. (Exhibit DD, Taflya Report, at 655.) Bloody eyeglasses were found neatly folded on top of the television. (7 RT 1937; Exhibit A, Photos, at 15-16.) Someone with bloody hands tidied up, coming into contact with a broken mug in the kitchen sink (Exhibit A, at 23); and placing an empty bowl on the kitchen counter next to the sink. (7 RT 1934, 1947. *See* Exhibit A, at 20-21, 24.) Bloody hands touched a bottle of water. (Exhibit A, at 18-19.)

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

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

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

(8 RT 2057.)

Of the shower specifically:

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

(8 RT 2058-2059.)

Defense counsel asked no questions about the shower. However, physical evidence in trial counsel's possession showed a bloody handprint dripping diluted blood down the shower wall. (Exhibit A, Photos, at 25-27.) Thus, by the prosecution's own logic, the perpetrator did in fact take a shower, as evidenced by the "wet dripping" in the photos. (Exhibit A, at 25-27.) This was highly exculpatory as it shows the perpetrator was sufficiently comfortable in the home, and sufficiently unhurried, to take a shower, and must have had clean clothes to change into, rather than the likely very bloody clothes worn during the killing. Defense counsel was presumably unaware of this evidence, as she failed to raise it at trial.

Other evidence showing the perpetrator's comfort and familiarity

included the presence of blood on the exterior of the front door, which would result from someone with blood on their hands leaving and then re-entering (possibly with a key). (*See* 7 RT 1927; Exhibit A, Photos, at 2-5; Exhibit F1, Supplemental Forensic Examination Report (hereinafter "Turvey Supplemental"), at 379.)

The fact that the perpetrator spent time at the sink based on the bloody bowl and broken coffee mug found there, coupled with the absence of blood on the faucet and the undisturbed coffee grounds, supports the inference that the perpetrator did not even attempt to turn on the water in the sink, but rather used the bathroom shower. (Exhibit A, Photos, at 20-24; 15 RT 4055 ("That sink was not run.").)

The significance of this fact is notable because there was no working hot water at the kitchen sink. (8 RT 2092.) It seems illogical that a stranger-perpetrator would place breakfast items in and near the kitchen sink, yet not turn on the water, and instead use the shower solely for the purpose of cleaning a knife. The more reasonable inference from the complete absence of blood on the kitchen faucet is that the perpetrator knew the hot water did not work and therefore went directly to the bathroom. This contention is bolstered by the fact that only the hot water knob in the shower had blood transfer. (7 RT 1978.) Only someone intimately familiar with the home would have this knowledge, and there was no evidence that Petitioner could have known this.

Evidence that the perpetrator spent time around the living room couch is based on blood in that area. (Exhibit A, Photos, at 32-37. *See also* Exhibit F, Forensic Examination Report, by Brent Turvey, MS (hereinafter

"Turvey Report"), at 374.) Why would a stranger rifle through papers on the couch but not take any of the valuable items in plain view? (15 RT 4140-41.) Indeed, none of the numerous valuable items in plain view were taken or apparently even touched based on the absence of blood on Ms. Vitale's purse, or the computers present. (8 RT 2049, 2065; Exhibit A, Photos, at 17.) Yet evidence shows the perpetrator took the time to touch many items in the house, including a bowl, a mug, glasses, and the shower, all discussed above, but the perpetrator also touched cardboard boxes, dripped on the couch and the kitchen floor, and went through legal files. There was also some blood on the papers in the bag supposedly dropped by Horowitz at the front door; this is notable as Mr. Horowitz claimed to have dropped those items as he first entered the home, and thus, there would have been no innocent explanation for this. (8 RT 2114-16. See Exhibit A, Photos, at 52-53.)

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

strategy.

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

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

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

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

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

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

> PO: Is... is there anybody else besides you or your wife, who feels comfortable like... or at home, in your trailer?
> DH: My friend Mike McKeirnan he'd feel comfortable.
> PO2: When he says comfortable, comfortable knowing that nobody is going to come back. That he has time in that house. Who would know that they have time there.
> DH: Oh, everybody would know... I mean Joe would know. Mike would know. Everyone who knows me would know.
> PO: But I mean, are you gone every Saturday?
> DH: No.
> PO: Throughout the day?
> DH: That's a good point, no. And this was uh... this was unusual. And I work a lot, but I don't usually work Saturday mornings. I'm usually at home. That's what we were just talking about. I think...
>
> ...
>
> PO2: It didn't appear to be any rush to leave.
>
> (Exhibit B2, Horowitz Interview, at 156.)

However, once Mr. Dyleski was arrested, these observations seemed to have been forgotten or ignored, not merely by the police and prosecution, but by the defense counsel as well.

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

All of the evidence discussed above indicating the perpetrator's comfort in the home also shows that the perpetrator did not feel rushed for time. Someone neatly folded and placed a pair of bloody on top of the television (7 RT 1937. *See also* Exhibit A, Photos, 15-16); someone with

bloody hands straightened up items by placing items in and around the sink, including an empty bowl (7 RT 1934, 1947; Exhibit A, at 20-24); the perpetrator apparently drank water (Exhibit A, at 18-19); likely showered (*See* discussion XXI(A)(1) *supra*; Exhibit A, at 25-31); used tissues and paper towels (Exhibit A, at 54); exited and re-entered, possibly with a key (7 RT 1927; Exhibit A, at 2-5. *See also* Exhibit F1, Turvey Supplemental, at 379); rifled through papers near the living room couch (Exhibit A, at 32-37; Exhibit F, Turvey Report, at 374); and touched boxes, apparently lifting off, and then replacing, the top of one banker's box, as evidenced by the fingermarks inside of the box top. (Exhibit A, Photos, at 38-49.) This behavior is inconsistent with anyone other than Mr. Horowitz.

The issue of time was critical in this case. Evidence that the perpetrator spent more time in the home would have contradicted the prosecution's extremely narrow timeline and strengthened Petitioner's alibi. The prosecution's theory that Ms. Vitale was murdered sometime after 10:12 a.m. was based on computer activity. (8 RT 2245.) Fred Curiel told the police on October 20, 2005, that he had seen Mr. Dyleski at home at 9:26 a.m., sitting on the couch with Mrs. Curiel, and Mrs. Curiel reported that he returned around 9:30 a.m., and Petitioner's whereabouts were accounted for the rest of the day, in which case it would have been impossible for Mr. Dyleski to have committed the crime. (11 RT 3010; 11 RT 3017; *see also* Exhibit M, Santiago Report, at 460; Exhibit GG, Fawell Report, at 707.) Michael Sikkema, another member of the Curiel household, reported in his initial interview, as well as at preliminary hearing and trial, that he saw Mr. Dyleski return between 10 a.m. and 11 a.m, in contradiction

to the statements of Mr. and Mrs. Curiel; however, Mr. Sikkema had just come downstairs at that time, and details of his statement conflict with Mrs. Curiel's such that it seems that Mr. Sikkema may not have seen Mr. Dyleski when he initially returned from his walk, but at some later time. (1 CT 305-306; 10 RT 2734.)

At trial, Mr. Curiel changed his statement and said he was unable to state whether he had seen Scott that day. Notably, contrary to defense counsel's claim that she had "watched everything and read everything" in preparation for trial, after the commencement of trial, she was entirely unaware that Mr. Curiel was questioning the accuracy of his memory. As the prosecutor led Mrs. Curiel backwards through her day from the time shown on a receipt for a purchase she made at the Spirit Store, she revised her previous statements and said Scott came in at approximately 10:45 a.m. (10 RT 2854, 2865-67.) Even accepting 10:45 a.m., a time arrived at through pointed questioning by the prosecution, not the witness's own recollection, that would leave about 33 minutes to commit the crime, move things around in the home, shower, get home, change, and dispose of bloody clothing.

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

scene." (15 RT 4058.)

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

Moreover, she failed to argue that even if Scott returned at 10:45, he did not have enough time to commit this crime, as the evidence shows the perpetrator was in the home for a significant length of time, and she left unchallenged the prosecution's claim that it took only ten minutes to walk between the two homes, despite evidence to the contrary. (15 RT 4058.)

The undersigned are informed and believe that ten minutes is not sufficient to walk or run this distance. (*See* Exhibit I, Declaration of Esther Fielding.) However, this cannot be confirmed thanks to a letter from Mr. Horowitz to prior counsel, forbidding him or his agents "from coming on my property." (Exhibit U, Letter from Daniel Horowitz to Philip Brooks, Dated 3/15/08.)

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

A crime scene analyst could have provided highly exculpatory testimony that the evidence was simply inconsistent with Mr. Dyleski being the perpetrator. Post-conviction, Petitioner's family engaged Brent Turvey, MS, crime scene analyst and forensic science expert. (*See* Exhibit F2,

Curriculum Vitae of Brent Turvey.) After reviewing crime scene photos, investigative reports, and other materials, Mr. Turvey concluded:

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

(Exhibit F, Turvey Report, at 269-370.)

The conclusion that "the offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide" was based on: bloody eyeglasses neatly folded on the TV; the mug in the sink and cereal bowl on the kitchen counter, the bloody bottle of water, blood near the couch; and moist hairs in the shower drain. (Exhibit F, at 373-374.)

"These are not the actions of a stranger offender concerned about being discovered at a violent crime scene with a murder victim lying just inside the front door. These actions suggest a degree of concern for, familiarity with, and comfortableness moving around within the residence that is beyond that of a stranger with a profit motivation." (Exhibit F, at 374.)

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

In multiple crime scene photos, bloodstain evidence

> consistent with hand and finger contact patterns may be observed on both the inside of the front door, and the outside of the front door. There are also bloodstains on both the interior and exterior doorknob and dead bolt. **This indicates that at some point during the altercation, after blood had started flowing, the victim was able to lock the offender outside of the residence.** Were the victim able to get free of the residence during the attack, fleeing from the offender, it is unreasonable to suggest that she would seek re-entry. Rather, it is most reasonable to infer that she would have run in the opposite direction, away from the residence. Consequently, the bloody hand and finger contact patterns on the interior of the door are most reasonably associated with the victim; and those on the exterior are most reasonably associated with the offender.
>
> **However, the offender was able to regain entry to the residence without force (e.g., breaking down or through the door). Specifically, the contact blood smears on the exterior of the door on and around the deadbolt are significant, as the deadbolt requires key. The only reason to have contact with the exterior deadbolt would be to insert a key. The only way to regain entry without force is by using a key.**
>
> (Exhibit F1, Turvey Supplemental, at 379-380 (emphasis added).)

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

Present counsel also engaged Michael Laufer, M.D. (Exhibit G1, *Curriculum Vitae* of Michael Laufer, M.D.) Upon reviewing the medical evidence, Dr. Laufer wrote "Ms. Vitale was engaged in a protracted struggle with her assailant but did not run away, which suggests that she knew the assailant and may have tried to "negotiate" an end to the altercation." (Exhibit G, Laufer Declaration, at 395.)

Parenthetically, the forensic pathologist in this case, Dr. Brian L.

Peterson, was part of the Forensic Medical Group, which has been subject to criticism as presented, for example, in an episode of "Frontline" that aired in 2011, titled "Post-Mortem." Whether to call an expert is normally considered trial strategy. People v. Bolin, 18 Cal. 4th 297 (1998) [rejecting claim of ineffective assistance; no showing how an expert would have helped.] However, such a showing as to how an expert would have aided the defense and raised evidence of a viable defense not otherwise presented, has been made here, and the expert's testimony would have refuted the prosecution's basic theory of the case, providing the reasonable doubt lacking in the presentation at trial.

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

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

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

This exculpatory evidence, which counsel unreasonably failed to investigate, could have provided the reasonable doubt otherwise lacking in Petitioner's defense by raising troubling questions. Could Petitioner have obtained a key to the home? If so, why would he re-enter? How could he know how long Mr. Horowitz would be gone? Why would he put dishes in the sink or use the shower? How did the perpetrator know the kitchen sink did not work? How does the finding of a protracted struggle fit with the small window of time for Petitioner to have committed the crime? Why did the killer pick up boxes, fold glasses, or rifle through legal files, but not touch the victim's purse or laptop left in plain sight?

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

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

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

Much of the crime scene evidence that is inconsistent with Mr. Dyleski's guilt implicates Mr. Horowitz. "The offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide. . . . These are not the actions of a stranger offender concerned [with being] discovered . . ." (Exhibit F, Turvey Report, at 373.)

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

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

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

(Exhibit C, Hill Interview, at 237.)

The detectives were also troubled by this precise question:

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

...

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

(Exhibit B2, Horowitz Interview, at 156.)

Furthermore, the mug placed in the kitchen sink, which contributed to Mr. Turvey's findings that the perpetrator was comfortable in the home, had saliva that matched Mr. Horowitz's DNA. (Exhibit F, at 373.) Evidence that the perpetrator did not turn on the water in the kitchen, but rather went to the bathroom shower implicates Mr. Horowitz. Who else knew that the hot water did not work in the kitchen? (*See* 7 RT 1936; 8 RT 2058-59; 15 RT 4055; Exhibit A, Photos, at 20-31; Exhibit F, at 374.) Most compelling is Mr. Turvey's finding that the perpetrator likely used a key to re-enter the home. (Exhibit F1, Turvey Supplemental, at 379-380.)

> The contact blood smears on the exterior of the door on and around the deadbolt are significant, as the deadbolt requires key. The only reason to have contact with the exterior deadbolt would be to insert a key. The only way

to regain entry without force is by using a key.

(Exhibit F1, at 379.)

Dr. Laufer determined that the superficial injuries on Ms. Vitale's back may have been done with the straight side of a key. (Exhibit G, Laufer Declaration, at 396.)

The lack of forced entry also indicates the perpetrator was someone known to Ms. Vitale, who could have gained entry to the home. Mr. Horowitz reported that he routinely left the door unlocked when he left, which would explain why there was no evidence of forced entry. (Exhibit B, at 81, 107; Exhibit B3, at 148.) However, according to Rick Ortiz, the door was always locked, and Ms. Vitale was so security conscious that even when she expected him, when he knocked, she called him from inside to make sure it was really him before she would open the door. (*See* Exhibit K, Ortiz Declaration, at 439.) This information is corroborated by emails dating back to 2003. One such email is from Ms. Vitale to Mr. Horowitz, dated 12/8/03: "I put the alarm on after our lesson from the locksmith the other night." He replied: "You could also just lock the deadbolt! But no harm in having the alarm on. Love, me." (*See* Exhibit EE, at 683.) Moreover, they were installing a state-of-the-art security and surveillance system in their new home, which included panic buttons in many rooms and high-tech cameras. (*See* Exhibit K, Ortiz Declaration, at 439; Exhibit EE, Emails, at 678-680.) It defies logic that the same individual who would choose to install high-tech surveillance equipment and panic buttons would feel secure routinely leaving his door unlocked. Thus, the absence of evidence of forced entry is highly inculpatory as to Mr. Horowitz.

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

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

As an aside, when the detectives asked if there was any connection between the Polk trial and this murder, Mr. Horowitz dismissed the Polk case as "fairly routine." To the contrary, he was acutely aware of the amount of attention to the Polk case, in which trial was underway. In fact, in an email dated August 31, 2005, he wrote "google 'Susan Polk' and Horowitz and you will see what my life is about. It is the highest profile criminal case in the U.S. and the trial hasn't even started yet!!!" (Exhibit EE, Emails, at 689.)

Ms. Vitale's sister and brother-in-law suspected that Mr. Horowitz may have been involved in her murder. (Exhibit C, Hill Interview, at 198.) Mr. Hill contacted law enforcement. (Exhibit N, Report of Detective Goldberg, Dated 11/3/05.) Ms. Hill was very close with her sister, and said of her marriage "either they're passionately in love, or it's a passionate rage. It's...one or the other." (Exhibit C, at 216-221.)

"[U]sually in these incidents, he would come back ... very remorseful .... probably say sorry. He might even start crying. ..."I didn't

mean to hurt you," and ... you know. He had a kind of a pattern of explosion..." (Exhibit C, at 222.)

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

> Daniel, I think, came into the marriage with a lot of issues from childhood. A lot of issues from a previous wife who slept with his best friend, and ran off together. ... He also had a lot of issues with, uh, childhood with a very abusive father. ... So, he had had a history of dealing with his feelings, and reactions to things that trigger ... Pam inadvertently – or on purpose, maybe to make her point – would get into situations where she had suddenly triggered some deep emotion in him.
>
> (Exhibit C, at 217-218.)

Ms. Hill described past incidents of rage that escalated to physical abuse: "It would go completely out of proportion, and he would be in this rage and screaming, and [one time] he threw a telephone at her." (Exhibit C, at 220.) Another time:

> [T[he toilet had overflowed or something. ... And he had come in and there was water all over the floor. And he just lost it. She was asleep, and he started screaming at her from the bathroom ... at the top of his lungs....She wakes up and he's throwing the [unintell] the pail and sponge and everything at her. At the bed.
>
> (Exhibit C, at 220.)

Mr. Horowitz once told Ms. Vitale: "'I just wish ... you would die.' And then [he] left." (Exhibit C, at 218-219.) Notably, Ms. Hill lived out-of-state, therefore these incidents were reported to her by Ms. Vitale; one must wonder what incidents were not reported.

A man named Richard Sellers contacted the Contra Costa Sheriff's Department a few days after the murder with information that approximately four months prior, Pamela came to his home to view tile work by the contractor she might want to use. She introduced a male

companion as her husband, but when Mr. Sellers saw the media reports on this case, he realized that the male companion was not Mr. Horowitz. Mr. Sellers described this man as a tall (6'3"- 6'4") Caucasian who appeared well groomed and affluent. (Exhibit Q, Report of Detective Martin, Dated 10/20/05.)

Another witness, Araceli Solis, worked for Ms. Vitale as a housekeeper every other Thursday. (Exhibit E, Transcript of Interview with Araceli Solis (hereinafter "Solis Interview"), at 354. *See also* Exhibit R, Report of G. Schiro, Dated 10/20/05 (hereinafter "Schiro Report"), at 530-531). Ms. Solis recalled how three or four months prior, Ms. Vitale called to tell her not to come that day; she had been in an accident. The next week Ms. Vitale had a black eye that "looked very, very bad." (Exhibit E, at 364-367.) Ms. Solis's account was independently corroborated by Ms. Hill's statement that Ms. Vitale told her she had an accident where she had to go to the emergency room for an injury to her eye caused by walking into the handle of a treadmill. (Exhibit C, at 239-41.)

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

> [T]he moment ... I said that, I was the recipient of the hateful rage. Over the phone, I wasn't in person. And he said, "You are the most selfish ... selfish person I have ever known in my life." And I don't know if he called me a bitch. He might have said "selfish bitch." And I'm like in tears. This was my lawyer... "And I can't believe that you don't care about anybody but yourself." You know? And saying, "Dan, I just want to go to court." ...

> he had me in total tears. I hung up on him at that point. I was sobbing for a day. ... [H]e snapped the second I said ... I wanted to go to court ... it was just this barrage of "You are the most worthless human being that I've ever met." And I'm in tears. I ended up settling 'cause I didn't want to deal with him anymore.
>
> (Exhibit C, Hill Interview, at 255-61.)

Another potential witness never interviewed by Ms. Leonida, Donna Powers, contacted police with information that Mr. Horowitz may have been having an affair at the time of Ms. Vitale's murder. (Exhibit T, Report of Detective Simmons, Dated 11/1/05, at 536-537.) Two detectives drove several hours to speak with her.

Ms. Powers had a close friend, Dr. Brenda Abbley. (*See* Exhibit D, Transcript of Interview of Donna Powers (hereinafter "Powers Interview") at 281.) Dr. Abbley knew Dan and Pam through her parents, the Lehmans. (Exhibit D, at 324.) Ms. Powers suspected Mr. Horowitz and Dr. Abbley of having an affair. (Exhibit D, at 316.) Her suspicion was based on the way her friend spoke of Horowitz, saying she loved him; he was the only man her friend spoke of other than her ex-husband; she saw them kiss on the lips when Horowitz came to visit, and they spent time alone with each other in her friend's bedroom. (Exhibit D, at 282, 306, 316, 321.)

Ms. Powers was concerned that Dr. Abbley was abusing drugs and alcohol. In May, 2005 she heard her call in a refillable prescription for Valium and Vicodin to a pharmacy in Lafayette for Horowitz and Vitale. Knowing that they were not her patients, Donna confronted Brenda, who said Horowitz was under a lot of stress because of the Michael Jackson trial, and she would not let a friend of hers be in pain. (Exhibit D, at 297-98, 301.)

Mr. Horowitz was in fact a legal commentator during the Michael Jackson trial. According to Mr. Ortiz, this was part of a "media plan" for Mr. Horowitz to become a celebrity attorney and thereby increase his earning potential. (*See* Exhibit K, Declaration of Rick Ortiz (hereinafter "Ortiz Declaration"), at 439.)

Two months later, Mr. Horowitz called Ms. Powers. (Exhibit D, at 293.) "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.... I'll make sure you lose custody of your daughter.'" (Exhibit D, at 291.) Ms. Powers relayed her concern about Brenda. (Exhibit D, at 277.) When she mentioned Brenda phoning in prescriptions, he "got extremely angry," and threatened to take away her daughter. (Exhibit D, at 300.) "He didn't know me from Adam. You know? ... And he called me up...And he showed me a side of a human being, that... I mean he threatened me with my child. Who does that?" (Exhibit D, at 320.)

Parenthetically, on October 15, 2005, Mr. Horowitz called Barbara Lehman at approximately 6:00 p.m., *before* notifying the police: "Lehman said she asked Horowitz if he had called the police yet and Horowitz said, 'No, why should I? She's dead.'" (Exhibit M, Santiago Report, at 458.)

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

Barnes Report, at 492.)

Thus, there was evidence provided to trial counsel that indicated Mr. Horowitz had a problem with anger and abusive behavior (directed to Ms. Vitale and others), and that there were significant problems in the marriage. This evidence is particularly compelling in light of the experts' findings that Ms. Vitale's murder was the result of rage or anger. "The injuries are atypical of a burglary or robbery gone bad, and are far more commonly associated with anger or rage." (Exhibit G, Laufer Declaration, at 395.) "The available evidence is ... most consistent with an anger/revenge motivation...a primary goal of offense behavior is to service cumulative rage and aggression." (Exhibit F, Turvey Report, at 31-372.) Indeed, in the course of the Horowitz interview, he himself uses the word "rage" at least 15 times.

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

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

Marital tension between Ms. Vitale and Mr. Horowitz was exacerbated by problems surrounding the construction of their home. (Exhibit C, Hill Interview, at 223.) For several years, the couple was in the process of building a large new home. (8 RT 2084.) The project was difficult from the start. Rick Ortiz was hired as the contractor in March of

2002. The original plans were incomplete, which caused significant delays and increased the final construction costs. The very first check from Mr. Horowitz bounced. (Exhibit K, Ortiz Declaration, at 440.)

Many of the construction problems sprang from Ms. Vitale's indecisiveness. "She had difficulty making decisions, she altered elevations frequently after already being built ... changed materials, added custom features...made hundreds of smaller changes, [and] ordered materials that took months to acquire." This resulted in hundreds of thousands of dollars in lost time, and increased labor and materials. (Exhibit K, at 439-440; Exhibit TT, Letters from John Warloff.) On June 1, 2004, Mr. Ortiz compiled a list of the increased costs that had resulted from Ms. Vitale's indecision totaling over $214,000. (Exhibit K1, Change Orders to Date.)

Mr. Ortiz became close with the couple and was able to observe how the construction problems strained their relationship. (Exhibit K, at 439-440.) Mr. Horowitz withdrew from the process but Ms. Vitale grew more obsessed. Her health began to suffer. She developed severe allergies and couldn't leave her home. When she did leave, she wore a mask and gloves, and covered her head. (Exhibit K, at 440.) (Petitioner notes that the reluctance to leave home is interesting in light of statements by Mr. Horowitz that his wife had plans to attend the ballet that evening with a friend. (Exhibit P, Pate Report , at 500.) The identity of this friend was never pursued by law enforcement.)

The observations of Mr. Ortiz regarding issues in the marriage, and the causes of those issues, are corroborated by a journal entry of Ms. Vitale's dated March 14, 2004. (See Exhibit HH, Journal Entry, dated

March 14, 2004.) In that entry, Ms. Vitale wrote of tension: "I hurt. I'm sad. I feel my guts have been ripped open inside . . . I thought we had such a great marriage." (Exhibit HH, Journal Entry, at 711.) She alludes to a number of issues, including marital tension as a result of the homebuilding process, her health problems, and her difficulty making decisions:

> My lover is in excruciating pain. Agonizing emotional pain . . . and he says I put him there! It is completely shocking to me. I don't know what to think, say, do. What? I have put him in this excruciating pain? My illness, my persnicketyness, my procrastination, my desires for the house, my lack of decision, my perfectionism . . .
>
> The house no longer delights me. It's not fun. I don't care anymore. I don't want to do it anymore. This price is way too high.
>
> (Exhibit HH, Journal Entry, at 711-712.)

Notably the journal page directly following this entry just contains a list of a few numbers: "$188, 000 Change Orders," "$102,000," and "$200,000 cost plus." (Exhibit HH, Journal Entry, at 713.)

Mr. Horowitz was one of the lawyers for Pavlo Lazarenko, former Ukrainian Prime Minister, in a criminal case in the United States District Court, Northern District of California. Mr. Horowitz told Mr. Ortiz that he was expecting a one million dollar bonus upon acquittal. However, Lazarenko was convicted in May of 2004. Mr. Horowitz "came home to Lafayette angrier than I had ever seen. We spent nearly two hours discussing his anger and where to go from there. We spoke of money issues and how Dan was going to have to rein Pamela in and put some controls in place. I remember watching Dan on TV bashing his briefcase against the columns of the court house thinking this is not good." (Exhibit K, at 441.) Because Mr. Horowitz had largely foregone his legal practice to pursue his

career as a legal commentator, he had less income, and without the anticipated bonus, there were no funds for the construction, and he already owed Mr. Ortiz more than $200,000. (Exhibit K, at 441. See also Exhibit TT, Warloff Letters, at 758.)

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

> Dan threatened my family. He showed me pictures of my wife and kids outside our new home in Shreveport, Louisiana. He said his family had sent someone down to take pictures and that he (Dan) could not guarantee their safety. Dan said his family had ties with...the "mob" and they don't "play."
>
> (Exhibit K, at 441.)

Mr. Horowitz used these threats to get Mr. Ortiz to sign a new modified contract, with Mr. Ortiz's vacation home as collateral. Mr. Ortiz's attorney, Mr. John Warloff, advised against the modified contract, stating that it put the vast majority of the cost for past and future changes caused by Ms. Vitale and Mr. Horowitz on Mr. Ortiz. (Exhibit TT, Warloff Letter, at 758-759.) Nonetheless, due to the threats, Mr. Ortiz agreed to the modified contract, and signed a deed to his house as collateral. (Exhibit K, at 441. Exhibit II. Exhibit TT, at 762.) Mr. Horowitz then recorded a fraudulent deed of trust and seized Mr. Ortiz's home. (Exhibit K, at 442; Exhibit II1, Deed.) The deed that Mr. Ortiz states that he signed includes the signatures of Mr. Horowitz, Ms. Vitale and Mr. Ortiz at the bottom. (Exhibit II, Deed.) According to Mr. Ortiz, Horowitz then altered this deed without his permission, and recorded it, thereby seizing the property. (Exhibit II1, Deed.)

Thus, on October 15, 2005, Horowitz and Vitale were under a lot of financial pressure and experiencing significant marital strife, confirmed

by Ms. Hill:

> So, several arguments over the last year and a half to two years have been just exclusive house issues ... the last argument they had about this which I would say was within the last two months – maybe three months – was them just talking about the fact that he ... this wasn't his house ... he accused Pam of just ... that she didn't love him, and ... was just using him to make all the money so that she could build her house.
>
> (Exhibit C, Hill Interview, at 225.)

Mr. Ortiz was never contacted by anyone before trial. (Exhibit K, at 442.) However, trial counsel and law enforcement should have known of Mr. Ortiz's existence as several people indicated he may be a potential suspect who law enforcement should investigate, including Tammy Hill. (Exhibit C, at 213.)

Just prior to Ms. Vitale's murder, there was a new crisis that she confided to her sister in one of their last conversations. The workers had started to install flooring in the new home, but because it sat in the basement for three years due to the many delays, the finish was ruined. (Exhibit C, at 226-227.)

> [S]he was afraid to tell Daniel about that because it was just one more thing, and he was starting the Polk case ... I don't know if she meant afraid 'cause now there's going to be this huge blow up, or just didn't want to put that extra stress on him at that time. Uh, but I know there was this house thing recently, this week, that was a big issue. I mean it's three floors of flooring that might have to be replaced.
>
> And you never know if she actually told him about this or not?
>
> I do not know. On Tuesday uh, I'm pretty sure she had not.
>
> (Exhibit C, at 227.)

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

Moreover, this evidence of marital strife over the home construction is particularly poignant in light of items found at the scene, bloody and broken, that were likely used in the murder: crown molding and a balustrade that were samples for the home building and a vase that had been a wedding gift and was engraved with a message of well wishes to the couple. (Exhibit A, Photos, at 8-14.)

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

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

Soon after, Mr. Horowitz produced a Safeway receipt, his last "errand" before arriving home. Only a few items were purchased, including packaged salad and salad dressing. (Exhibit A, Photos, at 55.) However, investigators documented that there were seven bags of packaged salad in the fridge, and twenty-five bottles of salad dressing. (*See* Exhibit R, Schiro Report, at 526-528.)

While being interviewed by the police, Mr. Horowitz showed few signs of shock or grief. (*See* Exhibit B, B1, and B2, Digital Recordings of Horowitz Interview.) He made numerous phone calls, and similar to Sergeant Hoffman's description, appears animated as he lays out his theory of the case: "I've pretty much figured out the time and manner and everything else. I just don't know who." (Exhibit B, at 57.)

When Mr. Horowitz explained his story to Ms. Hill:

"He wasn't enraged ... [I] haven't seen him be angry over the

> death." (Exhibit C, Hill Interview, at 245.) This lack of anger was shown in statements of Mr. Horowitz made to other people, including "I think they're not going to solve this, but it doesn't matter." (Exhibit B, at 59.) Also, Ms. Lehman said that Mr. Horowitz called her on October 15, 2005 *before* notifying the police. "Lehman said she asked Horowitz if he had called the police yet and Horowitz said, 'No, why should I? She's dead.'"
>
> (Exhibit M, Santiago Report, at 458.)

While speaking with detectives, Mr. Horowitz answers a phone call from Bob Massi, with whom he had breakfast that morning, and says matter-of-factly: "Bob, I'm here with two homicide guys. My wife was murdered." (Exhibit B, Horowitz Interview, at 87-88.)

Although Mr. Horowitz made approximately fifty phone calls in the hours following his reported discovery of his wife's body, he did not personally notify her sister but instead had his sister Carol call Ms. Hill around 7:45, nearly two hours later. (Exhibit C, at 234, 276. *See also* Declaration of Sara Zalkin.)

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

At the station Mr. Horowitz brought up Mr. Lynch at least twenty times. (*See, e.g.*, Exhibit B, at 59, 61, 64, 66-69, 73, 75, 79, 82, 86, 100, 104, 118-119; Exhibit B1, at 131-133, 135, 137-139; Exhibit B2, at 147, 19, 151-152, 156-157, 161, 167, 171-172, 174-175, 178, 192.)

Two days after Ms. Vitale's death, Mr. Horowitz pulled Ms. Hill aside to tell her why he was angry with Pamela and how she had hurt him,

which is inconsistent with a grieving spouse and implies consciousness of guilt:

> TH: And he said, "I was talking to Jan, and she said that Pam uh... had had some calls with Neal, and ... and even went out to dinner with him. What do you think about that?" And he ... or ... or, "Do you know anything about that?" And I was like, "Why are you asking me this?"
>
> ***
>
> TH: And that uh... And I said, "Well, I think that maybe he did have some telephone conversations with her. I had no idea about any dinners."
>
> PO2: Uhuh.
>
> TH: And he goes, "What do you know about that neighbor [unintell]" And goes, "I know, he knows," You know? That was her house, and he just kept going back to "This is her house. And I was just the money person. And, you know. That really hurt me." And uh...
>
> PO2: This is... When was this?
>
> TH: This was yesterday. And "I guess she loved me."
>
> PO2: Uhuh.
>
> TH: And I'm like, "What bizarre thing to tell me, then is asking me about at this juncture. And to tell me that really hurt him....How am I supposed to react to that?
>
> (Exhibit C, Hill Interview, at 269-271.)

Mr. Horowitz's behavior was inconsistent with a shocked and grieving spouse.

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

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

Vitale that day. Second, he made statements implying knowledge about the knife wound on his wife's stomach.

At the scene, Mr. Horowitz told Sergeant Hoffman that Mr. Lynch "was supposed to come by and **drop off** a check for $188.00. For water." (Exhibit L, Hoffman Report, at 449.) In his interview at the police station the night of the murder, Mr. Horowitz claims Ms. Vitale told him that **they owed** Joe a check for $180 for water. (Exhibit B, at 83.)

However, as detectives took turns questioning Mr. Lynch and Mr. Horowitz (explaining their periodic appearance in the room with Horowitz), Lynch was adamant that he had just called that day, October 15th, and left a message on the Vitale/Horowitz answering machine, between 11 a.m. and 2 p.m., about needing the $180 check for the water. (Exhibit P, Pate Report, at 508.)

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

Mr. Horowitz told detectives that he left his residence at 7:30 a.m. and did not return until almost 6 p.m., when he reported the murder. (Exhibit P, 499-500.) Aside from touching her neck and calling 911, he

claimed he did not touch or access any other areas or items within the residence. (Exhibit P, at 501.) Furthermore, although Mr. Horowitz suggested the officers check the answering machine, implying Joe might have called that day and left a message, exactly as Joe states he did, Mr. Horowitz does not tell the officers he had heard any such message:

> DH: ...Anyway, so the water was delivered by Jim Wickersham. So we owed Joe $180. He would pay Jim in advance, and go like that to give him a check. So, Pamela said... you know we owed Joe $180, [unintell] have ten bucks. So, actually I was going to go give him a check.
> PO: When did she tell you this?
> DH: Either yesterday, or day before.
> PO: OK.
> DH: But, I was going to go give Joe a check. But maybe... or whatever. [unintell] to interact with Joe. Now...
> PO: You're speculating that he came to get the check. Maybe...
> DH: They have also...
> PO: Didn't she have a scheduled meeting with him? That she...
> DH: No, she didn't. He... the check that answering machine. Joe calls a lot.
> PO: Yeah?
> DH: Yeah. The call from... [sighs] Uh, today's Saturday. Friday? I did Nancy Grace. I did get that show. And Nancy called me that night, and I believe that's the last message on the machine, from the night before.
> PO: OK.
> DH: So, I mean after they got the date/time stamp on the machine. Any messages with that connection and later that night. I don't think would... would have actually been [unintell]. But I don't know if Joe came up for the check. But I seen... I think is that maybe Joe was coming up to kill me. He was... [unintell] he's delusional... And this is scenario one.

Thus, based on Mr. Horowitz's account, he had no way to know Mr. Lynch was owed $180. Ms. Leonida did not investigate or cross-examine on this inconsistency.

Mr. Horowitz also made statements implying awareness of a wound that was not visible from Ms. Vitale's position when discovered. "There could have been other wounds too. There could have been a second

one on the other side. I don't know." (Exhibit B1, Horowitz Interview, at 142.)

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

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

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

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

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

> Dan Horowitz was Pamela Vitale's husband. He was the last one to see her alive that Saturday morning, and discovered her body Saturday evening. He had some blood on his clothing at the time he was originally contacted by Sheriff's deputies, and some of his clothing bearing blood was found near Ms. Vitale's body. His

> DNA was found on a broken coffee cup in the kitchen sink that also had a blood smear on it. He was relatively composed at the time the deputies first contacted him, talking on a cell phone to various people he had apparently called before the Sheriff's deputies arrived, including Sheriff's Dispatch (non-emergency). (3 CT 873.)

He continues:

> [T]here is no question that the husband of a deceased woman, last to see her alive, with his DNA inside the residence, including a broken cup, which has her blood on it, is going to be raised, whether the defense specifically brings out third-party culpability or not. (1 RT 9.)

Thus, the prosecutor understood not only that there was evidencing implicating Mr. Horowitz, but that this evidence would be relevant at trial to a defense of third party culpability. Tragically, defense counsel did not.

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

Evidence of third party culpability need only be capable of raising a reasonable doubt as to the defendant's guilt. People v. Cudjo, 6 Cal.4th 585, 609 (1993); People v. Hall, 41 Cal.3d 826, 833 (1986). Here, evidence linking Horowitz to the crime was capable of creating reasonable doubt. The physical evidence used to link Petitioner to the crime was "problematic at best," (Exhibit F, Turvey Report, at 370); the prosecution failed to develop a rational motive; and Petitioner had an alibi and no history of violence. If the jury had evidence of abusive behavior, marital problems, the physical evidence implicating him, and statements implying guilt and knowledge, it would likely have raised a reasonable doubt otherwise

lacking.

Trial counsel made little to no effort to investigate evidence of third party culpability in general and Mr. Horowitz in particular. Ms. Leonida claimed that she read "everything," watched all of the interviews, and had her investigator Ed Stein contact the Hills and Ms. Powers. However, Mr. Stein did not recall interviewing the Hills, and had no idea who Ms. Powers was. (*See* Declaration of Katherine Hallinan.) There are no notes in the public defender's file about the interviews of Tamara Hill, Daniel Horowitz, Joe Lynch, Donna Powers, Gerry Wheeler, Mario Vitale, or Marissa Vitale, although there are notes on other witness interviews. (*See* Declaration of Katherine Hallinan.) This suggests that even if Ms. Leonida did watch those interviews, she failed to recognize their worth. Notably, all of the witnesses about whose interviews were noted in the file were those who had information about Mr. Dyleski, such as the Curiels, not about the murder, Ms. Vitale, or Mr. Horowitz.

Further evidence that Ms. Leonida failed to investigate evidence of third party culpability is the fact that she never contacted Mr. Ortiz, although several of Vitale's family members suggested his possible involvement. (*See* Exhibit K, Ortiz Declaration, at 442; Exhibit C, Hill Interview, at 213-215.)

Perhaps most compelling is Ms. Leonida's apparent lack of awareness of a crime scene photo, in her possession, which directly refuted the prosecution's claim that the perpetrator had not showered.

In his declaration, Mr. Dyleski relates that Ms. Leonida:

> [I]nformed me that no evidence or interview existed that implicated Daniel Horowitz in the murder of his wife ...

> besides the Declaration of Susan Polk. I found out recently from my habeas counsel that Ms. Leonida had in her possession ... multiple interviews that were exculpatory . . . Ms. Leonida further stated that investigating Mr. Horowitz and presenting him as a suspect at trial would not be wise because of his notoriety.
>
> (Exhibit H, Declaration of Scott Dyleski, at 418.)

Susan Polk, a former client of Mr. Horowitz, provided a declaration stating that Mr. Horowitz told her that he framed Mr. Dyleski. (Exhibit J, Declaration of Susan Polk, at 435. *See also* Exhibit S, Report of Deputy Wilhelm, Dated 1/13/06, at 534.) Ms. Leonida's decision to not investigate compelling evidence of third party culpability because of Mr. Horowitz's "notoriety" cannot be justified as strategy. Her concern with "notoriety" is far more consistent with that of a burgeoning public defender in the home jurisdiction of a prominent member of the criminal defense bar, who had no desire to tangle with such a colleague, or the judicial officers and other attorneys with whom he regularly interacted.

a. Emails on Ms. Vitale's Computer (Previously Used by Mr. Horowitz)

Based on counsel's review of the available email files on a disk contained in the discovery, the laptop referred to as Ms. Vitale's was apparently a hand-me-down from Mr. Horowitz to her some time in June of 2004, when he acquired a new one. (*See* Declaration of Sara Zalkin.)

The emails are a gold mine of information about Mr. Horowitz and his impressive computer savvy and media savvy. When his contractor, Rick Ortiz, was pursuing candidacy as the Mayor of Vallejo, in neighboring Solano County, Mr. Horowitz helped him set up a website ("Yesterday I had an email sent to you which will allow you to set up your own control

account for your website.") (Exhibit EE, at 677.)

> I reviewed your site with people I know who are involved in politics. It is well designed for the Philipino and Hispanic communities which was my intent....My political consultant people (e.g. those whose family are elected to Congress, etc.) tell me that this is the idea that 'all politics are local.'
>
> (Exhibit EE, at 677.)

The same email relays that all of the video equipment for the security system in the new home is "sitting in the living room on the floor." He instructs Mr. Ortiz about the dome cameras at the front entry; under the front steps, in the garage, and around the exterior ("Back of house shooting to towards the back hills.") Digital deadbolts were on order, one for the garage door. (Exhibit EE, at 678.) In an email to his stepson, Mario, Mr. Horowitz describes the amazing security system he designed, while also hinting to Mario that he could earn money with such a business (and would therefore be less dependent on him for funds). (Exhibit EE, at 679-680.)

The Ortiz declaration recounts how problems with the construction were adding up around the time that Mr. Horowitz was out of the country assisting on the Lazarenko case. ("I need you to watch out for budget going forward. We are way over on extra's etc. This is no one's 'Fault' but the next few months are the difference between too much over budget and the normal anticipated. Since I won't be there I need you to fill my role in that sense.") (Exhibit EE, at 678.) In an email from Vitale to Horowitz on Friday, October 24, 2003, she repeats how much she misses him, and apologizes that she "sounded down" when he called. She was feeling "tense and pressured":

> Mostly I'm feeling pressure about the house stuff. I also feel on top of it after our meeting today...which was excellent.

> Looked at all angles and determined a strategy. But still...it's just nerve wracking cuz it's such an important piece of our life on the line. That being said...I DO feel in control of it at this point. So, don't worry that I'm getting shaky on handling it...I'm not.
>
> (Exhibit EE, at 681.)

By reply, Mr. Horowitz says: **"In the world of law and business power is the number one commodity. Power then money then friendship then morality.** Power at your meeting is everything. Love, Dan." (Exhibit EE, at 681.) [Emphasis added.]

Along with the Ortiz declaration, Petitioner proffers that, if called to testify, Mr. Ortiz would confirm that on at least two occasions when Mr. Horowitz was a guest commentator on a legal program about the Scott Peterson trial, Mr. Horowitz coached him to call in with a specific question. The following email was sent from Mr. Horowitz to Ms. Vitale (who often assisted in his law practice) on 7/17/04:

> As a former paralegal for one of the most aggressive atty's in my community I have some knowledge of the 'justice' system. If people will take note, from the OJ case, to M. Jackson, K. Bryant and Scott Peterson - the Defense RARELY states that their client is innocent. The primary focus is usually on the faults of others, just listen to Chrix Bixly and Daniel Horowitz and other Defense oriented legal commentators. Our system no longer seems to be concerned about guilty or innocence, it's about how you play the game....Without all the facts, I can not state emphatically that SP is guilty - do I believe he is, more likely than not. I find so many things about this case interesting. I wonder if he has ever had a psychological test - is he a sociopath/psychopath? How does he recall a cut on his finger on Dec 24, but can't recall what happened to several anchors? Did he deliberately create a mass of confusion about who he is in an effort to thwart an investigation if he was considered as a perpetrator? He knew that a spouse is always under suspicion first - (by his own admission). I have always believed that if something or someone appeared to be to good to be true, it or they usually are. I still keep in my mind, right or wrong, that sometimes people don't really need a REASON OR MOTIVE to kill -

> and if they really want to accomplish such a feat, all things are possible. Unfortunately we now live in a society where people blame everyone and everything else for their behavior and it seems that it is easier to lie than to assume responsibility for our OWN actions. To some, men or women, divorce including child support, equitable distribution, admission that all is not well with the happy couple, possible alimony and the ties that bind a couple for years because of children, couples either stay married with hearts filled with hate or consider other alternatives including but not limited to murder.
>
> (Exhibit EE, at 684.)

b. Cellular Phone Records

Habeas counsel spent hours reviewing the phone records of Mr. Horowitz, which were received on a disk along with the other material sent by Brent Turvey. (*See* Declaration of Sara Zalkin.) There is nothing in the file to indicate that anyone in the Public Defender's office did so.

These records cover the period from August 13, 2005 through October 16, 2005. Counsel has identified several phone numbers of news reporters and television networks, both local and national. (*See* Declaration of Sara Zalkin.)

One such reporter is Bruce Gerstman of the Contra Costa County Times. There were eleven calls in the period covered by the phone records, from or to Mr. Horowitz's cellular number, to two numbers used by Gerstman (suffix of 2670 and 1696), including one on call waiting (1696) to Mr. Horowitz at 10:01 p.m., when Mr. Horowitz was at the Sheriff's station. A text message from that number was found on the cell phone, as documented by Inspector Venable's report: "Let me know how I can help. Shalom Bruce" at 10:34 p.m. on 10/15/05. (Exhibit LL, Venable Report, at 723.) Inspector Venable also documented the fact that Mr. Horowitz said in

his interview that he called his wife several times that day, but based on the records "[n]one of the calls were completed and none of the calls appeared on VITALE's call detail, indicating HOROWITZ hung up prior to the call being transferred to voice mail." (Exhibit LL, Venable Report, at 729.)

The close relationship between Mr. Horowitz and Mr. Gerstman is indicative of a critical factor in this case- the control Mr. Horowitz had over the media reports regarding his wife's murder. Because Petitioner's counsel never reviewed the phone records, she was unaware of his media contacts. Indeed, the motion for change of venue lists 39 articles written or co-authored by Mr. Gerstman, with headlines such as: "Household item used to kill lawyer's wife, source says" (October 19, 2005); "Mother of murder suspect assisted after fact, police say" (October 28, 2005); and "Bereaved lawyer ready for Polk trial" (November 18, 2005). (3 CT 914-918).

The manner in which Mr. Horowitz controlled the official story surrounding the murder is evidenced in the recording made at the police station. Mr. Horowitz made approximately fifty phone calls in the hours following his reported discovery of his wife's body, including to media sources. (See Declaration of Sara Zalkin.) Many of those calls were recorded on the video taken at the police station. In that video, Horowitz is heard repeating his recounting of events, which included key facts that became central assumptions of the investigation, and he insists that he has figured out what happened:

> Hey Jim, it's Dan. . . . I've pretty much figured out the time and the manner and everything else. I just don't know who. And... I think it had to happen after I left in the morning. About 7:30. She was cold. She was in her underwear. She

didn't open the door. Had her un... you know? She might have been rushing to lock it.

(Exhibit B, at 57.)

Hi, it's Danny . . . Hey, I'll tell you something. Uh, I know what happened. I mean, I could see the scene. I was there for ten minutes before they came. I didn't change. Yeah, she was in her un... underwear, and a shirt. So she didn't... probably just woke up. I left at 7:30, and she probably was up, and maybe about 08:00, in the kitchen. And then somebody came on the deck. And she was probably either running to the bedroom, 'cause she didn't want to be seen in her underwear. Unless uh... But, then I think she went to the door. Somebody just started to come in. And she went to the door. I think to try to lock it. 'Cause I know she wouldn't have answered the door in her underwear. No, not for anybody . . . I think it's that crazy bastard Joe Lynch is my guess. It would have to be.

(Exhibit B, at 58-59.)

Hey Rick, It's Dan. Did they arrest the guy? Yeah, Joe. Joe Lynch . . . And he might have been coming up to get some money that we owed him. That's my guess. I think it happened about 8:00... I think it happened... I figured out... I figured out when it happened. Time wise . . . I wish they would take the information from me though, so they could get a little bit more focused. **They're doing crime scene shit, and I'm the one who knows the facts.**

(Exhibit B, at 64-65.) [Emphasis added.]

This is just a sample of the numerous calls he made in the hours after Ms. Vitale's death, each of which he used to provide critical details about the murder that shaped the investigation and prosecution of the case. Not only is there no evidence that defense counsel reviewed the phone records, there is also no evidence that she watched the video of Mr. Horowitz. (See Declaration of Katherine Hallinan.)

Counsel's failure to investigate prejudiced Petitioner, since the prosecution's case went largely unchallenged. Also found in the files obtained from prior counsel was a transcript from a Court TV chat room

interview of a juror from Mr. Dyleski's trial, Mr. Peter De Cristofaro. (Exhibit X, Transcript of Chat with Peter De Cristofaro.) Mr. De Cristofaro called the defense "weak":

> It was almost all character witnesses and even the number of character witnesses was not that much. I personally would have like to have seen more, or an alternate theory as to who might have done it. **If Scott Dyleski didn't do it, I would have liked to have seen Ellen Leonida give us an alternate theory to the crime. She never did.**
>
> (Exhibit X, at 565-566.) [Emphasis added.]

Although Ms. Leonida had ample grounds to present an "alternate theory," she did not do so. This failure prejudiced Mr. Dyleski, as evidenced by the statement of a juror that he would have liked to hear such an alternative theory.

If anyone could pull off staging a murder in order to frame an innocent bystander, a well-respected criminal defense attorney, experienced in capital and homicide trials, might. As argued herein, there is plenty of information to suggest that Mr. Horowitz targeted neighbor/tenant Joe Lynch to take the fall - not the least of which being the Horowitz interview itself. (*See, e.g.*, Exhibit B, at 59, 61, 64, 66-69, 73, 75, 79, 82, 86, 100, 104, 118-119; Exhibit B1, at 131-133, 135, 137-139; Exhibit B2, at 147, 19, 151-152, 156-157, 161, 167, 171-172, 174-175, 178, 192.)

At present, the undersigned are not able to explain the chain of events that led to the recovery of the duffel bag from the abandoned van on the Curiel property, which contained items belonging to Petitioner as well as DNA linked to Ms. Vitale. Petitioner notes that his mother, Esther, was walking with Joe Lynch when she observed the duffel bag, and that Joe participated in clearing the brush to comply with the fire department's edict.

It is possible that Mr. Horowitz either knew or learned that Joe would be participating, but was somehow thwarted in his intent to plant evidence or otherwise incriminate Joe in the murder. It is possible that as events unfolded, and detectives appeared to dismiss Joe as a suspect despite the insistence of Mr. Horowitz, it became necessary to modify the plan. It is possible that as events unfolded establishing a connection between the credit card scam devised by Petitioner and his friend Robin Croen, in which 1901 Hunsaker was listed as the billing address, like any trial attorney, Mr. Horowitz saw an opening and took it. Petitioner's investigation is ongoing, and should this Court not grant the requested relief, the undersigned anticipate uncovering additional details that will be included in future habeas filings.

By immediately diverting suspicion away from himself, Mr. Horowitz had the upper hand in steering the investigation and whipping up the media coverage. A number of video clips or articles can be easily found online, starring Mr. Horowitz.

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

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

Four images taken by law enforcement personnel in processing the crime scene show the same ruler being used in different locations, with

identical apparent blood transfer in each image. (Exhibit A, Photos, at 28-30.) These images show how evidence can be easily and inadvertently contaminated, which likely occurred here.

Trial counsel additionally failed to question the chain of custody and potential contamination of critical inculpatory evidence: the duffel bag. Reserve Deputy Kovar, who located the duffel bag in the van, testified that when he found the bag, he moved items around inside of it. (9 RT 2338.) This could have potentially cross-contaminated items. A photo taken at 1050 Hunsaker Canyon Road of the bag sitting on the porch, with some of its contents displayed on top, shows the sloppy handling of important evidence. (Exhibit A, Photos, at 56. *See also* 9 RT 2323.)

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

The unestablished chain of custody for the items within the bag is interesting in light of the single photo of the bag and its contents on the porch of 1050 Hunsaker, which only shows two items of clothing, the pullover and the balaclava, but not the coat or glove that were allegedly found. (Exhibit A, at 56. *See also* 9 RT 2323.) It does not make sense that

the investigators would photograph some items but ignore the remainder, including the all-important glove. In fact, nobody mentioned having observed a glove at the scene. Mr. Collins' handwritten field notes state: "Kovar reported finding a black duffel bag, containing dark clothing, a ski mask, and a clump of loose reddish hairs ..." (*See* Exhibit AA, Field Services Information, at 572.)

Although Mr. Kovar did not report finding a glove, he was permitted to authenticate the glove at trial. (9 RT 2332-2333.) However, the veracity of this testimony is questionable at best as he directly contradicts himself during his testimony, both at trial and preliminary hearing, as to whether or not he actually saw the glove at the scene:

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

(9 RT 2322.)

After abandoning the topic, the prosecutor returned to it later and asks a leading question, eliciting the necessary affirmative response to authenticate the glove:

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

A. Yes.

(9 RT 2332-33.)

Apart from this improper examination, Mr. Kovar made no mention of a glove, and specifically stated that he saw a sweater and balaclava, and then called his supervisor. Mr. Kovar was nonetheless permitted to authenticate the glove.

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

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

(CT 1 151-152.)

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

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

...

Q. Do you remember what else was near it or what order the things were placed in the bag in?
A. I don't, and I – the only reason I know there was a jacket in

there is at the time it was taken to the front porch is when some of the contents were pulled out to be examined by the detective.

Q. Okay. So you don't know where anything was in relation to anything else inside the bag?

A. No.

(1 CT 154.)

Ms. Leonida did not ask any questions about these inconsistencies or the glove's chain of custody. This evidence would have been particularly meaningful in light of the strange nature of the duffel bag evidence. Logically, in order for such items to have Ms. Vitale's DNA on them, they must have been worn by the perpetrator during the crime. However, DNA analysis of the glove excluded Mr. Dyleski entirely. Moreover, the bag only contained a single glove, a mask, and a shirt and coat that had no blood on them whatsoever. Thus, if the mask and glove were worn by the killer, what happened to the other glove and the rest of the clothes? Why were the rest of the items disposed of so well, and a few random pieces were left in a bag with Mr. Dyleski's name on it, mere yards from his home? Moreover, due to the bloody nature of the crime, one would expect any clothes used in the murder to have a great deal of blood on them. In light of the damaging, but puzzling, nature of the duffel bag evidence, it was essential for defense counsel to provide an alternative explanation for the manner in which Ms. Vitale's DNA could have made it onto the bag (to wit, contamination). Defense counsel failed to do so, and this failure fell below an objectively reasonable standard of competence, and prejudiced Petitioner.

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

At the time of trial, Kathryn Novaes had been a latent fingerprint examiner with the Contra Costa County Sheriff's Department for four years, and testified as an expert "in the composition and identification of latent fingerprints." (12 RT 3298-3299.)

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

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

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

Mr. Jewett later asked:

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

***

Q. Did you closely examine in the laboratory some of those prints on some of those boxes?
A. Yes.
Q. And when doing that, did you form any opinions as to what did make at least some of those prints?
A. Yes.
Q. What?
A. It was a fabric.
Q. And can you be at all more specific about what kind of fabric or item it was?

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

(12 RT 3312-3314)

People's Exhibit 18B, the glove she was told came from a duffel bag inside a van, looked "similar" to the prints found at 1901 Hunsaker:

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

(12 RT 3314)

Q. At the time that you saw this glove in the fume hood, were there other items of evidence that were also present in the laboratory that Mr. Collins was work working [sic] on?
A. I'm not sure.
Q. Okay. So was it Mr. Collins who directed your attention to this glove in the fume hood?
A. Yes.
Q. All right. Let me - - I'll ask you a hypothetical. Okay. Assuming that this is the glove that Mr. - - and by this, I mean People's Exhibit 18B - - was the glove that you saw Mr. Collins working on....Did you have an opportunity to look at...specifically the fabric of this glove, in and effort to determine whether or not it could have made, the pattern that you characterized as a fabric pattern on the boxes?

A. Yes.
Q. And you have an opinion with respect to that?
A. It looked similar in my opinion.

***

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

(12 RT 3315-3316.)

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

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

***

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

(12 RT 3320.)

Aware that it was problematic that no fingerprints of Mr. Dyleski were found at the crime scene, Mr. Jewett skillfully led the witness, inquiring on redirect:

Q. Well, let me ask you this: Suppose, for instance, that I were to touch this area in front of you and I were just to drag my hand on it across like that. Would you expect to find a usable latent fingerprint if I do that?
A. Maybe not.
Q. Why not?
A. Because you haven't actually put the right amount of pressure on the object. Instead, it's a smear.
Q. Okay. It's a smear. Okay. So if a person's hand is in motion

at the time it touches something, does that sometimes obscure ridge detail?

A. Yes.

Q. And if that happens, can you have occasions where you know or suspect that somebody has touched something because you have a smear, but you don't have enough ridge detail to be able to identify it as a usable latent fingerprint?

A. Yes.

Q. Is that common or not common?

A. It can happen. People move - - skin is fragile....

Q. Is it uncommon to find when you are posting [sic] either an item or a scene to **find smears that you believe are left by somebody's hand**, but it doesn't give you enough information to make a comparison?

A. No.

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

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

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

This is yet another instance where Petitioner's right to confront the witnesses against him was violated. Ms. Leonida's cross-examination accomplished nothing except reminding the jurors about Mr. Halpin, who had already told them how Mr. Dyleski used his information to order marijuana-related items as well. Indeed, Ms. Leonida made no attempt to

object to the foundation of the witness's conclusions, or the lack of expertise in this area. Ms. Novaes testified as an expert in the "composition and identification of latent fingerprints." All of her stated training and expertise was in the area of "fingerprints." (12 RT 3299.) She did not mention any sort of training whatsoever in any field besides fingerprints, such as fabric prints or fabric comparisons of any kind. Nevertheless, without objection, she testified that she not only could tell that prints left on boxes were made by fabric, but specifically by a glove, and that the print was consistent with the glove found in the duffel bag.

Counsel was ineffective for failing to object to this unqualified expert opinion, or to cross examine Ms. Novaes on the basis of her opinion. In People v. Gutierrez, 14 Cal.App.4th 1425 (1993), the court found that counsel was not ineffective for failing to object to a gang expert's opinion because he was asked about matters within the scope of his expertise. Id. at 1435. Ms. Novaes testified to matters well beyond her expertise.

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

Ms. Novaes had indeed processed "a lot of objects" from the crime scene. (12 RT 3320.) She identified fourteen latent fingerprints of Mr. Horowitz on the bottom of a box (lab #22); and on a folder and "witness list" collected along with other paperwork from the sofa (lab #26); and other paperwork in front of the sofa (lab #25), all of which contained apparent bloodstains. (*See* Exhibit W, Report of K. Novaes, dated 4/25/06,

at 545-556.) Ms. Novaes also noted that item #26 "has unusual impression that appears 3 times same as on folder." (Exhibit W, at 552.)

Additional information that could have been elicited from this witness included her identification of four latent prints made by Mr. Horowitz: "lifted from 'open whiskey bottle in drawer next to bed' - right thumb, right middle and ring fingers" and "lifted from 'Grant's Scotch beside bed' - right palm." (Exhibit W1, Report of K. Novaes, Dated 2/24/06, at 557.) In his closing argument, regarding the bloody water bottle in the kitchen, said Mr. Jewett: "There's a plastic cup with clear liquid in it. And we don't know what it is, but it's certainly reasonable to infer it was water. It wasn't vodka, you know." (15 RT 4053-4054.)

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

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

1. Artwork and Writings

Petitioner's artwork and writings were a central topic at trial, and symbols appearing in the artwork were compared to incisions observed on Ms. Vitale's back. However, the subject matter of the artwork and writings often depicted violent themes, which were highly prejudicial to Mr.

Dyleski. (*See* 15 RT 4000-4005.) Moreover, the prosecution used the symbols on the artwork to mislead the jury by arguing that they were similar to the marks found on Ms. Vitale's back, when in fact there were no similarities. This resulted in prejudice to Mr. Dyleski, and trial counsel's failure to seek exclusion of this "evidence" fell below an objectively reasonable standard of conduct.

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

Mr. Jewett questioned witnesses extensively on this topic. He elicited testimony from Detective Moore about art in Petitioner's room that utilized a variety of symbols, none of which were the same as the marks on the victim's back. However, this artwork was highly inflammatory as it contained themes of mass murderers, swastikas, anti-Christian and/or

Satanic beliefs, vivisection, Absinthe use, violence and hate. (13 RT 3512-27; *see also* 9 RT 2454-47; 10 RT 2685; 11 RT 3075-77.)

The introduction of Petitioner's artwork and writings portraying violent themes likely prejudiced the jury, as it appeared to be evidence of Petitioner's violent nature, when in reality all it revealed was his interest in certain types of popular music and art.

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

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

2. Bumper Sticker

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

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

The idea that the fact that a bumpersticker found in Petitioner's room contains a stylized A could be used as proof of Petitioner's guilt because an injury to the victim's back vaguely resembles the A in the bumpersticker defies reason. Yet, defense counsel did not object although it was patently irrelevant and, as used by the prosecutor, highly prejudicial, because it contained the word "hate" and an anti-Christian theme. Defense counsel's failure to object further supports Petitioner's claim of ineffective assistance.

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

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

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

G. Counsel's Ineffective Assistance Prejudiced Petitioner and Resulted in a Deprivation of His Fifth and Sixth Amendment Rights.

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

Trial counsel's failure to adequately investigate the evidence left her unable to effectively challenge the physical evidence presented by the prosecution, and her puzzling decision to ignore the most compelling exculpatory evidence available left the jury without an alternative theory, necessary to effectively question the prosecution's interpretation of the evidence. Her failure to challenge the admission of irrelevant and inflammatory evidence allowed the prosecution to paint Petitioner as a violent sadist, thus infecting the entire trial with prejudice. The Petitioner was prejudiced thereby.

XXVII.

Petitioner's Fifth and Fourteenth Amendment Rights to a fair trial and to due process of law were violated by prosecutorial misconduct. Prosecutor Jewett engaged in just about every category of misconduct recognized by law. Multiple instances of misconduct infected the trial with unfairness. Each of these errors individually may be sufficient to render Petitioner's trial fundamentally unfair, as they certainly do when considered cumulatively. See Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974).

The main question "is whether the errors rendered the criminal defense 'far less persuasive,' Chambers v. Mississippi, 410 U.S. 284, 294

(1973), and thereby had a 'substantial and injurious effect or influence' on the jury's verdict, Brecht v. Abramson, 507 U.S. 619, 637 (1993)(internal quotations omitted). See Parles v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007), citing Chambers, *supra*, 410 U.S. 284 and Brecht, *supra*, 507 U.S. 619. Here, the defense was already constitutionally deficient, as argued above, so the egregious misconduct unquestionably had a "substantial and injurious effect or influence" on the verdict.

A. The "Gothic Theme."

The prosecutor skillfully wove a "Gothic theme" into his case to arouse feelings of passion and prejudice, despite evidence that Petitioner had outgrown that stylistic phase after high school. This approach also deflected attention from the prosecution's theory of motive, which was weak, at best.

Petitioner's trial counsel raised the issue in her motion for change of venue. (3 CT 945 - 977.) The media disseminated photographs of Petitioner from that stage of adolescence. (3 CT 945.) In large part, the diabolical portrayal of Petitioner was related to the unchallenged depiction of a "symbol" that the killer carved on Ms. Vitale's back. (3 CT 944.) Despite the varying descriptions of these injuries as resembling a "double crossed "T" or an "H," Petitioner's trial counsel never challenged the notion that this was an "etching" or "brand" of the killer (versus one of the numerous injuries inflicted in the attack.)

At the hearing on the venue motion, Dr. Ross testified regarding his review of the pretrial publicity. He identified the following words or phrases as among the most prevalent: "Shocks, gruesome, bludgeoning;

bludgeoned, stabbed and had a symbol carved into her back...brutal and callous, horrendous act; carved into her back." (1 RT 228-229.) Defense counsel asked:

> Q. Did you also do an analysis of how Scott Dyleski has been characterized in the publicity?
>
> A. Yes. And the references would - - in most cases refer to his living conditions. His house was a mess, rodent infested, that he's troubled. The - - both newspapers included pictures of the defendant and received comments from readers about including those showing progression in the year book from a clean-cut Boy Scout to someone who's taken on Goth characteristics, references to his being troubled, becoming troubled and darker after his sister's death.

(1 RT 229-230.)

On re-direct, in response to the prosecutor's question regarding "additional fact-recognition" in the survey sample, Dr. Ross testified:

> A. Well, the highest was the recognition of Daniel Horowitz involved in the Susan Polk case, and then the marijuana growing equipment and the stolen credit cards.
>
> And then the next most referred to or recognized was associated with goth at his high school....

(2 RT 323.)

Later on, Mr. Jewett argued against the motion for change of venue:

> And contrary to defense counsel's argument that somehow there's something prejudicial about references to Goth, I haven't seen and counsel has not produced, even though I raised this in the people's pleadings, anything that necessarily suggests that Goth is somehow necessarily prejudicial.
>
> We have a lot of alternative lifestyles....The fact of the matter is we recognize there are many differences, particularly in young people and there has been since the time of Elvis Presley and the Beatles and most people know that.
>
> And so the fact that somebody is Goth is not necessarily prejudicial to their ability to get a fair trial in a case like this....

(2 RT 385-386.)

The next mention of "Goth" on the record was when the court began asking prospective jurors about their familiarity or lack thereof with "for lack of a better term, the Goth culture." (3 RT 770-771.) The court asked this question of every prospective juror. The prosecutor took full advantage of his ability to raise the "Gothic theme" in voir dire, for example: "Now, whether or not Mr. Dyleski, in his appearance here in court necessarily reflects Mr. Dyleski's life in the fall of last year, we will have to wait for the evidence to see." (4 RT 1049-1050.)

> MR. JEWETT: Okay. Is there - - I have to ask you this question: Has anybody here - - and let me limit it again to immediate family - - ever done any studying or showed a special interest in - - and I'm not talking about just reading, you know, Silence of the Lambs - - but...showing a special interest in subject matters such as, you know, psychotic killers, mass murderers, Jack the Ripper, sadomasochism, anything like that?
>
> (4 RT 1063.)

After a prospective juror asked whether "witches" would fall into that category, Mr. Jewett asked: "Anybody here or immediate family either studied or had an apparent interest in issues surrounding witchcraft or the occult, anything like that?" (4 RT 1064-1065.) There are many instances where "Goth" is discussed in the jury selection process. (See also, e.g., 5 RT 1274-1279; 5 RT 1359; 5 RT 1394-1395; 5 RT 1412-1414.)

At least two jurors associated "Goth culture" with the Columbine High School shootings, including dark hair, black clothing, and trench coats. (6 RT 1566-1568.)

The prosecutor's opening statement mentioned a "marked change" after Mr. Dyleski's sister died in a car accident:

> He started wearing black. It's been characterized as 'Goth,' you have been getting a lot of questions regarding Goth...it's not so much

> Goth what Goth is that has anything to do with this case, what it does have to do with is black, for instance, black clothing, okay, that's going to become relevant.
>
> But there's something else; because it's not just the style, Mr. Dyleski is something of an artist and he likes to write as well. And you are going to see a number of his pieces of artwork, and you are going to read a number of his pieces of writing, and you are going to see some things that are going to be disturbing to you. It wasn't Goth and it wasn't even death, it was murder, it was killing.
>
> We have all kinds of very disturbing pieces of art that have very frightening images on them with blood, with the word murder, with vivisection, something that appears prominently on his computer which is the removal of organs.
>
> Okay. And perhaps while the content of that artwork and those writings may give you something of a window into the heart and the mind of Scott Dyleski, there's something else about those writings that's very important, because Mr. Dyleski was big into symbols....
>
> (7 RT 1742-1743.)

This inflammatory and prejudicial rhetoric continued throughout the trial and permeated the prosecutor's closing argument. "Hate is a part of this case and it manifests itself in the person of the defendant both philosophically and at a personal level." (15 RT 3999-4000.)

The prosecutor argued that lettering on a bumper sticker found in Petitioner's room ("I'm for the separation of church and hate"), resembled the injury on Ms. Vitale's back. (15 RT 4002.) This argument was not only inflammatory, but also was based on a fact not in evidence.

This presentation continued:

> And one of the things...that [Jena Reddy] talked about, albeit begrudgingly, was there is a God, there is Satan, but there is no good and evil.
>
> That's a very interesting philosophy. And frankly it's not a unique one. And there's a certain logic to it, if you think about it. But the logic is extremely dangerous and the logic deals with the proposition that the universe is in balance and it's balanced by God and Satan.

> [S]uch a philosophy is not about immorality, it's about amorality.
>
> (15 RT 4003-4004.)

The writings and artwork, said Mr. Jewett, would trouble any parent. Scott's mother:

> [R]ecognized there was trouble, although she got up here and talked about how she thought it was a product of a broken heart, but that's not what she said in the tape we played for you.
>
> She was talking about seeing drawings of body parts that she pulled out of the waste basket, and based on that was thinking about giving the defendant therapy. And when was that? It was a week before Pamela Vitale was killed.
>
> ...[w]hy did I spend so much time on those things, because Pamela Vitale was beaten to death? No. The beating was brutal....
>
> It was the etching, it was the brand on her back, it was the stab wound of a dead body or somebody who is in their agonal phase. She had already been mortally wounded when that knife was plunged into her abdomen.
>
> Something else is going on there that's beyond simply trying to cause her pain or kill her. There's some other element there that you do not normally see in a homicide that is at least circumstantially reflective of the mind, the heart, the soul of the person who inflicts that kind of injury.
>
> That's why we spent time on the drawings, on the philosophical beliefs of the defendant, because there is some very real and very disturbing physical evidence in this case that that evidence has some bearing on.
>
> (15 RT 4004-4005.)

The probative value of the "Gothic culture" was minimal, at best. The prosecutor was patently aware of the "hot button" nature of adolescent angst, especially since the Columbine shootings, and took full advantage of that in his case. Prosecutors should not use arguments calculated to inflame the passions or prejudices of the jury. See Berger v. United States, 295 U.S.

78, 88 (1935).

Mr. Jewett's closing is full of inflammatory argument. As his words were the last heard by the jury, the prejudicial effect is magnified because it is fresh in the mind of the jury. See Baldwin v. Adams, 2012 U.S. Dist. LEXIS 123178, at *28-29 (N.D. Cal. August 29, 2012).

B. The Prosecutor Misrepresented the Physical Evidence.

1. The Shower.

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

This assertion was crucial to the prosecutor for at least two reasons. First, the notion that a stranger who had no way of knowing if and when Mr. Horowitz or anyone else might show up, would take the time to tidy up a bit and shower, could independently establish reasonable doubt. Second, given the problematic and conflicting testimony as to what time Petitioner returned from his walk, the longer the perpetrator spent at the home, the worse for prosecution's case.

However, the first page of Criminalist Taflya's 22-page report, dated January 18, 2006, plainly states: "The suspect appeared to have showered and a bloody handprint was observed on the shower wall." (See Exhibit DD, Taflya Report, at 660.)

Mr. Jewett was undoubtedly familiar with the crime scene photographs depicting a bloody, dripping handprint on the shower wall.

(Exhibit A, Photos, at 25-27; 2 RT 418-425.)

"Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." People v. Hill (1998) 17 Cal.4th 800, 823. The concerted portrayal that the perpetrator did not take a shower based on the absence of wet dripping when wet dripping in fact is clearly evidenced in crime scene photos supports Petitioner's claim of willful misconduct.

2. "The Glove"

The prosecutor managed to create the impression that the lone black evening glove reportedly found in the duffel bag, containing DNA evidence from Ms. Vitale, belonged to Petitioner; was used in the crime; and had a missing other glove out there that had yet to be found. He was so persuasive that even Petitioner's counsel, Ms. Leonida, began referring to "these gloves." (See, e.g., 8 RT 2068; see also 8 RT 2052-2053.)

3. "That Knife"

The prosecutor argued that in the days after the murder, Mr. Dyleski got rid of items "that have nothing to do with credit card fraud. That knife has nothing to do with credit card fraud. I would submit to you the shoes have nothing to do with credit card fraud." (15 RT 4081.)

There was no evidence that the knife turned over by Ms. Fielding had any connection with the murder of Ms. Vitale. Nevertheless, the prosecutor consistently referred to the knife as if there was such evidence.

4. Referring to Presumptive Test Results as "Blood."

Throughout the trial the prosecutor repeatedly referred to "presumptive" test results in a misleading fashion in his effort to secure a

conviction. This misrepresentation violates due process and constitutes prosecutorial misconduct. See, e.g., Miller v. Pate, 386 U.S. 1 (1967) [granting a writ of habeas corpus on the basis of the prosecution's presentation of red stains as blood, when this was known to be false].

Of the presumptive blood test on the black shirt in duffle bag, Mr. Jewett said, in opening, "On the shirt Pamela's blood wasn't there, but the defendant's was. The same with the overcoat." (7 RT 1776.) Yet, there was no evidence of any further analysis on the overcoat, and therefore no evidence whatsoever that it contained Petitioner's blood, rather than sweat or skin cells from normal usage.

Mr. Jewett continued to play "fast and loose" with regard to presumptive screening for the presence of blood versus blood confirmed as such, notwithstanding defense objection. (13 RT 3277-3286.)

The California Supreme Court held that evidence of presumptive blood tests are admissible in People v. Alexander, 49 Cal. 4th 846 (2010) However, in that case:

> The testimony regarding the presumptive blood tests had no particularly emotional component, nor did it consume an unjustified amount of time. Further, because the defense fully explored the limitations of the presumptive tests through cross-examination, there is no likelihood this evidence confused or misled the jury.
>
> Id. at 905.

Here, in contrast, the defense did not "fully explore" the limitations. Moreover, Mr. Jewett repeatedly referred to "blood" on items which had only reacted to preliminary screening. This was misconduct.

C. Referring to Facts Not in Evidence.

As he did with "the gloves," in closing, Mr. Jewett referred to a

bumper sticker from Petitioner's room that the prosecutor argued was similar to the H-shaped injury on Ms. Vitale's back. (15 RT 4002.) However, this bumper sticker was never presented in any testimony. Referring to facts not in evidence is "clearly misconduct." Hill, *supra*, 17 Cal.4th at 828. Such statements "tend to make the prosecutor his own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." People v. Bolton, 23 Cal.3d 208, 213 (1979). Here, this particular evidence was highly inflammatory, as it contained an anti-Christian message, had the word "hate," and was the only image presented that showed an H with an elongated horizontal line, like the image on Ms. Vitale's back. Thus, this improper evidence was not only misconduct, but it was also highly prejudicial.

D. Mr. Jewett Repeatedly Asked Improper Questions.

For instance, in the middle of the prosecutor's examination of Sheriff's Criminalist Taflya, at recess:

THE COURT: The record should reflect the jury has left. Mr. Jewett, the last four objections by Ms. Leonida have been that you are leading and I sustained all four objections, sir. Please don't testify for your witnesses. Okay?

MR. JEWETT: That's not my attention [sic]. A lot of this is foundational, but I know - -

THE COURT: Well - -

MR. JEWETT: – that.

THE COURT: - - where she's objecting, sir, it's not foundational. Okay. We're on break.

(7 RT 1978-1979.)

Yet, when testimony resumed, Mr. Jewett asked Mr. Taflya:

> Q. Isn't that a pattern you are familiar with, the pattern of the carpet?
>
> A. After looking at it, yes. I don't believe I have seen that in the past, well, prior to coming into this home.

(7 RT 1985.)

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

The 5th Amendment (made applicable to the State of California by the 14th Amendment) "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609, 615 (1965). See also Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) ("Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.").

Of the "stupid lie" Petitioner made up when confronted about DNA by Fred Curiel, said the prosecutor:

> Well, if this is just some stupid lie then where, sir, did you get those scratches?
>
> Okay. And the other $64,000 question is, 'If this was just a stupid lie, why are you worried about DNA?' Let me repeat that. 'Why are you worried about DNA? Your explanation for the DNA possibly being on Pamela Vitale's body is this mysterious woman you ran into on the road. If that's a stupid lie, then there's absolutely no reason for you to be concerned about your DNA being on Pamela Vitale's body,' save one, and that's because, like Fred said, 'You were there.'

(15 RT 4087.)

The argument continued as to Petitioner's statement to his friend and credit card co-conspirator, Robin Croen, that he will just say he used

Robin's computer, so Robin won't get into trouble. (15 RT 4088.)

> And he tells the story about the lady down the road and his concern about the DNA being on her body. And of course, you know, that it's that information that through Tom Croen came to the attention of the sheriff's office the following day, and it's from that that this investigation against Scott Dyleski was launched. But the story had actually been told on a number of occasions to a number of people before it was told to Robin.
>
> But then the defendant does tell something to Robin that is interesting....'Not to worry, I have got an alibi. Really? How do you have an alibi? This is Tuesday. The crime is three days old.
>
> [The Alameda County computer investigator] hasn't even looked at [it] yet. What we know at that time is that Dan Horowitz left that home shortly before 8:00 o'clock that morning and he found Pamela's body shortly before 6:00 o'clock that night. That the information we have.
>
> We don't have anything about 10:12 a.m., or anything remotely resembling that. Maybe, Ladies and Gentlemen, in the course of the days between Saturday and Tuesday, some information filtered out, maybe the fact that the bed was unmade or that milk was on the counter.
>
> Mr. Horowitz, he's obviously no stranger to the media. He may have made a comment or somehow speculated about when this killing might have happened and it would certainly be reasonable to conclude based upon the things that Mr. Horowitz knew that it happened sometime in the morning.
>
> But what time in the morning? How is it that you think you have an alibi on Tuesday? I mean let's not forget, folks, that nobody saw the defendant. If they saw him at 9:26, nobody saw him before that. There isn't one witness who testified they saw the defendant before then, directly or indirectly.
>
> Dan Horowitz left before 8:00 o'clock. Exactly how is it that you know that Pamela Vitale was not killed between 8:00 and 9:26? What exactly, what time is it that you, Scott Dyleski, think you have an alibi for? That's pretty important to the people.
>
> (15 RT 4088-4089.)

F. <u>Improper Appeal to Sympathy</u>

The "Golden Rule" argument is a "tactic of advocacy, universally condemned across the nation." People v. Vance, 188 Cal. App. 4th, 1182, 1188 (1st Dist. 2010). The condemnation extends to both civil and criminal cases, by both state and federal courts. See id. at 1198. A prosecutor may not invite the jury to "put itself in the victim's position and imagine what the victim experienced." See id. at 1188. "This is misconduct, because it is a blatant appeal to the jury's natural sympathy for the victim." Id.

For the same reason, "victim impact evidence, which relates 'to the personal characteristics of the victim and the emotional impact of the crime on the victim's family," is prohibited. See id. at 1199.

Here, the prosecutor thematically appealed to the jury's natural sympathy. During jury selection, Mr. Jewett spoke of the "mental gymnastics" required in order to put aside one's emotions. (3 RT 661.) In closing argument, he referred to personal characteristics of Ms. Vitale at least twice: "I hope you remember that as you are reflecting on the evidence in this case, that she is about as innocent a victim as you can have in a criminal case." (15 RT 3999.) "A woman that virtually everybody in that neighborhood loved or certainly liked." (15 RT 4010.) Later on in his, Mr. Jewett told the jurors to:

> Imagine the vision presented to...Pamela Vitale when a masked person...there can be no question whatsoever that this person was wearing a mask and gloves at the time he entered this house and that is what Pamela is confronted with as she is in a completely different world, looking into her family tree.
>
> (15 RT 4041-4042.)

The prosecutor's misconduct was magnified by his skillful manipulation of the physical evidence and improper argument about the

mask and gloves. Compounding the prejudice, defense counsel failed to object or otherwise try to neutralize the prosecutor's tactics, consistent with Petitioner's claim that he was prejudiced by the ineffective assistance of counsel.

XXVIII.

Petitioner's Fifth Amendment right to due process of the law and his Sixth Amendment right to effective assistance of counsel under the United States and California Constitutions were violated by the failure of appellate counsel to present meritorious defenses available to the Petitioner, and to properly advise him as to his rights and the law. Appellate counsel failed to raise the argument that trial counsel was ineffective for failing to use all of her peremptory challenges, thus foregoing adequate appellate review of the erroneous denial of a meritorious change of venue motion. The two-prong test for ineffective assistance of counsel articulated in Strickland applies to claims of ineffective assistance of appellate counsel. See Smith v. Robbins (2000) 528 U.S. 259, 285. Had Mr. Brooks raised ineffective assistance of trial counsel, based on the abundance of evidence of such ineffectiveness in his possession, Petitioner could have prevailed on appeal.

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

Philip Brooks to Scott Dyleski, Dated 2/5/11.)

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

A. Appellate Counsel's Failure to Raise Trial Counsel's Ineffectiveness for Not Using All Peremptory Challenges Was Ineffective and Prejudiced the Petitioner.

For reasons discussed below, Petitioner submits that the failure of his trial counsel, Ms. Ellen Leonida, to exhaust all the peremptory challenges available to the defense prior to the empaneling of the jury constituted ineffective assistance of counsel, as it prevented Petitioner from receiving adequate appellate review of this meritorious issue. Moreover, Petitioner contends that the failure of his appointed appellate counsel, Phillip M. Brooks, to raise this issue also constitutes ineffective assistance of counsel, and further precluded appellate review of the erroneous denial of his meritorious motion for a change of venue.

At trial, Petitioner moved for change of venue prior to jury selection. The written motion included some 302 exhibits and thoroughly documented the pervasive pretrial publicity about the case. This documentation showed that all the major print news services, all the national and local television networks, and many internet news services covered the murder from its inception and throughout the investigation in an inflammatory and sensationalized manner. Many evidentiary details appeared in the news

coverage including prejudicial photos of Petitioner, sympathetic photos of Vitale and Horowitz, photos of the crime scene, and an overwhelming amount of factual assertions, some accurate and some patently false.

Petitioner's trial counsel also presented the results of a survey of Contra Costa residents regarding their exposure to the publicity about the case. This survey revealed that 89 percent of those polled had been exposed to publicity about the case and that approximately 60 percent of those exposed to such publicity harbored the belief that Petitioner was certainly or probably guilty. The defense adduced expert testimony interpreting the results in regard to the motion for change of venue. (1 RT 197-329.) After the pretrial hearing, the trial court denied the motion without prejudice, pending the review of the voir dire of the prospective jurors. (2 RT 414.)

Written and oral voir dire of the summoned jurors bore out the results of the public opinion survey, revealing that 82 percent had been exposed to the pretrial publicity surrounding this case. Additionally, eleven of the twelve sworn jurors who convicted Petitioner, and all four of the alternates, were exposed to pretrial publicity. When the jury was sworn, the defense had six peremptory challenges remaining. Of the 31 available jurors left in the jury pool, only six indicated that they had not been exposed to pretrial publicity regarding this case.

After jury selection, Ms. Leonida renewed the motion for change of venue based on the voir dire of the jurors. The trial court again denied the motion, noting that the defense had not exhausted all of its peremptory challenge, and pointing out that this failure would weigh heavily in any appeal of the denial of the motion for change of venue. (6 RT 1489.) As a

result, the jury that convicted Petitioner contained only one juror who had not been exposed to pretrial publicity.

Petitioner appealed the trial court's denial of his motion for change of venue to the Court of Appeal arguing that the trial court did not properly apply the criteria set forth in Williams v. Superior Court, 34 Cal.3d 584 (1983). (*See* Appellants Opening Brief, People v. Scott Dyleski, No. A115725.) In response, the Attorney General contended that the non-exhaustion of the defense's peremptory challenges at trial strongly implied defense satisfaction with the impartiality of the jury pursuant to People v. Panah, 35 Cal.4th 395, 449 (2005) and People v. Zambrano, 41 Cal.4th 1082, 1127-1128 (2007). (*See* People's Reply Brief, People v. Scott Dyleski, No. A115725.) In response, Petitioner's appellate counsel argued only that the renewal of the motion for change of venue after jury selection evidenced Petitioner's dissatisfaction with the jury, and that use of the defense's remaining peremptory challenges at trial would have been pointless since only six of the remaining 31 jurors had not been exposed to pretrial publicity. (See Appellant's Reply Brief, People v. Scott Dyleski, No. A115725.) Appellate counsel did not contend that the trial counsel's failure was due to ineffective assistance.

Although the Court of Appeal reviewed the motion on the merits, trial counsel's failure to exercise all peremptory challenges colored the Court's review of this issue, and contributed to the Appellate Court's erroneous denial. The Court wrote: "While we do not regard defendant's failure to use more challenges as dispositive of the venue issue, it certainly casts doubt on his claim that the jury as constituted was so tainted by

pretrial publicity that he could not get a fair trial." (Decision in People v. Scott Dyleski (hereinafter "Appellate Decision"), No. A115725, at 31-32.) In its conclusion, the court relied again on "the number of unused peremptory challenges defendant had left when the jury was seated," to find the denial of the change of venue motion was proper. (Appellate Decision, at 36.) Thus, although the Court did review the substantive merits of the motion, in its decision, it stated that the failure to use the peremptory challenges contributed to its ruling and "cast doubt" on Petitioner's claim, and it specifically stated that it was one of a number of reasons why the motion was denied. Indeed, by casting doubt on the likelihood that the denial of the motion resulted in any actual prejudice to the Petitioner, the failure to exercise those challenges fatally prejudiced his chance of obtaining relief on this issue.

Moreover, appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to exercise all peremptory challenges. Case law is clear that the failure to exercise all one's peremptory challenges may result in the forfeiture of any issues with the voir dire, such as change of venue, yet appellate counsel entirely overlooked defense counsel's deficiency in this regard. This is even more egregious in light of the fact that the Court indicated on the record that this failure by trial counsel may prejudice the Petitioner on appeal, thus alerting appellate counsel to this exact issue. (6 RT 1489.) Appellate counsel fatally prejudiced the Petitioner by preventing adequate appellate review, which resulted in a denial of an otherwise meritorious appellate issue.

The Court of Appeal found that Ms. Leonida's failure to exhaust all

of the peremptory challenges available to the defense inferred that Petitioner was "satisfied with the jury" despite the fact that Ms. Leonida renewed the motion for change of venue after the jury was selected. In fact, neither the trial court nor the Court of Appeal gave any weight to the renewed motion for change of venue as it related to satisfaction with the jury, since "the defense was compelled to renew the venue motion simply in order to preserve the issue for appellate review." (Appellate Decision, at 31.) This interpretation by the Court of Appeal suggests that Ms. Leonida was competent enough to make decisions at trial based not only on the litigation in front of her, but also with an eye toward any appeal which might follow.

Were Ms. Leonida operating with such professional competence, however, she would have realized the damaging effect her failure to exhaust the defense's peremptory challenges would have on the very issue she sought to preserve. Given the highly damaging effect of Ms. Leonida's decision not to exhaust the available peremptory challenges to defendant's appeal, despite her attempt to preserve this issue, and the relative strength of his claim that change of venue was necessary based on the extensive pretrial publicity and the voir dire of the jurors, Petitioner here contends Ms. Leonida was ineffective in her litigation of the motion for change of venue. To illustrate this point, a discussion of the merits of Petitioner's motion for change of venue and renewed motion for change of venue is necessary.

1. Petitioner's Motion for Change of Venue Was Meritorious, and Its Denial Was in Error.

The right of the accused to a trial by a fair and impartial jury is guaranteed by the Sixth Amendment of the United States Constitution.

Duncan v. Louisiana, 391 U.S. 145, 154 (1968). This constitutional right is codified by California Penal Code section 1033, which provides that a trial court "shall" order a change of venue where "it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the [applicable] county." Cal. Pen. Code § 1033; see also Cal. Const., art. I, § 16. This constitutional concept of impartiality includes the right to a jury which has not been impermissibly tainted by outside influences such as prejudicial pretrial publicity. Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966). Both the California and the United States Supreme Court have held that a change of venue must be granted where there is a "reasonable likelihood" that a fair and impartial jury cannot be summoned in a particular county. Id. at 363; Maine v. Superior Court, 68 Cal.2d 375, 383 (1968).

As such, when a motion for change of venue is brought before jury selection, a defendant need not even show by a preponderance of the evidence that a fair trial could not be had in that particular jurisdiction. Rather, it is sufficient to show only that a "reasonable likelihood" existed that a fair and impartial jury could not be had in the originating county. Frazier v. Superior Court 5 Cal.3d 287, 294-295 (1971); People v. Tidwell, 3 Cal.3d 62, 69 (1970). In making this determination, the trial court must consider (1) the nature and extent of the publicity, (2) the size of the population of the county, (3) the nature and gravity of the offense, (4) the status of the victim and the accused, and (5) whether any political overtones are present. See Williams v. Superior Court, 34 Cal.3d 584, 588 (1983).

On appeal from the denial of a motion for change of venue, the appellant must show that (1) it was in fact reasonably likely at the time the

motion was brought that a fair trial could not have been had; and (2) viewed in retrospect, it is reasonably likely that a fair trial was not in fact had. People v. Jenkins, 22 Cal.4th 900, 943 (2000). In considering the first issue, the Court must look to the five factors that the trial court is required to consider as articulated in Williams. Jenkins, *supra*, at 943. In considering the second issue, the Court must consider the actual voir dire of the jurors. Id.

In considering whether it was reasonably likely that a fair and impartial jury could not be found in Contra Costa County at the time of the motion for change of venue, the Court is required to consider the five factors set forth in Williams. Williams, *supra*, 34 Cal.3d at 588. These factors are addressed in turn below.

a. The Nature and Extent of the Pretrial Publicity

The story of the death of Pamela Vitale and the ensuing investigation was covered by every major national and local news outlet, including but not limited to CNN, CNN Headline News, MSNBC, Fox News, the San Francisco Chronicle and the Contra Costa Times. As noted by the Court of Appeal, "[t]here is no question that the case did attract substantial coverage" and the defense documented 225 newspapers articles, 664 television broadcasts, and 67 postings to internet news services at the time the original motion for change of venue was filed. (Appellate Decision, at 33.) This coverage was almost universally sensationalized and inflammatory, included discussion of "evidence" found in the investigation (much of which was false), and suggested that Petitioner was in fact guilty of murdering Vitale. Typical of this coverage is a Fox News broadcast from

October 25, 2005 which showed courtroom drawings of Petitioner over the headline "GOTH MURDER MADNESS." (See Exhibit MM, Goth Murder Madness Screenshot.) The national broadcast media was not alone in its inflammatory portrayal of Petitioner. On October 21, 2005, the San Francisco Chronicle ran a front-page story under the headline "Teen Held in Bizarre Slaying" and used outdated high school yearbook photos to portray a transformation of Petitioner from a clean-cut youth to a menacing, disturbed, "goth culture"-obsessed figure. (See Exhibit NN, San Francisco Chronicle Cover.) Both national and local news outlets were consistent in emphasizing Petitioner's image as being involved in "goth" culture, an aesthetic which is commonly associated with the occult and satanic worship. The best-known single example of this is perhaps the San Francisco Chronicle cover from October 21, 2005. This perception was reinforced by multiple and repeated references throughout the media to the alleged symbols supposedly carved into Vitale's back. Conversely, photographs of Horowitz and Vitale published by the media in relation to this case tended to show a happy, loving married couple.

This case is perhaps the most publicized Bay Area crime story since the murder of Laci Peterson and the subsequent trial of her husband Scott Peterson. Ironically, the publicity which surrounded Petitioner's case is tied directly to the notoriety of Scott Peterson due to the involvement in both cases of Daniel Horowitz, husband of Pamela Vitale. Prior to the murder, Horowitz was a prominent California defense attorney who regularly appeared on some of the very networks that covered the instant case to discuss other high-profile cases. Horowitz was perhaps best known for his

commentary on the Scott Peterson trial with television host Nancy Grace. (See Exhibit OO, San Francisco Chronicle, Daniel Horowitz a Perfect Fit as a Celebrity Lawyer, at 733-734.) With the murder of his wife, Horowitz found himself in the middle of one of the stories he would ordinarily be covering. The San Francisco Chronicle has since observed that "[t]he media flooded Lafayette" [where Petitioner and Horowitz lived at the time of Vitale's death]. (See Exhibit OO, at 735.) It was no coincidence that Nancy Grace covered this case. In fact, Horowitz's extensive personal relationships with media celebrities such as Nancy Grace directly drove not only the amount of coverage this case received, but also the portrayal of Petitioner. (See Section XXV(B)(7), *supra*.) At the time of Petitioner's arrest, Grace opened her show by asking viewers not about Petitioner's guilt, but rather presupposing it: "Did Dyleski act alone?" (See Pamela Vitale Murder Investigation, available at http://www.youtube.com/watch?v=M2BMZRZ5bU8; last visited September 22, 2012.) Exacerbating all of this, at the time of Pamela Vitale's death, Horowitz was counsel of record in the trial of Susan Polk, another case which received a great deal of media attention due in part to his involvement.

Although the Court of Appeal referred to the Manson Family murders in noting that "even massive publicity does not automatically translate into prejudice or compel the granting of a motion for a change of venue," the Court of Appeal failed to note that the Manson case was perhaps one of the most publicized news stories in American history and that it would have probably been impossible to find a jury which had not

been exposed to press in that case anywhere in the United States. (Appellate Decision, at 33.) In such instances, a court may deny a motion for a change of venue on the ground that it would simply do no good. See People v. Davis, 46 Cal.4th 539, 579 (2009); quoting People v. Manson, 61 Cal.App.3d 102, 177 (1976) ("A change of venue offered no solution to the publicity problem."). In this case however, a review of the pretrial media coverage as documented by Petitioner's trial counsel shows that the intensity of the media coverage waned in inverse proportion to increased geographical distance from Contra Costa County due mostly to the intense coverage by the San Francisco Chronicle, the Contra Costa Times and their sister publications. A Lexis Nexis search reveals that between Vitale's death and the selection of Petitioner's jury, at least 118 articles mentioning Petitioner, Horowitz or Vitale in the Contra Cost Times alone. (See Exhibit PP, List of Articles.)

The Court of Appeal also made much of its finding that the media coverage was "clustered" around the time of Petitioner's arrest and that jury selection did not begin until nine months later. (Appellate Decision, at 33.) While the passage of nine months may "'attenuate[] the effect of media coverage'" it also may not attenuate such inflammatory and prejudicial coverage as was associated with this case. (Appellate Decision, at 34.) While the Court of Appeal characterized the media coverage as generally "'factual' rather than 'inflammatory,'" headlines such as "GOTH MURDER MADNESS" belie this finding, as does a review of the exhibits in the motion for change of venue submitted at trial. While the Court of Appeal was correct in its assertion that "[c]overage describing the

circumstances of a crime or the grief of the victim's family is not biased per se," the court erred in giving little weight to the media coverage which maligned Petitioner's character, described the brutal nature of the crime, and reported both accurate and inaccurate accounts of the investigation. (Appellate Decision, at 34.)

The Court of Appeal further erred in totally discounting the findings of the public opinion survey presented by the defense before the jury was selected. (Appellate Decision, 34-36.) The court below found it to be "methodological error" that only 305 of the 748 people contacted chose to participate after they were told that the survey was about this case. If anything can be read into this figure, it is the benign observation that the public generally has a negative view of unsolicited telephone callers interrupting their day to ask if the recipient would like to discuss a murder case. The Court of Appeal was also critical of the fact that those who did participate in the survey were asked whether they had heard anything about either the Susan Polk case or the instant case. As discussed above, however, the Polk case was tied directly to the publicity issues of this case due to the notoriety of Daniel Horowitz. In fact, media coverage of this case often mentioned the fact that Horowitz was in the midst of the Polk trial at the time of Vitale's death. (See Exhibit PP, List of Articles.) What the Court of Appeal ignored about the survey, was that statistics based on the responses of those who participated indicated the overwhelming exposure of Contra Costa residents to information concerning this case (89.8%). Of those who had heard about the case, 60.6% had formed the opinion that Petitioner was "probably" or "definitely" guilty.

The Court of Appeal's dismissal of the survey for "methodological error" must be evaluated in light of the fact that the information gathered during voir dire bore out the results of the study. All but one of the sworn jurors and alternates in this case reported exposure to pretrial media coverage. Of the 156 potential jurors who filled out a questionnaire or were questioned by the court regarding publicity, 127 reported that they had heard or read about the case (82%).

With respect to the influence of the press on the sworn jurors, the Court of Appeal found that while eleven of the twelve jurors reported knowledge of the case, their knowledge was attenuated by the passage of time, they were exposed only to "headlines," and their recollections of the media coverage were "fragmentary and not entirely accurate." (Appellate Decision, at 34.). As set forth above, the media coverage was so inflammatory and prejudicial that exposure to headlines alone could have easily affected impartiality, e.g., "GOTH MURDER MADNESS." Juror number 11, for example, reported her knowledge that Petitioner had stolen credit cards and bought things with them, had "written" something on Vitale's body, and was "pleading guilty under insanity" based on what she had heard prior to her service. (4 CT 1313) These details are generally consistent with the media reports which were common before the trial, especially as reported in the Contra Costa Times. (Exhibit PP, List of Articles.)

As the California Supreme Court noted in Williams, "[a] juror's declaration of impartiality...is not conclusive." Although each of the sworn jurors in this case claimed that they could set aside their prior knowledge,

this Court must look past those assurances in determining whether it was realistically possible for them to do so in light of the nature and extent of the press coverage. Petitioner here contends that it was not.

b. The Size of the Population of Contra Costa County

While Contra Costa County is the ninth largest county in California by population, the size of the county alone is not determinative in considering whether a motion for change of venue should be granted. As noted in Lansdown v. Superior Court, 10 Cal.App.3d 604, 609 (1970), "Population, *qua* population, is not alone determinative." The crucial inquiry is whether the population is large enough to provide enough impartial jurors that a fair trial may be had. In Williams, the California Supreme Court found that where 52 percent of the prospective jurors "had read or heard about the case," there was "more than a reasonable possibility that the case could not be viewed with the requisite impartiality" and vacated the defendant's conviction on those grounds. Williams, *supra*, at 1128-1129. While the population of Contra Costa County is much greater than that in Williams (Placer County), so is the percentage of prospective jurors in Petitioner's case exposed to pretrial publicity as revealed by voir dire (82%), including eleven of the twelve jurors who found him guilty. As such, the relatively large population of Contra Costa County does not weigh against a change of venue under the circumstances of this case, and in light of the rate of exposure to prejudicial media reports revealed by voir dire, this factor weighs in favor of a change of venue.

c. The Nature and Gravity of the Offense

The crime at issue in this case is a brutal murder wherein Pamela

Vitale was beaten to death and the potential sentence was life without parole. According to the coroner's report, the cause of Vitale's death was blunt force trauma to the head. The coroner further reported that Vitale had been stabbed in a fashion that penetrated her stomach and bowels, that the stabbing likely occurred post-mortem, and that the head injuries were likely "inflicted with the victim face down." (Exhibit QQ; Coroner's Report.)

Accused of committing such a heinous act, Petitioner was only spared the prospect of the death penalty due to his age, and was in fact eligible for and received life without the possibility of parole, the most severe sentence that may constitutionally be imposed on a juvenile. See Miller v. Alabama, 132 S.Ct. 2455 (2012). In light of the heinousness of the crime, the age of Petitioner at the time of the crime and the trial, and the fact that he faced the most serious sanction possible if convicted, the nature and gravity of the offense in this case weighs heavily in favor of a change of venue.

d. The Status of the Victim and the Accused

While she may not have been a prominent figure in and of herself, Pamela Vitale became a prominent figure posthumously due to her status as the spouse of Daniel Horowitz. Horowitz was already a well-known criminal attorney at the time of Vitale's death, and his fame increased even more as he parlayed his success as a criminal defense lawyer into a career as a legal analyst for national television networks. Additionally, Horowitz was actively engaged in the Susan Polk trial, which had itself received substantial media attention, and at the time of Vitale's death. Horowitz and Vitale were (at least according to the press) a happily married couple,

upstanding, respected, wealthy and valued members of an affluent community (Lafayette).

Although Petitioner also lived in Lafayette, he could hardly be said to have enjoyed the same lifestyle or have been viewed by the community of Lafayette and the greater community of Contra Costa County in the positive light as were Vitale and Horowitz. Petitioner was far from wealthy. Rather, he and his mother lived with their friends, the Curiels, in conditions which have been described as akin to a "hippie commune." See Frazier v. Superior Court, 5 Cal.3d 287 (1971). Petitioner and his mother could not even afford to pay rent to the Curiels, and for years had lived in a tent-like structure with no running water or electricity. In the press, Petitioner was further portrayed as an outcast obsessed by "goth" culture to the point where some assumed that he was involved with devil worship. (See Questionnaires of Prospective Jurors 7 and 179, 1 Supplemental Clerks Transcript 71; 7 CT Supp 2054.) These impressions were exacerbated by reports that Petitioner was involved in a scheme to buy drug paraphernalia with stolen credit cards, that he killed Vitale for interfering with that scheme, and that he had carved some sort of "Satanic" symbol on Vitale's back. As such, the relative statuses of Vitale and Petitioner in their community weigh heavily in favor of a change of venue.

e. Whether Any Political Overtones Are Present

With respect to political overtones, none appear to have been present in relation to this case. As such, this factor is neutral on the question of whether a change of venue should have been granted.

f. The Results of Voir Dire

For the reasons set forth above, the factors identified by the court in Williams, as applied here, strongly suggest that there was far more than a "reasonable likelihood" that a fair and impartial jury could not be drawn from the citizenry of Contra Costa County at the time of trial..

As discussed above, of the 156 potential jurors who filled out a questionnaire or were questioned by the court regarding publicity, 127 reported that they had heard or read about this case (82%). Additionally, eleven of the twelve jurors who convicted Petitioner, and all of the alternate jurors, had been exposed to press coverage of this case. The most glaring example is Juror number 11 who reported her knowledge that Petitioner had stolen credit cards and was buying things with them, had "written" something on Vitale's body, and was "pleading guilty under insanity" based on what she had heard. (4 CT 1313.) In ruling on this issue, the Court of Appeal noted that "[e]xposure to publicity does not automatically translate into prejudice" and that "[t]here is no prejudice if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court." (Appellate Decision, at 35-36.) However, in doing so the Court of Appeal disregarded the precedent of the California Supreme Court in Williams, that "[a] juror's declaration of impartiality, however, is not conclusive." Williams, *supra*, at 1129. The Williams court went on to write that:

> To be sure, perfection is not required; some knowledge of the case is sometimes unavoidable. [In Williams], however, a brutal murder had obviously become deeply embedded in the public consciousness (half of the jurors questioned knew something about this case). Thus it is more than a reasonable possibility that the case could not be viewed with the requisite impartiality.

Williams, *supra*, at 1129.

The media coverage the jurors were exposed to contained false information that incriminated Petitioner. Most significant of these false reports were allegations that defendant was involved in a scheme where he used stolen credit cards to purchase supplies for growing marijuana, had the supplies delivered to the Vitale residence, and that Vitale's death was the result of some confrontation between Vitale and Petitioner over the supplies. Typical of this theory is an article printed in the Contra Costa Times on the day jury selection began entitled: "DREAM ENDS IN NIGHTMARE; Jury selection begins today in trial of Dyleski, who is charged with the murder of Vitale last year on her Lafayette property." (Exhibit RR; Contra Costa Times, Dream Ends in Nightmare.) This theory was not even argued by the prosecution at trial. Still, the false theory of such a confrontation between Vitale and Petitioner was widely referred to by prospective jurors throughout voir dire.

In Marshall v. United States, 360 U.S. 310 (1959), the United States Supreme Court reversed the conviction where the jury had been exposed to news reports containing information "of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence." Notably, the seven affected jurors in that case had been exposed only to two newspaper articles.

Although the trial court in this case did not specifically rule on the admissibility of the false information contained in the media coverage of this case about some sort of confrontation over drug paraphernalia, such a ruling was unnecessary since its introduction was barred by its falsity. The

prosecution did not adopt this theory to explain Petitioner's alleged killing of Ms. Vitale at any stage of the trial. The Marshall Court held that "[t]he prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. [Citation omitted] It may indeed be greater, for then it is not tempered by protective procedures." Marshall, *supra*, at 1252.

Such was the case here. Petitioner hereby contends that based on the level of exposure of the potential jurors, the sworn jurors, and the alternate jurors to the media coverage of this case, which was continually and consistently inflammatory and prejudicial (and much of which included false information which tended to incriminate Petitioner), there exists more than a reasonable likelihood that Petitioner did not in fact receive a fair and impartial trial. However, the Court of Appeal did not give sufficient weight to the prejudice suffered by Petitioner as a result of the erroneous denial of the change of venue motion as a result of trial counsel's ineffectiveness in not exercising all of her peremptories, and appellate counsel's failure to present that claim. Thus, were it not for the deficient performance of both trial and appellate counsel, the appellate court may well have found error in the denial of the motion for change of venue. Petitioner was prejudiced thereby.

XXIX.

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

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

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

XXX.

Penal Code section 190.5 is unconstitutionally vague, and violated the Petitioner's rights under the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Recent decisions by the Supreme Court, subsequent to Petitioner's conviction and direct appeal, have expanded upon the separate body of jurisprudence applicable to the punishment of juveniles tried as adults. See Miller v. Alabama, 132 S.Ct. 2455 (2012) (holding mandatory sentences of life without the possibility of parole for juveniles to be unconstitutional); Graham v. Florida, 130 S.Ct. 2011 (2010) (holding sentences of life without the possibility of parole for juveniles for any crime other than homicide to be unconstitutional). Thus, although the issue of whether Penal Code section 190.5(b) is unconstitutionally vague, and violates Petitioner's rights to due process of law, equal protection, and to be free from cruel and unusual punishment was raised and rejected on

direct appeal, the new case law allows this issue to be raised anew on habeas corpus. In re Harris, 5 Cal.4th 813, 841 (1993) (holding that a change in the law affecting the Petitioner is an exception to the rule barring claims in a habeas petition that were raised and rejected on appeal). Pursuant to the rationale of Miller and Graham, California Penal Code section 190.5, which controls the punishment of a juvenile convicted of first degree murder, improperly favors the sentence of life without the possibility of parole (LWOP) over the more lenient alternative, and does not require the proper exercise of discretion before the imposition of a sentence of LWOP, thus violating the Eighth Amendment's proscription on cruel and unusual punishment. Moreover, the statute is vague as to whether LWOP is in fact the favored punishment, and as to the nature of the discretion allowed, and thus runs afoul of the Fifth and Fourteenth Amendments, and violates Due Process and Equal Protection.

Penal Code section 190.5 is vague in many critical respects. Subdivision (b) of Section 190.5 provides that:

> The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, **shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.**
>
> (Pen. Code, § 190.5, subd. (b).)

First, this section is vague as to whether it creates a presumption that the greater sentence (LWOP) be imposed. Second, it fails to describe what factors the court should consider in exercising its discretion. By creating a presumption in favor of LWOP and failing to provide specific criteria for

the court to consider in exercising its discretion, the statute violates the Fifth and Fourteenth Amendment rights to due process and equal protection and the Eighth Amendment right to be free from cruel and unusual punishment, and directly implicates the constitutional concerns expressed by the Supreme Court in Miller and Graham.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). The vagueness doctrine applies to penalty provisions. Chapman v. United States, 500 U.S. 453, 467 (1991); United States v. Batchelder, 442 U.S. 114, 123 (1979); United States v. Evans, 333 U.S. 483 (1948); People v. Sipe, 36 Cal.App.4th 468, 480 (1995); see also Tuilaepa v. California, 512 U.S. 967 (1994). Moreover, the penalty imposed in a case may not be based upon "an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." Chapman, *supra*, 500 U.S. at 465.

Subdivision (b) of section 190.5 is vague in that it does not make clear whether the court has equal discretion to impose the two possible sentences, or whether there is a presumption favoring LWOP. The Fourth Appellate District has interpreted subdivision (b) to require LWOP "*unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." People v. Guinn, 28 Cal.App.4th 1130, 1141 (1994) [emphasis in original]. The court in Guinn found support for this presumption for LWOP in the use of the word "shall" in the phrase "shall be confined in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." Id. Thus, although vague, some

courts have held that LWOP is favored, absent a specific exercise of discretion by the judge to impose the lesser punishment. This interpretation violates the principles expressed by the Supreme Court in Miller and Graham.

Moreover, subdivision (b) is also unconstitutional as it fails to provide any guidance as to how the statutory sentencing discretion must be exercised. Subdivision (b) simply states that the choice shall be at the court's discretion. Thus, it allows for similarly-situated individuals to be treated differently based on an individual judge's interpretation of this highly vague statute, violating equal protection and due process.

The federal constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., 14th Amend., § 1. Article I, section 7(a), of the California Constitution similarly provides: "A person may not be . . . denied equal protection of the laws . . . ." Subdivision (b) provides: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." Likewise, article IV, section 16, subdivision (a), of the California Constitution provides that: "All laws of a general nature have uniform operation." Subdivision (b) of Penal Code section 190.5 violates all of these provisions.

Where legislation results in a great disparity of treatment, the fundamental right to liberty is at stake and the classification is subject to strict scrutiny. People v. Fryman, 97 Cal.App.4th 1315, 1331 (2002). Here, the lack of criteria provides unfettered discretion in the choice of sentence. Although both are harsh, the complete denial of any opportunity for release

with a sentence of LWOP renders it fundamentally different, even than a sentence of 25 years to life. For this reason the statute violates the state and federal constitutional rights to due process, to equal protection, and to be free from cruel and unusual punishment.

Here, the court failed to consider Petitioner's age in sentencing him to LWOP, focusing instead on the heinousness of the crime to which he had been convicted. At sentencing, defense counsel asked the court to consider his youth as a factor in mitigation, as did numerous individuals who provided statements and letters on his behalf. (15 RT 4295-98; 5 CT 1723-1749.)

Although, in sentencing Scott to life without possibility of parole, the trial court referred to the requests for leniency based on age, in explaining her rationale for imposing a sentence of life without the possibility of parole, the Court relied solely on the nature of the crime, and did not take into account Scott's age or level of maturity in any way. The court stated:

> People do not want to understand and do not want to accept that someone who looks like you, who is the young man living next door, can be so evil. I can understand how they have difficulty comprehending that in this day and age society can produce someone like you. . . . We are indeed a produc[t] of our environment. But you also have free will, sir, and we make choices, and you made the choice, sir, to murder Ms. Vitale. . . . Sir, you do not deserve to live among human people, decent people. Your commitment is going to be for life.
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> (15 RT 4303-4304.)

The Court's failure to consider Petitioner's age speaks to the exact concerns expressed in Graham and Miller, as to the imposition of LWOP sentences on juveniles.

In Miller, the Supreme Court ruled that statutes mandating the

imposition of a sentence of LWOP for juveniles are unconstitutional under the Eighth Amendment, as they fail to provide the court with the discretion to consider the defendant's age and circumstance. Id. at 2475. Here, section 190.5's apparent presumption in favor of the imposition of LWOP and the lack of any standards for the exercise of discretion result in courts imposing LWOP without weighing the factors found to be constitutionally necessary in Miller.

The recent decisions by the Supreme Court make clear that the considerations in juvenile sentencing are different than for adults. "[Y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Id. at 2465. Because of the nature of youth, and its effect on decision-making, as well as the possibility of rehabilitation, it must always be considered: "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham, *supra*, at 2031.

However, although 190.5 allows for such considerations, it does not require them, and as a result, sentencing decisions can be made that run afoul of the constitution. In Miller, the Court rejected the idea that prosecutorial discretion in deciding whether to charge a defendant as an adult was sufficient to allow for mandatory sentencing schemes, at least in part due to the lack of standards imposed on the exercise of that discretion: "prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking." Miller, *supra*, at 2474.

The court in Graham, in finding that sentencing a juvenile defendant to LWOP for crimes other than homicide violates the Eighth Amendment, specifically considered, and rejected, the possibility that the exercise of judicial discretion could be sufficient to render such sentences constitutional. The court was concerned that trial courts are ill-equipped to determine a juvenile's likelihood of rehabilitation, and that the heinousness of the crime would overwhelm the court's decision:

Another possible approach would be to hold that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime. This approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes . . . .

The case-by-case approach to sentencing must, however, be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this. For even if we were to assume that some juvenile non-homicide offenders might have sufficient psychological maturity, and at the same time demonstrate sufficient depravity to merit a life without parole sentence, **it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.** Roper rejected the argument that the Eighth Amendment required only that juries be told they must consider the defendant's age as a mitigating factor in sentencing. The Court concluded that **an unacceptable likelihood exists that the brutality or cold-blooded nature of any**

particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. Here, as with the death penalty, the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for a non-homicide crime despite insufficient culpability. Graham, *supra*, at 2031-32 (internal quotations omitted) (emphasis added).

Graham's determination that courts are ill-equipped to consider the import of age, and that the nature of the crime would overwhelm other considerations, perfectly captures what occurred here. The trial court failed to consider Petitioner's age, or his possibility for rehabilitation, and instead found that, based on the depravity of the crime, "you do not deserve to live among human people." Indeed, the court specifically rejected the idea that Petitioner's age should have been considered, stating that people who requested mercy based on Petitioner's age just "do not want to accept that someone who looks like you, who is the young man living next door, can be so evil." (15 RT 4303-4304.) "And these individuals have focused all on your age. They claim because of your age, you're too immature to understand what happened, that you didn't know what you were doing . . . These individuals did not see all the evidence in this case." (15 RT 4300-4301.) Thus, due to the absence of specific criteria in Penal Code section 190.5, the Court was able to entirely ignore critical factors deemed constitutionally relevant by the Supreme Court in Graham and Miller.

Another concern expressed by the Court in Graham is particularly

poignant in light of the egregious miscarriage of justice alleged in this petition. Here, it is not merely that Mr. Dyleski was sentenced pursuant to an unconstitutional statute, but rather that the sentence was a result of a wrongful conviction, which occurred as a result of a confluence of factors, including ineffective assistance of counsel and prosecutorial misconduct. Graham recognized the difficulties in obtaining a fair trial for a juvenile because of their immaturity and lack of foresight:

> Another problem with a case-by-case approach is that it does not take account of special difficulties encountered by counsel in juvenile representation. As some amici note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.
>
> Graham, *supra*, at 2032.

These added difficulties are apparent in the poor choices made by Petitioner in lying to try to cover up the credit card fraud, and in the absence of effective communication between him and his counsel, which exacerbated the ineffective assistance. Perhaps if Petitioner had the maturity to effectively communicate with his defense counsel and the foresight to comprehend that the judicial system does not always work as it should, he would have been better equipped to persuade her of his innocence, and she may have pursued the critical investigation and meritorious defenses that she entirely ignored. All of this contributed to the wrongful conviction here at issue.

The absence of any statutory mandate that the court consider any specific factors resulted in the court sentencing Petitioner without taking into consideration his age. What the recent Supreme Court opinions make clear, is that sentencing juvenile defendants is fundamentally different than sentencing adults, and that the decision to sentence a minor to LWOP cannot be entered into lightly, without fully considering the implications of the defendant's age, as occurred here: "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." Graham, *supra*, at 2032. Although the holdings of Miller and Graham are limited to situations outside the scope of this case, the rationale is on point, and mandates a finding that the sentencing of Petitioner to life without the possibility of parole was unconstitutional.

PRAYER

WHEREFORE, Petitioner respectfully requests that this Court:

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

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

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

//

Executed on October 12, 2012, at San Francisco, California.

Respectfully submitted,

_____
KATHERINE HALLINAN
SARA ZALKIN
Attorneys for Petitioner
SCOTT EDGAR DYLESKI

VERIFICATION

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

I am authorized to file this petition for writ of habeas corpus on Petitioner's behalf pursuant to 28 U.S.C. § 2242. All facts alleged in the above document, not otherwise supported by citations to the record, exhibits or other documents, are true of my personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on October 11, 2012, at San Francisco, California.

SARA ZALKIN
Attorney for Petitioner
SCOTT EDGAR DYLESKI

ARGUMENT

I.

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

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

The right to counsel is critical to ensure the fundamental right to a fair trial. See Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Gideon v. Wainright, 372 U.S. 335 (1963). 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, 466 U.S. 668, 685 (1984).

Counsel is ineffective where his or her performance falls below an "objective standard of reasonableness" and that deficient performance prejudiced the defense. *Id.* at 687-88. Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Judicial review is highly deferential to trial strategy; however:

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

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

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

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

Petitioner was denied effective assistance of counsel as a result of trial counsel's failure to adequately investigate and present compelling defenses available; to wit, that much of the evidence was not only inconsistent with Petitioner's guilt, but in fact pointed to another perpetrator. Trial counsel did not present facts necessary to Petitioner's alibi, and failed to rebut the prosecution's theories. Nor did trial counsel challenge the scientific evidence, including chain of custody and contamination, or call any expert witnesses. Trial counsel did not object to irrelevant and inflammatory evidence or to unfounded and damaging expert testimony. Whether considered independently or cumulatively, counsel's performance fell below the standard of care, and prejudice ensued.

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

Trial counsel failed to investigate or present troubling inconsistencies in the prosecution's case that spoke to Mr. Dyleski's innocence. A decision not to present a particular defense is unreasonable unless counsel has sufficiently investigated the potential defense to discover the facts that would be relevant to his making an informed decision. Wiggins v. Smith (2003) 539 U.S. 510, 522-23. The duty to "reasonably investigate the evidence supporting each potentially meritorious defense before making a tactical choice among them exists regardless of the defense ultimately relied on at trial." In re Cordero, 46 Cal.3d 161, 181, n. 8 (1988). However, it must be shown that counsel knew or should have known further investigation was necessary. *See* People v. Williams, 44 Cal. 3d 883, 937 (1988). Failure to investigate is "especially egregious when a defense attorney fails to consider potentially exculpatory evidence." Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002).

This crime scene indicated that the perpetrator was someone known to Ms. Vitale, comfortable in and familiar with the home, who did not feel rushed for time. This evidence stands in direct contrast to the uncontested facts that Petitioner was unacquainted with Ms. Vitale, had never been inside their home, and would have had a narrow window of time to commit the murder. This evidence was in counsel's possession, but she failed to pursue any investigation or present it to the jury.

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

The crime scene evidence possessed by trial counsel indicated that the perpetrator was familiar with and comfortable in the Horowitz/Vitale home. Petitioner was unacquainted with Ms. Vitale[1] and had never been inside her home. (15 RT 4155; *See also* Exhibit H, Declaration of Scott Dyleski (hereinafter "Dyleski Declaration") at 417-418.)

Several things indicated that the perpetrator exercised a degree of familiarity and comfort in the home. Bloody eyeglasses were found neatly folded on top of the television. 7 RT 1937. (*See* Exhibit A, Crime Scene Photographs (hereinafter "Photos"), at 15-16.)

Someone with bloody hands straightened up the home; touched a broken mug in the kitchen sink (*See* Exhibit A, Photos, at 23); and picked up an empty bowl, placing it on the kitchen counter next to the sink. (7 RT 1934; 7 RT 1947. *See* Exhibit A, at 20-22, 24) Bloody hands touched a bottle of water. (Exhibit A, at 18-19.)

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

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2/ Petitioner had seen Ms. Vitale around the neighborhood and was familiar with her appearance. (Exhibit H, Dyleski Declaration, at 417-418.)

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

> Q : . . . [S]uppose they did turn it on, would you expect to see any evidence of that with respect to any wet blood that might be adhering to any item that's in the sink, assuming it was struck by water?

hands left the home and then re-entered, possibly with the use of a key. (7 RT 1927. *See also* Exhibit F1, Forensic Examination Report, by Brent Turvey, MS (hereinafter "Turvey Supplemental"), at 379; Exhibit A, Photos, at 2-5.)

Although the perpetrator apparently spent time at the sink based on the bloody bowl and broken coffee mug, there is evidence that the perpetrator did not turn on the water in the kitchen, but rather used the bathroom shower. Coffee grounds in the sink were found undisturbed. There was no blood on the water faucet. (Exhibit A, Photos, at 20-23. 15 RT 4055 ("That sink was not run.").) However, there is evidence that the shower in the

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A. I was going to say if the bloody area was struck with water I would expect that to happen, yes.
Q. And what would you expect to happen?
A. That there would be some diluted blood.
Q. And how would you discern the existence of diluted blood?
A. It wouldn't be the same color as the whole blood stain and you might see some wet dripping as well. 8 RT 2057.

Of the shower specifically:

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

8 RT 2058-59.

Defense counsel asked no questions about the shower and did not attempt to refute the prosecution's claim that the perpetrator had not showered because there was no wet dripping. However, physical evidence in trial counsel's possession showed a bloody handprint dripping diluted blood down the shower wall. (Exhibit A, Photos, at 25-28.) Thus, by the prosecution's own logic, the perpetrator *did* take a shower, as evidenced by the "wet dripping" in the photos. (Exhibit A, at 25-28.) Defense counsel was presumably unaware of this evidence, as she failed to use or present it in anyway. Moreover, she made statements that there were around 300 pictures. (1 RT 28.) The prosecutor referenced over 1,000. (2 RT 418.)

bathroom was used by the perpetrator. (See Footnote 2, *supra*.)

The fact that the perpetrator did not attempt to turn on the kitchen sink is notable because the hot water in the kitchen sink did not work. (8 RT 2092.) It seems unlikely that a stranger perpetrator would go over to the kitchen sink and place dishes in and around it, yet not even attempt to turn on the water, and instead forego the sink for the shower, but not to take a shower, just to wash off a knife, according to the prosecution. (15 RT 4054.) The more reasonable inference is that the perpetrator knew the hot water did not work and therefore went directly to the bathroom. This contention is bolstered by the fact that only the hot water knob in the shower had blood transfer. (7 RT 1978.) Only someone intimately familiar with the Horowitz/Vitale household would have this knowledge that Petitioner lacked. Again, the prosecution was aware that the fact there was no blood on the handle of the kitchen faucet was a bad fact for their case, and therefore argued that it would have been possible to push up the handle with one's arm instead of one's hand. (15 RT 4054.) Yet, the faucet was not found in the up position, as would be expected if the killer had unsuccessfully tried to turn on the sink. (Exhibit A, Photos, 20-23.) In the alternative, the prosecution argued that perhaps the perpetrator had just "given up" because of all the items in the sink, and instead of even trying the sink, just used the shower instead. (15 RT 4054.) Notably, although the prosecution was aware that this was a bad fact, and thus tried to explain it, however outlandish the explanations, defense counsel entirely failed to recognize the relevance of this evidence and did not argue it to the jury.

There is also evidence that the perpetrator spent time around the living room couch based on blood in that area. (Exhibit A, Photos, at 32-37. *See also* Exhibit F, Forensic Examination Report, by Brent Turvey, MS (hereinafter "Turvey Report"), at 374.) There was also blood found on boxes, showing the perpetrator apparently picked up boxes, and on legal papers, yet none of the valuables in plain view were touched, including Ms. Vitale's purse. (Exhibit A, Photos, at 17.) Why would a stranger-perpetrator spend time by the couch, rifling through papers, but not take any valuable items in plain view? (15 RT 4140-41) .

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

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

> You also have a lot of evidence that the person who did kill Pamela Vitale was not interested in credit card information or

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

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

In Alcala v. Woodford, 334 F.3d 862, 890-91 (9th Cir. 2003), the Ninth Circuit found trial counsel's failure to investigate the crime scene was ineffective and reversed the conviction. Proper investigation would have revealed evidence contradicting the prosecution's theory the victim died from knife wounds. *Id.* at 891. This investigative failure rendered counsel ineffective in countering the prosecution's case. *Id.* Similarly, here, trial counsel did not investigate the crime scene, and consequently failed to grasp how the evidence conflicted with the prosecution's theory of the case. This failure to investigate left the prosecution's theory essentially unchallenged, and Petitioner was thereby prejudiced.

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

Physical evidence at the crime scene indicated that the perpetrator did not feel rushed for time. This evidence is exculpatory, as Petitioner

could not have known when Mr. Horowitz was to return or whether anyone else might appear on Saturday, October 15, 2005.[3] This evidence also supports Petitioner's alibi. Trial counsel failed to develop this evidence or argue its relevance to the jury.

All of the evidence discussed above indicating the perpetrator was comfortable in the home also shows that the perpetrator did not feel rushed for time. Someone neatly folded a pair of bloody eyeglasses found on top of the television (7 RT 1937; *see also* Exhibit A, Photos, at 15-16); someone with bloody hands straightened up, putting a mug in the sink and an empty bowl found next to the sink (7 RT 1934, 1947; *see also* Exhibit A, at 20-24); the perpetrator apparently drank water (Exhibit A, at 18-19); likely showered (footnote 2, *supra*); used and disposed of tissues and paper towels (Exhibit A, at 54); exited and re-entered, possibly with a key (7 RT 1927; Exhibit A, at 2-5; *see also* Exhibit F1, Turvey Supplemental); and spent

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4/ The detectives apparently perceived this right away based on their interview of Mr. Horowitz:

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

(Exhibit B2, Horowitz Interview, at 156.)

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

time near the living room couch (Exhibit F, Turvey Report, at 374. Exhibit A, at 32-37.) This behavior is inconsistent with a stranger, who would be concerned that the longer he was in the home, the more likely he would be discovered.

The issue of time was critical in this case. Evidence that the perpetrator spent more time in the home would have contradicted the prosecution's extremely tight timeline and strengthened Petitioner's alibi. The prosecution's theory that Ms. Vitale was murdered sometime after 10:12 a.m. was based on computer activity. (8 RT 2245.) Fred Curiel told the police on October 20, 2005, that he had seen Mr. Dyleski at home at 9:26 a.m., sitting on the couch with Mrs. Curiel, and Mrs. Curiel reported that he returned around 9:30 a.m., and Petitioner's whereabouts were accounted for the rest of the day, in which case it would have been impossible for Mr. Dyleski to have committed the crime. (11 RT 3010; 11 RT 3017; *see also* Exhibit M, Santiago Report, at 460; Exhibit GG, Fawell Report, at 707.) Michael Sikkema, another member of the Curiel household, reported in his initial interview, as well as at preliminary hearing and trial, that he saw Mr. Dyleski return between 10 a.m. and 11 a.m, in contradiction to the statements of Mr. and Mrs. Curiel; however, Mr. Sikkema had just come downstairs at that time, and details of his statement conflict with Mrs. Curiel's such that it seems that Mr. Sikkema may not have seen Mr. Dyleski when he initially returned from his walk, but at some later time. (1 CT 305-306; 10 RT 2734.)

At trial, Mr. Curiel changed his statement and said he was unable to state whether he had seen Scott that day. Notably, contrary to defense

counsel's claim that she had "watched everything and read everything" in preparation for trial, after the commencement of trial, she was entirely unaware that Mr. Curiel was questioning the accuracy of his memory. Through the prosecutor walking Mrs. Curiel backwards through her day from the time shown on a receipt for a purchase she made at the Spirit Store, she also revised her previous statements and said Scott came in at approximately 10:45 a.m. (10 RT 2854, 2865-67.) Even accepting 10:45 a.m., a time arrived at through pointed questioning by the prosecution, not the witness's own recollection, that would leave about 33 minutes to commit the crime, move things around in the home, shower, get home, change, and dispose of bloody clothing.

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

Although Ms. Leonida attempted to argue an alibi defense by arguing that Mr. Dyleski returned home at 9:26, she failed to contest critical prosecutorial assumptions. She failed to challenge the evidence used to determine time of death, foregoing any cross-examination of Kyle Ritter, who testified about the computer activity; nor did she consult her own computer expert. (8 RT 2248.) Nor did she explore the forensic pathologist's failure to address time of death. (14 RT 3827-29.)

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

In Alcala v. Woodford, *supra*, 334 F.3d at 870-72, the Ninth Circuit found trial counsel ineffective for failing to adequately present an alibi defense, by not calling the only witness capable of placing the defendant elsewhere at the time alleged. *Id.* at 870. Here, counsel alluded to an alibi defense, but without rebutting the prosecutor's theories as to time, her attempt was ineffective. Physical evidence at the scene was inconsistent with Petitioner's guilt and bolstered his alibi, but she failed to investigate or present it, and Petitioner was prejudiced thereby.

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

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

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

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

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

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

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

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

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

(Exhibit F, Turvey Report, at 369-370.)

The conclusion that "the offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide" was based on: the neatly folded bloody eyeglasses found on the TV; the blood on the coffee mug in the sink, cereal bowl on the kitchen counter, the blood on the bottle of water, and around the couch; and the use of the shower based on hairs in the shower drain that "were still moist." (Exhibit F, at 373-374.)

"These are not the actions of a stranger offender concerned about being discovered at a violent crime scene with a murder victim lying just inside the front door. These actions suggest a degree of concern for, familiarity with, and comfortableness moving around within the residence that is beyond that of a stranger with a profit motivation." (Exhibit F, at 374.) Each conclusion is exculpatory in nature, indicating a perpetrator with intimate familiarity and comfort at the scene, unlike Petitioner.

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

> In multiple crime scene photos, bloodstain evidence consistent with hand and finger contact patterns may be observed on both the inside of the front door, and the outside of the front door. There are also bloodstains on both the interior and exterior doorknob and dead bolt. **This indicates that at some point during the altercation, after blood had started flowing, the victim was able to lock the offender outside of the residence.** Were the victim able to get free of the residence during the attack, fleeing from the offender, it is unreasonable to suggest that she would seek re-entry. Rather, it is most reasonable to infer that she would have run...away from the residence. Consequently, the bloody hand and finger contact patterns on the interior of the door are most reasonably associated with the victim; and those on the exterior are most reasonably associated with the offender.
>
> **However, the offender was able to regain entry to the residence without force (e.g., breaking down or through the door). Specifically, the contact blood smears on the exterior of the door on and around the deadbolt are significant, as the deadbolt requires key**. **The only reason to have contact with the exterior deadbolt would be to insert a key. The only way to regain entry without force is by using a key.**
>
> (Exhibit F1, Turvey Supplemental, at 377-378 (emphasis added).)

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

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

of Michael Laufer, M.D. (hereinafter "Laufer Declaration"), at 395.)

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

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

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

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

This exculpatory evidence could have provided the reasonable doubt otherwise lacking in Petitioner's defense by raising troubling questions. Could Petitioner have obtained a key to the home? If so, why would he re-

enter? How could he know when Mr. Horowitz would return on a Saturday? Why would he put dishes in the sink or take a shower? How does the finding of a protracted struggle fit with the small window of time Petitioner had to commit this crime?

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

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

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

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

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

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

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

Id. at 1121.

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

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

Much of the crime scene evidence that is inconsistent with Mr. Dyleski's guilt implicates Horowitz. "The offender demonstrated a degree of care and excessive comfort and familiarity during and subsequent to the homicide." "These are not the actions of a stranger offender concerned [with being] discovered ..." (Exhibit F, Turvey Report, at 373.)[5]

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

> "[Mr. Horowitz said] 'they must have been watching the house, because he knew that I was going to be gone for a while.'
> How would that person know that? . . . How would somebody not know he

Furthermore, the mug placed in the kitchen sink, which contributed to Mr. Turvey's findings that the perpetrator was comfortable in the home, had saliva that matched Mr. Horowitz's DNA. (Exhibit F, at 373.) Similarly, the files and boxes found at the home with blood on them also had Mr. Horowitz's fingerprints on them. (Exhibit W, Report of K. Novaes, dated 4/25/06, at 545-46.) Moreover, the bag that was found in front of the door, which Mr. Horowitz reported he had dropped upon seeing his wife's body, contained a notebook with a bloody print on it; although it appears to be a finger mark, no fingerprint is apparent, but rather it seems to display the same sort of patterning Ms. Novaes testified was likely from a glove. (See Exhibit A, Photos, 52-53.) The evidence that the perpetrator did not turn on the water in the kitchen, but rather went to the shower implicates Horowitz; only he could have known that the hot water in the kitchen did not work . (*See* Exhibit A, Photos, 20-23. Exhibit F, at 374. 7 RT 1936; 8 RT 2058-59; 15 RT 4055.) Perhaps most compelling is Mr. Turvey's finding of re-entry:

> The contact blood smears on the exterior of the door on and around the deadbolt are significant, as the deadbolt requires key. The only reason to have contact with the exterior deadbolt would be to insert a key. The only way to regain entry without force is by using a key.
>
> (Exhibit F1, at 379-380.)

Dr. Laufer determined that the superficial injuries on Ms. Vitale's back were consistent with the straight side of a key. (Exhibit G, Laufer Declaration, at 396.)

> just didn't go down and get some milk and come back?"
>
> (Exhibit C, Transcript of Interview of Tamara Hill (hereinafter "Hill Interview"), at 237.)

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

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

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

Ms. Vitale's sister and brother-in-law suspected that Mr. Horowitz may have been involved in her murder. (Exhibit C, Hill Interview, at 198.) Mr. Hill contacted law enforcement to express his suspicions. (Exhibit N, Report by Det. Goldberg, Dated 11/3/05.) Ms. Hill was very close with her sister. (Exhibit C, at 216-221.) Describing her sister's marriage, she said "either they're passionately in love, or it's a passionate rage. It's...one or the other."[6] (Exhibit C, at 220.)

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

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

7/ "[U]sually in these incidents, he would come back...very remorseful .... probably say sorry. He might even start crying...."I didn't mean to hurt you," and... you know. He had a kind of a pattern of explosion..." (Exhibit C, at 222.) This behavior is typical of abusive relationships. See People v. Brown, 33 Cal. 4th 892, 907 (2004).

(Exhibit C, at 217-218.)

Ms. Hill described past incidents of rage directed against her sister, which would escalate to physical abuse: "It would go completely out of proportion, and he would be in this rage and screaming, and [one time] he threw a telephone at her." (Exhibit C, at 220.) Another time:

> [T[he toilet had overflowed or something. ... And he had come in and there was water all over the floor. And he just lost it. She was asleep, and he started screaming at her from the bathroom ... at the top of his lungs. ... She wakes up and he's throwing the [unintell] the pail and sponge and everything at her. At the bed.
>
> (Exhibit C, at 220.)

Mr. Horowitz once told Ms. Vitale: "I just wish... you would die.' And then [he] left." (Exhibit C, at 218-219.)

Another witness, Araceli Solis, worked for Ms. Vitale as a housekeeper every other Thursday. (Exhibit E, Transcript of Interview with Araceli Solis (hereinafter "Solis Interview"), at 354. *See also* Exhibit R, Report of Deputy Schiro, Dated 10/20/05, at 530-31.) When interviewed on October 20, 2005, Ms. Solis recalled that three or four months prior, Ms. Vitale called and told her not to come that day; she had been in an accident. The next week Ms. Vitale had a black eye that "looked very, very bad." (Exhibit E, at 364-365.) Ms. Solis's account was independently corroborated by Ms. Hill's statement that Ms. Vitale told her a convoluted story about a visit to the emergency room after walking into a treadmill and injuring her eye. (Exhibit C, Hill Interview, at 240-42.)

Numerous witnesses spoke of Mr. Horowitz's problem with rage. Years ago Mr. Horowitz represented Ms. Hill in a lawsuit against a physician alleging sexual assault. A settlement was offered, but decided

she did not care about money, she wanted the doctor to answer in court for what he had done. Mr. Horowitz pressured her to settle and exploded in a rage when she did not take his advice:

> [T]he moment ... I said that, I was the recipient of the hateful rage. Over the phone, I wasn't in person. And he said, "You are the most selfish... selfish person I have ever known in my life." And I don't know if he called me a bitch. He might have said "selfish bitch." And I'm like in tears. This was my lawyer. . . "And I can't believe that you don't care about anybody but yourself." You know? And saying, "Dan, I just want to go to court." ... he had me in total tears. I hung up on him at that point. I was sobbing for a day. ... [H]he snapped the second I said ... I wanted to go to court. ... it was just this barrage of "You are the most worthless human being that I've ever met." And I'm in tears. I ended up settling 'cause I didn't want to deal with him anymore.
>
> (Exhibit C, Hill Interview, at 255-261.)

Another potential witness, Donna Powers, contacted police with information that Mr. Horowitz may have been involved in an affair around the time of the murder. (Exhibit T, Report of Detective Simmons, Dated 11/1/05, at 536-537.) In this interview - possessed by trial counsel - she recounted an incident where Mr. Horowitz directed his rage against her. (*See* Exhibit D, Interview of Donna Powers (hereinafter "Powers Interview"), at 291.)

Ms. Powers was close friends with a doctor named Brenda Abbley. (*See* Exhibit D, at 291.) Dr. Abbley knew Mr. Horowitz and Ms. Vitale through her parents, the Lehmans.[7] (Exhibit D, at 289.) Ms. Powers thought

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8/ Ms. Lehman told officers on October 15, 2005, that Mr. Horowitz called her that day at approximately 6 p.m., *before* notifying the police. "Lehman said she asked Horowitz if he had called the police yet and Horowitz said, 'No, why should I? She's dead.'" (Exhibit M, Santiago Report, at 458.)

Two days after Ms. Vitale's death "two subjects identifying themselves as Brenda Abbley and Barbara Lehman arrived . . after driving past the ... security gate ... Abbley described herself as Daniel Horowitz's physician and [Lehman's] daughter." Lehman said she was close friends of both Pamela and Daniel.

Mr. Horowitz and Dr. Abbley were having an affair.[8] (Exhibit D, at 316.)

Ms. Powers was concerned that Dr. Abbley was abusing drugs and alcohol. In May, 2005 she heard Brenda call in a refillable prescription for Valium and Vicodin to a pharmacy in Lafayette for Mr. Horowitz and Ms. Vitale. Knowing that they were not Brenda's patients, Donna confronted her. Brenda said Horowitz was under a lot of stress because of the Michael Jackson trial,[9] and she would not let a friend of hers be in pain. (Exhibit D, at 297-98. 301.)

Two months later, Mr. Horowitz called Ms. Powers. (Exhibit D, at 293.) "He said 'I told Brenda she's not allowed to talk to you ever again, and I don't want you to ever talk to her again. And if you [do]...I'll make sure you lose custody of your daughter.'" (Exhibit D, at 291.) Ms. Powers expressed her concern about Brenda. (Exhibit D, at 297.) When she mentioned Brenda calling in the prescriptions, he "got extremely angry," and threatened to take away her daughter. (Exhibit D, at 300.) "He didn't know me from Adam. You know? ... I wasn't a friend of his...he threatened me with my child. Who does that?" (Exhibit D, at 314.)

Thus, evidence in trial counsel's possession indicated that Mr. Horowitz had an anger problem and was physically abusive to Ms. Vitale.

(Exhibit O, Report of Detective Barnes, Dated 10/24/05 at 492.)

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

10/ Horowitz acted as a legal commentator during the Michael Jackson trial. As Mr. Ortiz reports, becoming a legal commentator was part of a "media plan" to make Mr. Horowitz a celebrity attorney and thereby increase his earning potential. (*See* Exhibit K, Ortiz Declaration, at 441.)

This evidence is particularly compelling in light of the experts' findings that Ms. Vitale's murder was the result of rage or anger. "The injuries are atypical of a burglary or robbery gone bad, and are far more commonly associated with anger or rage." (Exhibit G, Laufer Declaration, at 395.) "The available evidence is ... most consistent with an anger/revenge motivation...." (Exhibit F, Turvey Report, at 371-372.)

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

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

Marital tension between Ms. Vitale and Mr. Horowitz was exacerbated by problems with the construction of their new home. (Exhibit C, Hill Interview, at 223.) For several years, the couple was in the process of building a large new home. (8 RT 2084.) The project was difficult from the start. Mr. Horowitz hired contractor Rick Ortiz in March of 2002.[10] The original plans were incomplete, which caused significant delays and increased the final construction costs. The very first check from Mr. Horowitz bounced. (Exhibit K, Ortiz Declaration, at 439.)

11/ Mr. Ortiz was never contacted by anyone before the undersigned. (Exhibit K, Ortiz Declaration, at 442.) However, trial counsel should have known of Mr. Ortiz since several people mentioned him as a potential suspect, including Tammy Hill. (Exhibit C, Hill Interview, at 113.)

Ms. Vitale's extreme indecisiveness caused a lot of these problems. "She had difficulty making decisions, she altered elevations frequently after already being built ... changed materials, added custom features ... made hundreds of smaller changes, [and] ordered materials that took months to acquire." This resulted in hundreds of thousands of dollars in lost time, and increased labor and material costs. (Exhibit K, at 439-440.) As of June 2004, Mr. Ortiz calculated the cost of this indecision at more than $214,000. (Exhibit K1, Change Orders to Date.)

Mr. Ortiz became close with the couple and witnessed how the construction problems affected them. (Exhibit K, at 439-440.) Mr. Horowitz withdrew from the process while Ms. Vitale grew more obsessed. Her health suffered; she developed severe allergies and would not leave home without wearing a mask and gloves and covering her head.[11] (Exhibit K, at 440.)

During this time, Mr. Horowitz was one of the attorneys for Pavlo Lazarenko, former Ukrainian Prime Minister, in a criminal case in the United States District Court, Northern District of California. Horowitz told Ortiz that he was expecting a one million dollar bonus upon acquittal. However, Lazarenko was convicted in May of 2004. Mr. Horowitz "came home to Lafayette angrier than I had ever seen. We spent nearly two hours discussing his anger and where to go from there. We spoke of money issues and how Dan was going to have to rein Pamela in and put some controls in

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12/ This is interesting because Mr. Horowitz said that his wife had plans to attend the ballet that evening with a friend. (Exhibit P, Report of Detective Pate, dated 11/1/05, at 500.) This friend was never identified. Moreover, there does not appear to have been any attempt to do so by law enforcement or trial counsel.

place. I remember watching Dan on TV bashing his briefcase against the columns of the court house thinking this is not good." (Exhibit K, at 441.) Mr. Horowitz had taken time away from his legal practice to pursue his career as a legal commentator, so he had less income, and without the anticipated bonus, was short on funds; he already owed Mr. Ortiz over $200,000. (Exhibit K, at 441.)

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

> Dan threatened my family. He showed me pictures of my wife and kids outside our new home in Shreveport, Louisiana. He said his family had sent someone down to take pictures and that he (Dan) could not guarantee their safety. Dan said his family had ties with ... the "mob" and they don't "play."
>
> (Exhibit K, at 441.)

Mr. Horowitz used these threats to get Mr. Ortiz to sign a new modified contract, with Mr. Ortiz's vacation home as collateral. Mr. Ortiz's attorney, Mr. John Warloff, advised against the modified contract, stating that it put the vast majority of the cost for past and future changes caused by Ms. Vitale and Mr. Horowitz on Mr. Ortiz. (Exhibit TT, Warloff Letter, at 758-759.) Nonetheless, due to the threats, Mr. Ortiz agreed to the modified contract, and signed a deed to his house as collateral. (Exhibit K, at 441. Exhibit II. Exhibit TT, at 760.) Mr. Horowitz then recorded a fraudulent deed of trust and seized Mr. Ortiz's home. (Exhibit K, at 442; Exhibit II1, Deed.) The deed that Mr. Ortiz states that he signed includes the signatures of Mr. Horowitz, Ms. Vitale and Mr. Ortiz at the bottom. (Exhibit II, Deed.) Mr. Ortiz asserts that Mr. Horowitz then altered this deed without his permission, and recorded it, thereby seizing the property. (Exhibit II1,

Deed.)

Thus, on October 15, 2005, Mr. Horowitz and Ms. Vitale were under a great deal of financial pressure and experiencing significant marital strife.[12] Ms. Hill confirmed this situation:

> So, several arguments over the last year and a half to two years have been just exclusive house issues ... the last argument they had about this which I would say was within the last two months – maybe three months – was them just talking about the fact that he... this wasn't his house, ... he accused Pam of just ... that she didn't love him, and that ... she was just using him to make all the money so that she could build her house.
>
> (Exhibit C, Hill Interview, at 225.)

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

> [S]he was afraid to tell Daniel ... it was just one more thing, and he was starting the Polk case ... I don't know if she meant afraid 'cause now there's going to be this huge blow up, or just didn't want to put that extra stress on him...but I know there was this house thing recently, this week, that was a big issue. I mean it's three floors of flooring that might have to be replaced.
>
> And you never know if she actually told him about this or not?
>
> I do not know. On Tuesday ... I'm pretty sure she had not.
>
> (Exhibit C, at 225-226.)

13/ A man named Richard Sellers contacted the Contra Costa Sheriff's Department on or about October 19, 2005. Approximately four months prior, Pamela came over to look at the tile in his home because she was considering using the same tile contractor. She arrived with a man she said was her husband, but upon seeing media coverage of the murder, he realized it was not Mr. Horowitz. Mr. Sellers described this man as a tall (6'3" or 6'4") Caucasian who appeared well groomed and affluent. (Exhibit Q, Report by Detective Martin, 10/20/05.)

This is compelling evidence of a potential motive for Mr. Horowitz. This is especially compelling in light of the items found with blood on them that were likely used to beat Ms. Vitale: samples from the home construction (crown molding and a balustrade) and a vase that was a wedding gift to 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.

Sergeant Hoffman, first on scene, testified at preliminary hearing that when he first arrived, he placed Mr. Horowitz in a patrol vehicle, and Horowitz immediately said that he was with "a bunch of retired police officers that day" and that he was an attorney. (1 CT 36.) Mr. Horowitz produced a Safeway receipt, his last "errand" before arriving home.[13]

Sergeant Hoffman described Mr. Horowitz as "animated." (1 CT 38.) Similarly, in the 911 call, Horowitz is heard screaming initially, but in the subsequent call minutes later sounds calm. (1 CT 872-878.) When interviewed by detectives, Mr. Horowitz exhibited few signs of shock or grief. (See Exhibit B, B1, and B2, Transcript and Digital Recordings of Interview of Daniel Horowitz (hereinafter "Horowitz Interview").) Mr. Horowitz made numerous phone calls, and similar to Sergeant Hoffman's description, appears animated as he lays out his theory of the case: "I've pretty much figured out the time and manner and everything else. I just don't know who." (Exhibit B, at 57.)

14/ Mr. Horowitz purchased a few items, including salad and salad dressing. (Exhibit A, Photos, at 55.) However, an inventory of the refrigerator and pantry indicates that there were seven bags of lettuce in the fridge, and twenty-five bottles of salad dressing. (See Exhibit R, Report of G. Schiro, dated 10/20/05, 526-528.)

When Mr. Horowitz explained his theory to Ms. Hill: "He wasn't enraged .... haven't seen him be angry over the death. (Exhibit C, Hill Interview, at 236-37.) This was confirmed by his comments to Ms. Lehman mere minutes after finding Ms. Vitale dead; Mrs. Lehman told officers on October 15, 2005, that Mr. Horowitz called her that day at approximately 6 p.m., *before* notifying the police. "Lehman said she asked Horowitz if he had called the police yet and Horowitz said, 'No, why should I? She's dead.'" (Exhibit M, Santiago Report, at 458.)

While speaking with detectives, Mr. Horowitz answers a phone call from Bob Massi, with whom he had breakfast that morning, saying matter-of-factly: "Bob, I'm here with two homicide guys. My wife was murdered." (Exhibit B, Horowitz Interview, at 87-88.)

Although Mr. Horowitz made approximately fifty phone calls in the hours following his reported discovery of his wife's body (*See* Declaration of Sara Zalkin), he did not personally notify her sister but instead had his sister Carol call Ms. Hill around 7:45, nearly two hours later. (Exhibit C, Hill Interview, at 234, 276.)

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

Mr. Horowitz spoke of Mr. Lynch at least twenty times in the hours after the murder. (*See, e.g.*, Exhibit B, at 59, 61, 64, 66-69, 73, 75, 79, 82, 86, 100, 104, 118-119; Exhibit B1, at 131-133, 135, 137-139; Exhibit B2, at

147, 19, 151-152, 156-157, 161, 167, 171-172, 174-175, 178, 192. *See also* Exhibit C, Hill Interview, at 246.)

Two days after Ms. Vitale's death, Mr. Horowitz pulled Ms. Hill aside to tell her why he was angry with his wife and how she had hurt him, which is inconsistent with a grieving spouse and implies consciousness of guilt. (Exhibit C, Hill Interview, at 269-71.)[14]

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

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

At the scene, Mr. Horowitz told Sergeant Hoffman that Mr. Lynch "was supposed to come by and **drop off** a check for $188.00. For water."

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

***

TH: And that uh... And I said, "Well, I think that maybe he did have some telephone conversations with her. I had no idea about any dinners."
PO2: Uhuh.
TH: And he goes, "What do you know about that neighbor [unintell]"...[H]e just kept going back to "This is her house. And I was just the money person...
PO2: This is... When was this?
TH: This was yesterday. And "I guess she loved me."
PO2: Uhuh.
TH: And I'm like, "What bizarre thing to tell me, then is asking me about at this juncture. And to tell me that really hurt him .... How am I supposed to react to that?

(Exhibit L, Report by Sgt. Hoffman, dated 10/16/05, at 449.) In his interview at the police station the night of the murder, Mr. Horowitz claims Ms. Vitale told him that **they owed** Joe a check for $180 for water. (Exhibit B, Horowitz Interview, at 83 (emphasis added).)

However, as detectives took turns questioning Mr. Lynch and Mr. Horowitz (explaining their periodic appearance in the room with Mr. Horowitz) Mr. Lynch was adamant that he had just called that day, October 15, and left a message on their answering machine, at either 11 a.m. or 2 p.m., about needing the $180 check for the water (*See* Exhibit P, Report of Detective Pate, Dated 11/1/05, at 508.)

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

Mr. Horowitz told detectives that he left his residence at 7:30 a.m., and did not return until almost 6 p.m. when he found her. (Exhibit P, at 499-501.) Aside from touching her neck and calling 911, he claimed he did not touch or access any other areas or items within the residence. (Exhibit P, at 501.) Thus, based on Mr. Horowitz's account, he had no way to know Mr. Lynch was owed $180. Ms. Leonida did not raise this inconsistency.

Mr. Horowitz also made statements implying awareness of injuries that were not visible on Ms. Vitale at the scene. "There could have been

other wounds too. There could have been a second one on the other side. I don't know." (Exhibit B1, Horowitz Interview, at 142.)

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

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

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

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

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

> Dan Horowitz was Pamela Vitale's husband. He was the last one to see her alive that Saturday morning, and discovered her body Saturday evening. He had some blood on his clothing at the time he was originally contacted by Sheriff's deputies, and some of his clothing bearing blood was found near Ms. Vitale's body. His DNA was found on a broken coffee cup in the kitchen sink that also had a blood smear on it. He was relatively composed at the time the deputies first contacted him, talking on a cell phone to various

> people he had apparently called before the Sheriff's deputies arrived, including sheriff's dispatch (non-emergency). (3 CT 873.)
>
> [T]here is no question that the husband of a deceased woman, last to see her alive, with his DNA inside the residence, including a broken cup, which has her blood on it, is going to be raised, whether the defense specifically brings out third-party culpability or not. (1 RT 9.)

However, trial counsel tragically failed to recognize the same, fatally prejudicing Petitioner.

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

Evidence of third party culpability need only be capable of raising a reasonable doubt as to the defendant's guilt. People v. Cudjo, 6 Cal.4th 585, 609 (1993); People v. Hall, 41 Cal.3d 826, 833 (1986). Here, evidence linking Mr. Horowitz to the crime was capable of creating such reasonable doubt. The physical evidence used to link Petitioner to the crime was "problematic at best" (Exhibit F, Turvey Report, at 370); the prosecution failed to develop a rational motive; Petitioner had a potential alibi; and Petitioner had no history of violence. In light of the weak evidence against Mr. Dyleski, if the jury had evidence of Mr. Horowitz's abusive conduct, marital problems, incriminating physical evidence, and statements showing consciousness of guilt, it would likely have raised a reasonable doubt otherwise lacking.

In People v. Hamilton, 45 Cal. 4th 863 (2009), the California Supreme Court affirmed trial court's preclusion of expert testimony as to third party culpability, because there was no nexus between the third party and the particular crime. *Id.* at 913-14. The proffered testimony was that of

a forensic psychologist who would have said that the police should have looked more closely at the victim's husband, based on his juvenile record, some history of alcohol abuse, and a police report of domestic violence against a previous wife. *Id.* at 913. In contrast, there was evidence here not only of prior domestic abuse, but also of opportunity, physical evidence, motive, inconsistencies, and consciousness of guilt.

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

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

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

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

because of his notoriety. [15]

(Exhibit H, at 418.)

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

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

As evidence of prejudice in this case, there was a transcript in trial counsel's file from an online interview of a juror. (Exhibit X, Transcript of Chat with Peter De Cristofaro.) Mr. De Cristofaro said the defense was "weak" and "almost all character witnesses and even the number of character witnesses was not that much. I personally would have like to have seen more, or an alternate theory as to who might have done it. If Scott Dyleski didn't do it, I would have liked to have seen Ellen Leonida give us an alternate theory to the crime. She never did." (Exhibit X, at 565-566.)

Although Ms. Leonida had evidence of such an "alternate theory" available, she presented virtually no evidence or argument to counter the prosecution's case. Thus, the jury had no alternative but to accept the prosecution's theory of events.

16/ Susan Polk, a client of Mr. Horowitz at the time, provided a declaration stating that Mr. Horowitz told her that he framed Mr. Dyleski. (Exhibit J, Declaration of Susan Polk at 435; *see also* Exhibit S, Report of Deputy Wilhelm, Dated 1/13/06, at 534.)

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

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

Three images taken by law enforcement personnel in processing the crime scene show the same ruler being used in different locations, with identical apparent blood transfer in each image. (Exhibit A, Photos, at 28-30.) These images show how evidence can be easily and inadvertently contaminated, which likely occurred in this case.

Trial counsel additionally failed to question the chain of custody and potential contamination of critical inculpatory evidence: the duffel bag. Reserve Deputy Kovar testified that when he found the bag, he moved items around inside of it. (9 RT 2338.) A photo taken at 1050 Hunsaker Canyon Road shows the bag sitting on the porch, with some of its contents displayed on top, shows carelessness in the handling of important evidence. (Exhibit A, Photos, at 56. *See also* 9 RT 2323.)

Trial counsel likewise failed to challenge gaping holes in the chain of custody for items reportedly found in the duffel bag. Mr. Kovar testified that he signed the forensic property tag for the bag, before handing it over to a crime lab technician.[16] (9 RT 2327.) However, Mr. Kovar did not sign a forensic property tag for its contents. (9 RT 2331-2332.) No one testified to having signed any forensic property tag or chain of custody for the indi-

17/ Identified elsewhere as Eric Collins.

vidual items within the bag. Mr. Collins said he received the bag from Mr. Kovar but did not document its contents until later. (12 RT 3397-98.)

The unestablished chain of custody for the items within the bag is significant in light of the single photo of the bag and its contents on the porch of 1050 Hunsaker, which only shows two items of clothing, the pullover and the balaclava, but not the coat or glove that were allegedly found. (Exhibit A, at 56. See also 9 RT 2323.) It is perplexing that the investigators would photograph only some of the items but ignore the rest (including the all-important glove). In fact, nobody mentioned anything about a glove at the scene. Mr. Collins' handwritten field notes state: "Kovar reported finding a black duffel bag, cont. dark clothing, a ski mask, and a clump of loose reddish hairs ..." (See Exhibit AA, Field Services Information, at 572.)

Although Mr. Kovar did not report finding a glove, he was permitted to authenticate the glove at trial. (9 RT 2332-33.) However, the veracity of this testimony is questionable at best as he directly contradicts himself during his testimony, both at trial and preliminary hearing, as to whether or not he actually saw the glove at the scene:

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

Still on direct, Kovar later testifies:

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

(9 RT 2332-33.)

Although Mr. Kovar testified to having seen the glove, it was only after being asked a leading question by the prosecution specifically about the glove. In his unlead testimony, Mr. Kovar made no mention of having seen a glove, and specifically stated that he saw a sweater and a glove, and then called his supervisor. Mr. Kovar was then permitted to authenticate the glove.

At preliminary hearing, Mr. Kovar similarly contradicted himself:

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

(CT 1 151-152.)

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

Q. Did you move around the contents of the bag?
A. When I pulled the initial piece of clothing out, yes.

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

...

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

(1 CT 154.)

Ms. Leonida did not ask any questions about these inconsistencies, or the failure to establish a proper chain of custody. This evidence would have been particularly meaningful in light of the strange nature of the duffel bag evidence. Logically, in order for such items to have Ms. Vitale's DNA on them, they must have been worn by the perpetrator during the crime. However, the DNA analysis of the glove excluded Mr. Dyleski entirely. Moreover, the bag only contained a single glove, a mask, and a shirt and coat that had no blood on it whatsoever. Thus, if the killer had worn the mask and glove, what happened to the other glove and the rest of the clothes? Why were the rest of the items disposed of but for a few random items left in a bag that had Mr. Dyleski's name on it, mere yards from his home? In light of the damaging, but puzzling, duffel bag evidence, it was essential for defense counsel to provide an alternative explanation for the manner in which Ms. Vitale's DNA could have made it onto the bag (to wit, contamination). Defense counsel failed to do so, and this failure fell below an objectively reasonable standard of competence, and prejudiced

Petitioner.

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

Trial counsel was ineffective in not moving to exclude irrelevant, prejudicial, and misleading evidence, specifically Mr. Dyleski's artwork and writings and a bumper sticker from his room. This evidence was irrelevant to any matter of consequence, and was so prejudicial and misleading that any probative value was significantly outweighed by the risk of prejudice and should have been excluded from trial. (Evidence Code §§ 350; 352.) Trial counsel's failure to object fell below an objectively reasonable standard of conduct, and resulted in prejudice.

1. Artwork and Writing

Petitioner's artwork and writing were a central topic at trial, and symbols appearing in the artwork were compared to incisions observed on Ms. Vitale's back. However, the subject matter of the artwork and writings often depicted violent themes, which were highly prejudicial. (*See* 15 RT 4000-4005.) Moreover, the prosecutor used the symbols on the artwork to mislead the jury by arguing that they were similar to the marks found on Ms. Vitale's back, when in fact there were minimal similarities. This resulted in prejudice to Mr. Dyleski, and trial counsel's failure to move to exclude this prejudicial information fell below an objectively reasonable standard of conduct.

The district attorney argued extensively that "the content of that artwork and those writings may give you something of a window into the heart and mind of Scott Dyleski." (7 RT 1743. *See also* 15 RT 4004.) He further argued that "Mr. Dyleski was big into symbols." (7 RT 1743.) Mr.

Jewett used the symbols with which Mr. Dyleski often signed his artwork (described variously as a three-pronged propeller, a star in a circle, and otherwise) (*See* Exhibit Y, Example of symbol drawn by Mr. Dyleski), to argue that the scratches on Ms. Vitale's back in the shape of a "H"with an elongated horizontal line were in fact a symbolic signature. (14 RT 3795.) "It was the etching. It was the brand on her back. ... Something else is going on here that's beyond simply trying to cause her pain or kill her ... some other element there that you do not ordinarily see in a homicide that is at least circumstantially reflective of the mind, the heart, the soul of the person who inflicts that kind of injury." (15 RT 4004.)

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

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

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

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

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

2. Bumper Sticker

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

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

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

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

E. Failure to Object to Expert Opinion that a Glove Found in the Duffel Bag Was Consistent with Prints Found in Blood.

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

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

Counsel was ineffective for failing to object to this unqualified expert opinion, or to cross examine Ms. Novaes on the basis of her opinion. In People v. Gutierrez, 14 Cal.App.4th 1425 (1993), the court found that counsel was not ineffective for failing to object to an gang expert's opinion because he was asked about matters within the scope of his expertise. *Id.* at 1435. Ms. Novaes testified to matters well beyond her expertise.

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

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

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

Petitioner was initially charged by complaint with murder (Penal Code § 187); a deadly weapon enhancement; and a special allegation that he was at least 16 at the time of the offense. Mr. Dyleski was held to answer as charged. On March 1, 2006, the information filed added a special circumstance of felony murder, residential burglary (Penal Code § 190.2(a)(17)), which carries a sentence of life imprisonment without the possibility of parole. (3 CT 683.) Although there was insufficient evidence of burglary provided at the preliminary hearing, counsel failed to challenge this lack of evidence through a 995.

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

Petitioner was fatally prejudiced by the ineffective assistance of his counsel. "[I]n evaluating prejudice, we must compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently, and evaluate whether the difference between what was presented and what could have been presented is

sufficient to undermine confidence in the outcome of the proceeding." Belmontes v. Ayers, *supra*, at 863 [internal quotations omitted; overruled on other grounds].

Here, evidence that sounded damning, at closer inspection, turned out to be primarily inflammatory and irrelevant, and the physical evidence contained potential weaknesses in both the collection and processing.

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

II.

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

Petitioner's Fifth and Fourteenth Amendment Rights to a fair trial and to due process of law were violated by prosecutorial misconduct. Prosecutor Jewett engaged in just about every category of misconduct recognized by law. Multiple instances of misconduct infected the trial with unfairness. Each of these errors individually may be sufficient to render Petitioner's trial fundamentally unfair, as they certainly do when considered

cumulatively. See Donnelly v. DeChristoforo, 416 U.S. 637, 642-43 (1974).

The main question "is whether the errors rendered the criminal defense 'far less persuasive,' Chambers v. Mississippi, 410 U.S. 284, 294 (1973), and thereby had a 'substantial and injurious effect or influence' on the jury's verdict, Brecht v. Abramson, 507 U.S. 619, 637 (1993)(internal quotations omitted). See Parles v. Runnels, 505 F.3d 922, 928 (9th Cir. 2007), citing Chambers, *supra*, 410 U.S. 284 and Brecht, *supra*, 507 U.S. 619. Here, the defense was already constitutionally deficient, as argued above, so the egregious misconduct unquestionably had a "substantial and injurious effect or influence" on the verdict.

A. The "Gothic Theme."

The prosecutor skillfully wove a "Gothic theme" into his case to arouse feelings of passion and prejudice, despite evidence that Petitioner had outgrown that stylistic phase after high school. This approach also deflected attention from the prosecution's theory of motive, which was weak, at best.

Petitioner's trial counsel raised the issue in her motion for change of venue. (3 CT 945 - 977.) The media disseminated photographs of Petitioner from that stage of adolescence. (3 CT 945. See Exhibit NN, San Francisco Chronicle Cover.) In large part, the diabolical portrayal of Petitioner was related to the unchallenged depiction of a "symbol" that the killer carved on Ms. Vitale's back. (3 CT 944.) Despite the varying descriptions of these injuries as resembling a "double crossed "T" or an "H," Petitioner's trial counsel never challenged the notion that this was an "etching" or "brand" of the killer (versus one of the numerous injuries

inflicted in the attack.)

At the hearing on the venue motion, Dr. Ross testified regarding his review of the pretrial publicity. He identified the following words or phrases as among the most prevalent: "Shocks, gruesome, bludgeoning; bludgeoned, stabbed and had a symbol carved into her back...brutal and callous, horrendous act; carved into her back." (1 RT 228-229.) Defense counsel asked:

> Q. Did you also do an analysis of how Scott Dyleski has been characterized in the publicity?
>
> A. Yes. And the references would - - in most cases refer to his living conditions. His house was a mess, rodent infested, that he's troubled. The - - both newspapers included pictures of the defendant and received comments from readers about including those showing progression in the year book from a clean-cut Boy Scout to someone who's taken on Goth characteristics, references to his being troubled, becoming troubled and darker after his sister's death.

(1 RT 229-230.)

On re-direct, in response to the prosecutor's question regarding "additional fact-recognition" in the survey sample, Dr. Ross testified:

> A. Well, the highest was the recognition of Daniel Horowitz involved in the Susan Polk case, and then the marijuana growing equipment and the stolen credit cards.
>
> And then the next most referred to or recognized was associated with goth at his high school....

(2 RT 323.)

Later on, Mr. Jewett argued against the motion for change of venue:

> And contrary to defense counsel's argument that somehow there's something prejudicial about references to Goth, I haven't seen and counsel has not produced, even though I raised this in the people's pleadings, anything that necessarily suggests that Goth is somehow necessarily prejudicial.

> We have a lot of alternative lifestyles....The fact of the matter is we recognize there are many differences, particularly in young people and there has been since the time of Elvis Presley and the Beatles and most people know that.
>
> And so the fact that somebody is Goth is not necessarily prejudicial to their ability to get a fair trial in a case like this....
>
> (2 RT 385-386.)

The next mention of "Goth" in the Reporter's Transcript was when the court began asking prospective jurors about their familiarity or lack thereof with "for lack of a better term, the Goth culture." (3 RT 770-771.) The court asked this question of every prospective juror. The prosecutor took full advantage of his ability to raise the "Gothic theme" in voir dire, for example: "Now, whether or not Mr. Dyleski, in his appearance here in court necessarily reflects Mr. Dyleski's life in the fall of last year, we will have to wait for the evidence to see." (4 RT 1049-1050.)

> MR. JEWETT: Okay. Is there - - I have to ask you this question: Has anybody here - - and let me limit it again to immediate family - - ever done any studying or showed a special interest in - - and I'm not talking about just reading, you know, Silence of the Lambs - - but...showing a special interest in subject matters such as, you know, psychotic killers, mass murderers, Jack the Ripper, sadomasochism, anything like that?
>
> (4 RT 1063.)

After a prospective juror asked whether "witches" would fall into that category, Mr. Jewett asked: "Anybody here or immediate family either studied or had an apparent interest in issues surrounding witchcraft or the occult, anything like that?" (4 RT 1064-1065.) There are many instances where "Goth" is discussed in the jury selection process. (See also, e.g., 5 RT 1274-1279; 5 RT 1359; 5 RT 1394-1395; 5 RT 1412-1414.)

At least two jurors associated "Goth culture" with the Columbine High School shootings, including dark hair, black clothing, and trench coats. (6 RT 1566-1568.)

The prosecutor's opening statement mentioned a "marked change" after Petitioner's sister died in a car accident:

> He started wearing black. It's been characterized as 'Goth,' you have been getting a lot of questions regarding Goth...it's not so much Goth what Goth is that has anything to do with this case, what it does have to do with is black, for instance, black clothing, okay, that's going to become relevant.
>
> But there's something else; because it's not just the style, Mr. Dyleski is something of an artist and he likes to write as well. And you are going to see a number of his pieces of artwork, and you are going to read a number of his pieces of writing, and you are going to see some things that are going to be disturbing to you. It wasn't Goth and it wasn't even death, it was murder, it was killing.
>
> We have all kinds of very disturbing pieces of art that have very frightening images on them with blood, with the word murder, with vivisection, something that appears prominently on his computer which is the removal of organs.
>
> Okay. And perhaps while the content of that artwork and those writings may give you something of a window into the heart and the mind of Scott Dyleski, there's something else about those writings that's very important, because Mr. Dyleski was big into symbols....
>
> (7 RT 1742-1743.)

This inflammatory and prejudicial rhetoric continued throughout the trial and permeated the prosecutor's closing argument. "Hate is a part of this case and it manifests itself in the person of the defendant both philosophically and at a personal level." (15 RT 3999-4000.)

The prosecutor argued that lettering on a bumper sticker found in Petitioner's room ("I'm for the separation of church and hate"), appeared similar to the injury on Ms. Vitale's back. (15 RT 4002.) This argument

was not only inflammatory, but also was based on a fact not in evidence.

This presentation continued:

> And one of the things...that [Jena Reddy] talked about, albeit begrudgingly, was there is a God, there is Satan, but there is no good and evil.
>
> That's a very interesting philosophy. And frankly it's not a unique one. And there's a certain logic to it, if you think about it. But the logic is extremely dangerous and the logic deals with the proposition that the universe is in balance and it's balanced by God and Satan.
>
> [S]uch a philosophy is not about immorality, it's about amorality.
>
> (15 RT 4003-4004.)

The writings and artwork, said Mr. Jewett, would trouble any parent.

Scott's mother:

> [R]ecognized there was trouble, although she got up here and talked about how she thought it was a product of a broken heart, but that's not what she said in the tape we played for you.
>
> She was talking about seeing drawings of body parts that she pulled out of the waste basket, and based on that was thinking about giving the defendant therapy. And when was that? It was a week before Pamela Vitale was killed.
>
> ...[w]hy did I spend so much time on those things, because Pamela Vitale was beaten to death? No. The beating was brutal....
>
> It was the etching, it was the brand on her back, it was the stab wound of a dead body or somebody who is in their agonal phase. She had already been mortally wounded when that knife was plunged into her abdomen.
>
> Something else is going on there that's beyond simply trying to cause her pain or kill her. There's some other element there that you do not normally see in a homicide that is at least circumstantially reflective of the mind, the heart, the soul of the person who inflicts that kind of injury.
>
> That's why we spent time on the drawings, on the philosophical beliefs of the defendant, because there is some very real and very disturbing physical evidence in this case

that that evidence has some bearing on.

(15 RT 4004-4005.)

The probative value of the "Gothic culture" was minimal, at best. The prosecutor was patently aware of the "hot button" nature of adolescent angst, especially since the Columbine shootings, and fully availed himself of such in presenting his case. Prosecutors should not use arguments calculated to inflame the passions or prejudices of the jury. See Berger v. United States, 295 U.S. 78, 88 (1935.)

Mr. Jewett's closing is full of inflammatory argument. As his words were the last heard by the jury, the prejudicial effect is magnified because it is fresh in the mind of the jury. See Baldwin v. Adams, 2012 U.S. Dist. LEXIS 123178, at *28-29 (N.D. Cal. August 29, 2012).

B. The Prosecutor Misrepresented the Physical Evidence.

1. The Shower

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

This assertion was crucial to the prosecutor for at least two reasons. First, the notion that a stranger who had no way of knowing if and when Mr. Horowitz or anyone else might show up, would take time to tidy up a bit and shower, could independently establish reasonable doubt. Second, given the problematic and conflicting testimony as to what time Petitioner returned from his walk, the longer the perpetrator spent at the home, the

worse for prosecution's case.

However, the first page of Criminalist Taflya's 22-page report, dated January 18, 2006, plainly states: "The suspect appeared to have showered and a bloody handprint was observed on the shower wall." (See Exhibit DD, Taflya Report, at 660.)

Mr. Jewett was undoubtedly familiar with the crime scene photographs depicting a bloody, dripping handprint on the shower wall. (Exhibit A, Photos, at 25-27; 2 RT 418-425.)

"Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct." People v. Hill (1998) 17 Cal.4th 800, 823. The concerted portrayal that the perpetrator did not take a shower based on the absence of wet dripping when wet dripping in fact is clearly evidenced in crime scene photos supports Petitioner's claim of willful misconduct.

2. "The Glove"

The prosecutor managed to create the impression that the lone black evening glove reportedly found in the duffel bag, containing DNA evidence from Ms. Vitale, belonged to Petitioner; was used in the crime; and had a missing other glove out there that had yet to be found. He was so persuasive that even Petitioner's counsel, Ms. Leonida, began referring to "these gloves." (See, e.g., 8 RT 2068; see also 8 RT 2052-2053.)

3. "That Knife"

The prosecutor argued that in the days after the murder, Mr. Dyleski got rid of items "that have nothing to do with credit card fraud. That knife has nothing to do with credit card fraud. I would submit to you the shoes

have nothing to do with credit card fraud." (15 RT 4081.)

There was no evidence that the knife turned over by Ms. Fielding had any connection with the murder of Ms. Vitale. Nevertheless, the prosecutor consistently referred to the knife as if there was such evidence.

4. Referring to Presumptive Test Results as "Blood."

Throughout the trial the prosecutor repeatedly referred to "presumptive" test results in a misleading fashion in his effort to secure a conviction. This misrepresentation violates due process and constitutes prosecutorial misconduct. See, e.g., Miller v. Pate, 386 U.S. 1 (1967) (granting a writ of habeas corpus on the basis of the prosecution's presentation of red stains as blood, when this was known to be false).

Of the presumptive blood test on the black shirt in duffle bag, Mr. Jewett said, in opening, "On the shirt Pamela's blood wasn't there, but the defendant's was. The same with the overcoat." (7 RT 1776.) Yet, there was no evidence of any further analysis on the overcoat, and therefore no evidence whatsoever that it contained Petitioner's blood, rather than sweat or skin cells from normal usage.

Mr. Jewett continued to play "fast and loose" with regard to presumptive screening for the presence of blood versus blood confirmed as such, notwithstanding defense objection. (13 RT 3277-3286.)

The court held that evidence of presumptive blood tests are admissible in People v. Alexander, 49 Cal. 4th 846 (2010). However, in that case:

> The testimony regarding the presumptive blood tests had no particularly emotional component, nor did it consume an unjustified amount of time. Further, because the defense fully explored the limitations of the presumptive tests through cross-examination, there

is no likelihood this evidence confused or misled the jury. Id. at 905.

Here, in contrast, the defense did not "fully explore" the limitations. Moreover, Mr. Jewett repeatedly referred to "blood" on items which had only reacted to preliminary screening. This was misconduct.

C. Referring to Facts Not in Evidence.

As he did with "the gloves," in closing, Mr. Jewett referred to a bumper sticker from Petitioner's room that the prosecutor argued was similar to the H-shaped injury on Ms. Vitale's back. (15 RT 4002.) However, this bumper sticker was never presented in any testimony. Referring to facts not in evidence is "clearly misconduct." Hill, *supra*, 17 Cal.4th at 828. Such statements "tend to make the prosecutor his own witness--offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." People v. Bolton, 23 Cal.3d 208, 213 (1979). Here, this particular evidence was highly inflammatory, as it contained an anti-Christian message, had the word "hate," and was the only image presented that showed an H with an elongated horizontal line, like the image on Ms. Vitale's back. Thus, this improper evidence was not only misconduct, but it was also highly prejudicial.

D. Mr. Jewett Repeatedly Asked Improper Questions.

For instance, in the middle of the prosecutor's examination of Sheriff's Criminalist Taflya, at recess:

THE COURT: The record should reflect the jury has left. Mr. Jewett, the last four objections by Ms. Leonida have been that

you are leading and I sustained all four objections, sir. Please don't testify for your witnesses. Okay?

MR. JEWETT: That's not my attention [sic]. A lot of this is foundational, but I know - -

THE COURT: Well - -

MR. JEWETT: – that.

THE COURT: - - where she's objecting, sir, it's not foundational.

Okay. We're on break.

(7 RT 1978-1979.)

Yet, when testimony resumed, Mr. Jewett asked Mr. Taflya:

Q. Isn't that a pattern you are familiar with, the pattern of the carpet?

A. After looking at it, yes. I don't believe I have seen that in the past, well, prior to coming into this home.

(7 RT 1985.)

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

The 5th Amendment (made applicable to the State of California by the 14th Amendment) "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." Griffin v. California, 380 U.S. 609, 615 (1965). See also Baxter v. Palmigiano, 425 U.S. 308, 319 (1976) ("Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt.").

Of the "stupid lie" Petitioner made up when confronted about DNA by Fred Curiel, said the prosecutor:

Well, if this is just some stupid lie then where, sir, did you get those scratches?

> Okay. And the other $64,000 question is, 'If this was just a stupid lie, why are you worried about DNA?' Let me repeat that. 'Why are you worried about DNA? Your explanation for the DNA possibly being on Pamela Vitale's body is this mysterious woman you ran into on the road. If that's a stupid lie, then there's absolutely no reason for you to be concerned about your DNA being on Pamela Vitale's body,' save one, and that's because, like Fred said, 'You were there.'
>
> (15 RT 4087.)

The argument continued as to Petitioner's statement to his friend and credit card co-conspirator, Robin Croen, that he will just say he used Robin's computer, so Robin won't get into trouble. (15 RT 4088.)

> And he tells the story about the lady down the road and his concern about the DNA being on her body. And of course, you know, that it's that information that through Tom Croen came to the attention of the sheriff's office the following day, and it's from that that this investigation against Scott Dyleski was launched. But the story had actually been told on a number of occasions to a number of people before it was told to Robin.
>
> But then the defendant does tell something to Robin that is interesting....'Not to worry, I have got an alibi. Really? How do you have an alibi? This is Tuesday. The crime is three days old.
>
> [The Alameda County computer investigator] hasn't even looked at [it] yet. What we know at that time is that Dan Horowitz left that home shortly before 8:00 o'clock that morning and he found Pamela's body shortly before 6:00 o'clock that night. That the information we have.
>
> We don't have anything about 10:12 a.m., or anything remotely resembling that. Maybe, Ladies and Gentlemen, in the course of the days between Saturday and Tuesday, some information filtered out, maybe the fact that the bed was unmade or that milk was on the counter.
>
> Mr. Horowitz, he's obviously no stranger to the media. He may have made a comment or somehow speculated about when this killing might have happened and it would certainly be reasonable to conclude based upon the things that Mr. Horowitz knew that it happened sometime in the morning.

> But what time in the morning? How is it that you think you have an alibi on Tuesday? I mean let's not forget, folks, that nobody saw the defendant. If they saw him at 9:26, nobody saw him before that. There isn't one witness who testified they saw the defendant before then, directly or indirectly.
>
> Dan Horowitz left before 8:00 o'clock. Exactly how is it that you know that Pamela Vitale was not killed between 8:00 and 9:26? What exactly, what time is it that you, Scott Dyleski, think you have an alibi for? That's pretty important to the people.
>
> (15 RT 4088-4089.)

F. Improper Appeal to Sympathy

The "Golden Rule" argument is a "tactic of advocacy, universally condemned across the nation." People v. Vance, 188 Cal. App. 4th, 1182, 1188 (2010). The condemnation extends to both civil and criminal cases, by both state and federal courts. See id. at 1198. A prosecutor may not invite the jury to "put itself in the victim's position and imagine what the victim experienced." See id. at 1188. "This is misconduct, because it is a blatant appeal to the jury's natural sympathy for the victim." Id.

For the same reason, "victim impact evidence, which relates 'to the personal characteristics of the victim and the emotional impact of the crime on the victim's family," is prohibited. See id. at 1199.

Here, the prosecutor thematically appealed to the jury's natural sympathy. During jury selection, Mr. Jewett spoke of the "mental gymnastics" required in order to put aside one's emotions. (3 RT 661.) In closing argument, he referred to the personal characteristics of Ms. Vitale at least twice: "I hope you remember that as you are reflecting on the evidence in this case, that she is about as innocent a victim as you can have in a criminal case." (15 RT 3999.) "A woman that virtually everybody in

that neighborhood loved or certainly liked." (15 RT 4010.) Later on in closing argument, Mr. Jewett told the jurors to:

> Imagine the vision presented to...Pamela Vitale when a masked person...there can be no question whatsoever that this person was wearing a mask and gloves at the time he entered this house and that is what Pamela is confronted with as she is in a completely different world, looking into her family tree.
>
> (15 RT 4041-4042.)

The prosecutor's misconduct was magnified by his skillful manipulation of the physical evidence and improper argument about the mask and gloves. Compounding the prejudice, defense counsel failed to object or otherwise try to neutralize the prosecutor's tactics, consistent with Petitioner's claim that he was prejudiced by the ineffective assistance of counsel.

III.

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

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

ineffectiveness in the record and raised herein, Petitioner would likely have prevailed on appeal.

Moreover, appellate counsel was aware of Mr. Turvey's report, indicating there may be meritorious grounds for a habeas petition and thus he had an ethical obligation to advise Mr. Dyleski as to how to pursue such claims. See In re Clark, 5 Cal.4th 750, 783, n. 20 (1993). However, Mr. Brooks discouraged Mr. Dyleski from contacting a habeas attorney. (*See* Exhibit V, Letter from Philip Brooks to Scott Dyleski, dated May 26, 2010; Exhibit V1, Letter from Philip Brooks to Scott Dyleski, dated June 27, 2010; Exhibit V2, Letter from Philip Brooks to Scott Dyleski, dated Feb. 5, 2011.)

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

A. Appellate Counsel's Failure to Raise Trial Counsel's Ineffectiveness for Failing to Use All Peremptory Challenges Was Ineffective and Prejudiced Petitioner.

For reasons discussed below, Petitioner submits that the failure of his trial counsel, Ms. Ellen Leonida, to exhaust all the peremptory challenges available to the defense prior to the empaneling of the jury at trial constituted ineffective assistance of counsel, as it prevented Petitioner from receiving adequate appellate review of this meritorious issue. Moreover, Petitioner contends that the failure of his appointed appellate counsel,

Phillip M. Brooks, to raise the issue of Ms. Leonida's failure to exhaust all of the peremptory challenges available to the defense also constitutes ineffective assistance of counsel, and further prevented the Petitioner from receiving appellate review of the erroneous denial of his meritorious motion for a change of venue.

At trial, Petitioner moved for change of venue prior to jury selection. The written motion included some 302 exhibits and thoroughly documented the pervasive pretrial publicity about the case. This documentation showed that all the major print news services, all the national and local television networks, and many internet news services covered the case from the time of Pamela Vitale's death and throughout the investigation in an inflammatory and sensationalized manner. Many evidentiary details appeared in the news coverage including prejudicial photos of Petitioner, sympathetic photos of Vitale and Horowitz, photos of the crime scene, and an overwhelming amount of factual assertions, some of which were accurate and some of which was patently false.

Petitioner's trial counsel also presented the results of a survey of Contra Costa residents regarding their exposure to the publicity about the case. This survey revealed that 89 percent of those polled had been exposed to publicity about the case and that approximately 60 percent of those exposed to such publicity harbored the belief that Petitioner was certainly or probably guilty. The defense also presented expert testimony interpreting the results in relation to the motion to change venue. (1 RT 197-329.) After the pretrial hearing, the trial court denied the motion without prejudice, pending the review of the voir dire of the prospective jurors. (2 RT 414.)

Written and oral voir dire of the potential jurors called to serve in Petitioner's trial bore out the results of the public opinion survey, revealing that 82 percent of the available jurors had been exposed to the pretrial publicity surrounding this case. Additionally, eleven of the twelve sworn jurors who convicted Petitioner, and all four of the alternates, were exposed to pretrial publicity. When the jury was sworn, the defense had six peremptory challenges remaining. Of the 31 available jurors left in the jury pool, only six indicated that they had not been exposed to pretrial publicity regarding this case.

After jury selection, Ms. Leonida renewed Petitioner's motion for change of venue based on the voir dire of the jurors. The trial court again denied the motion, noting that the defense had not exhausted all of its peremptory challenges and admonishing Ms. Leonida that this failure would weigh heavily in any appeal of the denial of the motion for change of venue. (6 RT 1489.) As a result, the jury that convicted Petitioner contained only one juror who had not been exposed to pretrial publicity.

Petitioner appealed the trial court's denial of his motion for change of venue to the Court of Appeal arguing that the trial court did not appropriately apply the criteria set forth in Williams v. Superior Court, 34 Cal.3d 584 (1983). (See Appellants Opening Brief, People v. Scott Dyleski, No. A115725.) In their response to Petitioner's appeal, the People contended that the non-exhaustion of the defense's peremptory challenges at trial strongly implied the defense's satisfaction with the impartiality of the jury pursuant to People v. Panah, 35 Cal.4th 395, 449 (2005) and People v. Zambrano, 41 Cal.4th 1082, 1127-1128 (2007). (See People's Reply

Brief, People v. Scott Dyleski, No. A115725.) In reply, Petitioner's appellate counsel contended only that the defense's renewal of the motion for change of venue after jury selection evidenced Petitioner's dissatisfaction with the jury and that use of the defense's remaining peremptory challenges at trial would have been pointless since only six of the remaining 31 jurors had no exposure to pretrial publicity. (See Appellant's Reply Brief, People v. Scott Dyleski, No. A115725.) Appellate Counsel did not contend that the trial counsel's failure was due to ineffective assistance.

Although the Court of Appeal reviewed the motion on the merits, trial counsel's failure to exercise all peremptory challenges colored the Court's review of this issue, and contributed to the Appellate Court's erroneous denial. The Court wrote: "While we do not regard defendant's failure to use more challenges as dispositive of the venue issue, it certainly casts doubt on his claim that the jury as constituted was so tainted by pretrial publicity that he could not get a fair trial." (See Decision in People v. Scott Dyleski (hereinafter "Appellate Decision"), No. A115725, at 31-32.) In its conclusion, the court relied again on "the number of unused peremptory challenges defendant had left when the jury was seated," to find the denial of the change of venue motion was proper. (Appellate Decision, at 36.) Thus, although the Court did review the substantive merits of the motion, in its decision, it stated that the failure to use the peremptory challenges contributed to its ruling and "cast doubt" on the Petitioner's claim, and it specifically stated that it was one of a number of reasons why it denied the motion. Indeed, by casting doubt on the likelihood that the

denial of the motion resulted in any actual prejudice to the Petitioner, the failure to exercise those challenges fatally prejudiced the Petitioner's chances of obtaining relief on this issue.

Moreover, appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to exercise all peremptory challenges. Case law is clear that the failure to exercise all one's peremptory challenges may result in the forfeit of any issues with the voir dire, such as change of venue, yet appellate counsel entirely ignored defense counsel's failure in this regard. This is even more egregious in light of the fact that the Court indicated on the record that this failure by trial counsel may prejudice the Petitioner on appeal, thus alerting appellate counsel to this exact issue. (6 RT 1489.) This failure by appellate counsel fatally prejudiced the Petitioner by preventing adequate appellate review, which resulted in a denial of an otherwise meritorious appellate issue.

The Court of Appeal found that Ms. Leonida's failure to exhaust all of the peremptory challenges available to the defense inferred that Petitioner was "satisfied with the jury" despite the fact that Ms. Leonida renewed the motion for change of venue after the jury was selected. In fact, neither the trial court nor the Court of Appeal gave any weight to the renewed motion for change of venue as it related to the defense's satisfaction with the jury since "the defense was compelled to renew the venue motion simply in order to preserve the issue for appellate review." (Appellate Decision, at 31.) This interpretation by the Court of Appeal suggests that Ms. Leonida was competent enough to make decisions at trial based not only on the litigation in front of her, but also with an eye toward

any appeal which might follow.

Were Ms. Leonida operating with such professional competence, however, she would have realized the damaging effect her failure to exhaust the defense's peremptory challenges would have on the very appeal she was attempting to preserve. Given the severely damaging effect of Ms. Leonida's decision not to exhaust the available peremptory challenges to defendant's appeal, despite her attempt to preserve this issue, and the relative strength of his claim to a change of venue based on the extensive pretrial publicity and the voir dire of the jurors, Petitioner here contends Ms. Leonida was ineffective in her handling of the motion for change of venue. To illustrate this point, a discussion of the merits of Petitioner's motion for change of venue and renewed motion for change of venue is necessary.

1. Petitioner's Change of Venue Motion Was Meritorious, and Its Denial Was in Error.

The right of all criminal defendants to a trial by a fair and impartial jury is guaranteed by the Sixth Amendment of the United States Constitution. Duncan v. Louisiana 391 U.S. 145, 154 (1968). This constitutional right has been articulated by the People of California in Penal Code section 1033 which provides that a trial court "shall" order a change of venue where "it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the [applicable] county." Pen. Code § 1033; see also Cal. Const., art. I, § 16. This constitutional concept of impartiality includes the right to a jury which has not been impermissibly tainted by outside influences such as prejudicial pretrial publicity. Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966). Both the California and the

United States Supreme Court have held that a change of venue must be granted where there is a "reasonable likelihood" that a fair and impartial jury cannot be summoned in a particular county. Id. at 363; Maine v. Superior Court, 68 Cal.2d 375, 383 (1968).

As such, when a motion for change of venue is brought before jury selection, a defendant need not even show by a preponderance of the evidence that a fair trial could not be had in the county of the trial. Rather it is sufficient to show only that "reasonable likelihood" existed that a fair and impartial jury could not be had in the county of the trial. Frazier v. Superior Court, 5 Cal.3d 287, 294-295 (1971); People v. Tidwell, 3 Cal.3d 62, 69 (1970). In making this determination, the trial court must consider (1) the nature and extent of the publicity, (2) the size of the population of the county, (3) the nature and gravity of the offense, (4) the status of the victim and the accused, and (5) whether any political overtones are present. See Williams v. Superior Court, 34 Cal.3d 584, 588 (1983).

On appeal from the denial of a motion for change of venue, an appellant must show that (1) it was in fact reasonably likely at the time the motion was brought that a fair trial could not have been had; and (2) viewed in retrospect, it is reasonably likely that a fair trial was not in fact had. People v. Jenkins, 22 Cal.4th 900, 943 (2000). In considering the first issue, the Court must look to the five factors that the trial court is required to consider as articulated in Williams. Jenkins, *supra*, at 943. In considering the second issue, the Court must consider the actual voir dire of the jurors. Id.

In considering whether it was reasonably likely that a fair and

impartial jury could not be found in Contra Costa County at the time of the motion for change of venue, the Court is required to consider the five factors set forth in Williams. Williams, *supra*, 34 Cal.3d at 588. These factors are addressed in turn below.

a. The Nature and Extent of the Pretrial Publicity

The story of the death of Pamela Vitale and the ensuing investigation was covered by every major national and local news outlet, including but not limited to CNN, CNN Headline News, MSNBC, Fox News, the San Francisco Chronicle and the Contra Costa Times. As noted by the Court of Appeal, "[t]here is no question that the case did attract substantial coverage" and the defense documented 225 newspapers articles, 664 television broadcasts, and 67 postings to internet news services at the time of the filing of the original motion for change of venue. (Appellate Decision, at 33.) This coverage was almost universally sensationalized and inflammatory, included discussion of "evidence" found in the investigation (much of which was false), and suggested that Petitioner was in fact guilty of murdering Vitale. Typical of this coverage is a Fox News broadcast from October 25, 2005 which showed courtroom drawings of Petitioner over the headline "GOTH MURDER MADNESS." (See Exhibit MM, Goth Murder Madness Screenshot.) The national broadcast media was not alone in its inflammatory portrayal of Petitioner. On October 21, 2005, the San Francisco Chronicle ran a front-page story under the headline "Teen Held in Bizarre Slaying" and used out of date high school yearbook photos to portray a transformation of Petitioner from a clean-cut youth to a menacing, disturbed, "goth" culture-obsessed figure. (See Exhibit NN, San Francisco

Chronicle Cover.) Both national and local news outlets were consistent in emphasizing Petitioner's image as being involved in "goth" culture, an aesthetic which is commonly associated with the occult and Devil worship. The best-known single example of this is perhaps the San Francisco Chronicle cover from October 21, 2005. (See Exhibit NN, San Francisco Chronicle Cover.) This perception was reinforced by multiple and repeated references throughout the media to the alleged symbols supposedly found carved into Vitale's back. Conversely, photographs of Horowitz and Vitale published by the media in relation to this case tended to show an idyllic and loving married couple.

This case is perhaps the most publicized Bay Area crime story since the murder of Laci Peterson and the subsequent trial of her husband Scott Peterson. Ironically, the publicity which surrounded Petitioner's case is tied directly to the notoriety of Scott Peterson due to the involvement in both cases of Daniel Horowitz, husband of Pamela Vitale. Prior to the death of his wife, Horowitz was a prominent California defense attorney who regularly appeared on some of the very networks that covered the instant case to discuss other prominent and sensational cases. Horowitz was perhaps best known for his work on the Scott Peterson trial with television host Nancy Grace. (See Exhibit OO, San Francisco Chronicle, Daniel Horowitz a Perfect Fit as a Celebrity Lawyer, at 733-734.) With the murder of his wife, Horowitz found himself in the middle of one of the stories he would ordinarily be covering. The San Francisco Chronicle has since observed that "[t]he media flooded Lafayette" [where Petitioner and Horowitz lived at the time of the death of Vitale]. (See Exhibit OO, San

Francisco Chronicle, Daniel Horowitz a Perfect Fit as a Celebrity Lawyer, at 735.) It was no coincidence then that Nancy Grace covered this case. In fact, Horowitz's extensive personal relationships with major figures in the press such as Nancy Grace directly drove not only the amount of coverage this case received, but also the portrayal of Petitioner. (See Section XXV(B)(7), *supra*.) At the time of Petitioner's arrest, Grace opened her show by asking viewers not about Petitioner's guilt, but rather "Did Dyleski act alone?" (See Pamela Vitale Murder Investigation, available at http://www.youtube.com/watch?v=M2BMZRZ5bU8; last checked September 22, 2012.) Exacerbating all of this, at the time of Pamela Vitale's death, Horowitz was counsel of record in the trial of Susan Polk, another case which received huge amount of media attention due in part to Horowitz's involvement.

Although the Court of Appeal referred to the Manson Family murders in noting that "even massive publicity does not automatically translate into prejudice or compel the granting of a motion for a change of venue," the Court of Appeal failed to note that the Manson case was perhaps one of the most publicized news stories in American history and that it would have probably been impossible to find a jury which had not been exposed to press in that case anywhere in the United States. (Appellate Decision, at 33.) In such instances, a court may deny a motion for a change of venue on the ground that it would simply do no good. See People v. Davis, 46 Cal.4th 539, 579 (2009); quoting People v. Manson, 61 Cal.App.3d 102, 177 (1976) ("A change of venue offered no solution to the publicity problem."). In this case however, a review of the pretrial media

coverage as documented by Petitioner's trial counsel shows that the intensity of the media coverage waned in inverse proportion to increases in geographic distance from Contra Costa County due mostly to the intense coverage by the San Francisco Chronicle and the Contra Costa Times and their sister publications. A Lexis Nexis search reveals that between the day of Vitale's death and the day of the selection of Petitioner's jury, at least 118 articles mentioning Petitioner, Horowitz or Vitale in the Contra Cost Times alone. (See Exhibit PP, List of Articles.)

The Court of Appeal also made much of its finding that the media coverage was "clustered" around the time of Petitioner's arrest and that jury selection did not begin until nine months later. (Appellate Decision, at 33.) While the passage of nine months may "'attenuate[] the effect of media coverage'" it also may not attenuate such inflammatory and prejudicial coverage as was associated with this case. (Appellate Decision, at 34.) While the Court of Appeal characterized the media coverage as generally "'factual' rather than 'inflammatory,'" headlines such as "GOTH MURDER MADNESS" belie this finding, as does a review of the exhibits in the motion for change of venue submitted at trial. While the Court of Appeals was correct in its assertion that "[c]overage describing the circumstances of a crime or the grief of the victim's family is not biased per se," the court erred in giving little weight to the media coverage which maligned Petitioner's character, described the brutal nature of the crime, and reported both accurate and inaccurate reports of the findings of the investigation. (Appellate Decision, at 34.)

The Court of Appeal further erred in totally discounting the findings

of the defense's public opinion survey conducted before the jury was selected. (Appellate Decision, 34-36.) The court below found it to be "methodological error" that that only 305 of the 748 people contacted in regards to the survey chose to participate after they were informed that the survey concerned this case. If anything is to be read into this figure, it is the benign observation the public generally has a bad opinion of unsolicited telephone callers interrupting their everyday affairs and asking if the person receiving the call would like to discuss a grisly murder. The Court of Appeal also found flaw in the fact that those who participated in the survey were asked whether they had heard anything about either the Susan Polk case or the instant case. As discussed above, however, the Polk case was tied directly to the publicity issues of this case because of the celebrity status of Daniel Horowitz. In fact, media coverage of this case often mentioned the fact that Horowitz was in trial with Polk at the time of Vitale's death. (See Exhibit PP, List of Articles.) What the Court of Appeal ignored about the survey, was that statistics based on the responses of those who participated indicated the overwhelming exposure of the residents of Contra Costa County to information concerning this case (89.8%). Of those who had heard about the case, 60.6% had formed the opinion that Petitioner was probably or definitely guilty.

The Court of Appeal's dismissal of the survey for "methodological error" must be reconsidered in light of the fact that the information gathered during voir dire bore out the results of the study. All but one of the sworn jurors and sworn alternate jurors in this case reported exposure to pretrial media coverage. Of the 156 potential jurors who filled out a questionnaire

or were questioned by the court regarding publicity, 127 reported that they had heard or read about the case (82%).

With respect to the influence of the press on the sworn jurors, the Court of Appeal found that while eleven of the twelve jurors reported they had knowledge of the case, their knowledge was attenuated by the passage of time, that they were exposed only to "headlines," and that their recollections of the media coverage were "fragmentary and not entirely accurate." (Appellate Decision, at 34.). As demonstrated above, the media coverage of this case was so inflammatory and prejudicial that even exposure to headlines could have easily damaged the impartiality of the residents of Contra Costa County, e.g., "GOTH MURDER MADNESS." Juror number 11, for example, reported her knowledge that Petitioner had stolen credit cards and was buying things with them, had "written" something on Vitale's body, and was "pleading guilty under insanity" based on what she had heard about the case prior to her service. (4 CT 1313) These details are generally consistent with the media reports which were common prior to the trial, especially as reported in the Contra Costa Times. (Exhibit PP, List of Articles.)

As noted by the court in Williams, "[a] juror's declaration of impartiality, however, is not conclusive." Although each of the sworn jurors in this case stated that they could set aside their prior knowledge, this Court must look past those assurances in determining whether it was possible for them to do so in light of the nature and extent of the press coverage. Petitioner here contends that it was not.

b. The Size of the Population of Contra Costa County

While Contra Costa County is the ninth largest county in California by population, the size of the county alone is not determinative in considering whether a motion for change of venue should be granted. As noted in Lansdown v. Superior Court, 10 Cal.App.3d 604, 609 (1970), "Population, qua population, is not alone determinative." The crucial point is whether the population is large enough to provide enough impartial jurors that a fair trial may be had. In Williams, the court found that where 52 percent of the prospective jurors "had read or heard about the case," there was "more than a reasonable possibility that the case could not be viewed with the requisite impartiality" and found that the defendant's conviction be overturned on those grounds. Williams, *supra*, at 1128-1129. While the population of Contra Costa County is much greater than the applicable county in Williams (Placer) was at the time of the crime in that case, so is the percentage of prospective jurors in Petitioner's case exposed to pretrial publicity as documented by voir dire (82 percent), including eleven of the twelve jurors who actually convicted Petitioner. As such, the relatively large population of Contra Costa County does not weigh against a change of venue under the circumstances of this case, and in light of the rate of exposure to prejudicial media reports revealed by voir dire, this factor weighs in favor of a change of venue.

c. The Nature and Gravity of the Offense

The crime at issue in this case is a brutal murder wherein Pamela Vitale was beaten to death and the potential sentence of Petitioner at the time of trial was life without parole. According to the coroner's report, the cause of Vitale's death was blunt force trauma to the head. The coroner

further reported that Vitale had been stabbed in a fashion that penetrated her stomach and bowels, that the stabbing likely occurred after Vitale was already dead, and that the injuries to her head were likely "inflicted with the victim face down." (Exhibit QQ; Coroner's Report.)

Accused of committing such a heinous act, Petitioner was only spared the prospect of the death penalty at trial due to his age, and was in fact eligible for and received life without the possibility of parole, the most severe sentence that may constitutionally be imposed on a juvenile. See Miller v. Alabama, 132 S.Ct. 2455 (2012). In light of the heinousness of the crime, the age of Petitioner at the time of the crime and the trial, and the fact that Petitioner faced the most serious sanction possible if convicted, the nature and gravity of the offense in this case weighs heavily in favor of a change of venue.

d. The Status of the Victim and the Accused

While she may not have been a prominent figure in and of herself, Pamela Vitale became a prominent figure posthumously due to her status as the spouse of Daniel Horowitz. Horowitz was already a well-known criminal attorney at the time of Vitale's death, and his fame increased even more as he parlayed his success as a criminal defense lawyer into a career as a legal analyst for national television networks. Additionally, Horowitz was engaged in the Susan Polk trial at the time of Vitale's murder, which had itself received significant media attention. Horowitz and Vitale were (at least according to press coverage) a happily married couple, upstanding, respected, wealthy and valued members of their community: the affluent town of Lafayette in Contra Costa County.

Although Petitioner also lived in Lafayette, he could hardly be said to have enjoyed the same lifestyle or have been viewed by the community of Lafayette and the greater community of Contra Costa County in as positive a light as Vitale and Horowitz. Petitioner was far from wealthy. Rather, Petitioner and his mother were living with their friends, the Curiels, in conditions which have been described as being consistent with that of a "hippie commune." See Frazier v. Superior Court, 5 Cal.3d 287 (1971). Petitioner and his mother could not even afford to pay rent to the Curiels, and for years had lived in a tent-like structure on their land with no running water or electricity. In the press, Petitioner was further portrayed as an outcast obsessed by "goth" culture to the point where some assumed that he was involved with devil worship. (See Questionnaires of Prospective Jurors 7 and 179, 1 Supplemental Clerks Transcript 71; 7 CT Supp 2054.) These impressions were exacerbated by reports that Petitioner was involved in a scheme to buy drug paraphernalia with stolen credit cards, that he killed Vitale for interfering with that scheme, and that Petitioner had carved some sort of "Satanic" symbol into the back of Vitale. As such, the relative statuses of Vitale and Petitioner in their community weigh heavily in favor of a change of venue.

e. Whether Any Political Overtones Are Present

With respect to political overtones, none appear to have been present in relation to this case. As such, this factor is neutral on the question of whether a change of venue should have been granted.

f. The Results of Voir Dire

For the reasons set forth above, the factors set forth by the Court in

Williams as applied to the facts of the instant case strongly suggest that there was far more than a "reasonable likelihood" that a fair and impartial jury could not be drawn from the citizenry of Contra Costa County at the time of the trial in this matter.

As discussed above, of the 156 potential jurors who filled out a questionnaire or were questioned by the court regarding publicity, 127 reported that they had heard or read about this case (82%). Additionally, eleven of the twelve jurors who convicted Petitioner, as well as all of the alternate jurors, had been exposed to press coverage of this case. The most glaring example is Juror number 11 who reported her knowledge that Petitioner had stolen credit cards and was buying things with them, had "written" something on Vitale's body, and was "pleading guilty under insanity" based on what she had heard about the case prior to her service. (4 CT 1313.) In ruling on this issue, the Court of Appeal noted that "[e]xposure to publicity does not automatically translate into prejudice" and that "[t]here is no prejudice if the jurors can lay aside their impressions or opinions and render a verdict based on the evidence presented in court." (Appellate Decision, at 35-6.) However, in doing so the Court of Appeal disregarded the precedent of the California Supreme Court in Williams, that "[a] juror's declaration of impartiality, however, is not conclusive." Williams, *supra*, at 1129. The Williams court went on to write that:

> To be sure, perfection is not required; some knowledge of the case is sometimes unavoidable. [In Williams], however, a brutal murder had obviously become deeply embedded in the public consciousness (half of the jurors questioned knew something about this case). Thus it is more than a reasonable possibility that the case could not be viewed with the requisite impartiality.

Williams, *supra*, at 1129.

The media coverage the jurors were exposed to contained false information that incriminated Petitioner. Most significant of these false reports were allegations that defendant was involved in a scheme where he used stolen credit cards to purchase supplies for growing marijuana, had the supplies delivered to the Vitale residence, and that that Vitale's death was the result of some confrontation between Vitale and Petitioner over the supplies. Typical of this theory is an article printed in the Contra Costa Times on the day jury selection began entitled: "DREAM ENDS IN NIGHTMARE; Jury selection begins today in trial of Dyleski, who s charged with the murder of Vitale last year on her Lafayette property." (Exhibit RR; Contra Costa Times, Dream Ends in Nightmare.) This theory was not even argued by the prosecution at trial. Still, the false theory of a confrontation between Vitale and Petitioner was widely referred to by prospective jurors throughout voir dire.

In Marshall v. United States, 360 U.S. 310 (1959), the United States Supreme Court reversed the conviction of a Petitioner whose jury had been exposed to news reports containing information "of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence." Notably, the seven affected jurors in that case had been exposed only to two newspaper articles.

Although the trial court in this case did not specifically rule on the admissibility of the false information contained in the media coverage of this case about some sort of confrontation between Petitioner and Vitale over drug paraphernalia, such a ruling was unnecessary since its

introduction was barred by its falsity. The prosecution did not adopt this theory to explain Petitioner's alleged killing of Ms. Vitale at any stage of the trial. The Marshall Court held that "[t]he prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. [Citation omitted] It may indeed be greater, for then it is not tempered by protective procedures." Marshall, *supra*, at 1252.

Such was the case here. Petitioner hereby contends that based on the level of exposure of the potential jurors, the sworn jurors, and the alternate jurors to the media coverage of this case, which was continually and consistently inflammatory and prejudicial to Petitioner (and much of which included false information which tended to incriminate Petitioner), there exists more than a reasonable likelihood that Petitioner did not in fact receive a fair and impartial trial. However, the Appellate Court did not give sufficient weight to the prejudice incurred by the Petitioner as a result of the erroneous denial of the change of venue motion as a result of trial counsel's ineffectiveness in not exercising all of her peremptories, and appellate counsel's failure to raise her ineffectiveness. Thus, were it not for the ineffectiveness of both trial and appellate counsel, the appellate court would likely have correctly found that the denial of the motion was in error. Petitioner was prejudiced thereby.

IV.

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

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

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

V.

PENAL CODE SECTION 190.5 IS UNCONSTITUTIONALLY VAGUE, FAVORS LIFE WITHOUT THE POSSIBILITY OF PAROLE OVER MORE LENIENT SENTENCES, AND FAILS TO PROVIDE SPECIFIC CRITERIA FOR THE EXERCISE OF SENTENCING DISCRETION, THUS VIOLATING PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENT, INCLUDING THE RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT PURSUANT TO MILLER V. ALABAMA, 132 S.CT. 2455 (2012) AND GRAHAM V. FLORIDA, 130 S.CT 2011 (2010).

Recent decisions by the Supreme Court, subsequent to Petitioner's conviction and direct appeal, have expanded upon the separate body of jurisprudence applicable to the punishment of juveniles who were tried as adults. See Miller v. Alabama, 132 S.Ct. 2455 (2012) (holding mandatory sentences of life without the possibility of parole for juveniles to be unconstitutional); Graham v. Florida, 130 S.Ct. 2011 (2010) (holding sentences of life without the possibility of parole for juveniles for any crime other than homicide to be unconstitutional). Thus, although the issue of whether Penal Code section 190.5(b) is unconstitutionally vague, and violates Petitioner's rights to due process of law, equal protection, and to be free from cruel and unusual punishment was raised and rejected on direct appeal, the new case law allows this issue to be raised anew on habeas corpus. In re Harris, 5 Cal.4th 813, 841 (1993) (holding that a change in the law affecting the Petitioner is an exception to the rule barring raising claims in a habeas petition that had been raised and rejected on appeal). Pursuant to the rationale of Miller and Graham, California Penal Code section 190.5, which controls the punishment of a juvenile convicted of first degree

murder, improperly favors the sentence of life without the possibility of parole (LWOP) over the more lenient alternative and does not require the proper exercise of discretion before the imposition of a sentence of LWOP, thus violating the Eighth Amendment's proscription on cruel and unusual punishment. Moreover, the statute is vague as to whether LWOP is in fact the favored punishment and as to the nature of the discretion allowed, and thus runs afoul of the Fifth and Fourteenth Amendment, and violates Due Process and Equal Protection.

Penal Code section 190.5 is vague in numerous critical respects. Subdivision (b) of Section 190.5 provides that:

> The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, **shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.**
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> (Pen. Code, § 190.5, subd. (b).)

First, it is vague as to whether it creates a presumption that the greater sentence (LWOP) be imposed. Second, it fails to describe what factors should be considered by the court in exercising its discretion. By creating a presumption in favor of LWOP and failing to provide specific criteria for the court to consider in exercising its discretion, the statute violates the Fifth and Fourteenth Amendment rights to due process and equal protection and the Eighth Amendment right to be free from cruel and unusual punishment, and directly implicates the constitutional concerns expressed by the Supreme Court in Miller and Graham.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). The vagueness doctrine applies to penalty provisions. Chapman v. United States, 500 U.S. 453, 467 (1991); United States v. Batchelder, 442 U.S. 114, 123 (1979); United States v. Evans, 333 U.S. 483 (1948); People v. Sipe, 36 Cal.App.4th 468, 480 (1995); see also Tuilaepa v. California, 512 U.S. 967 (1994). Moreover, the penalty imposed in a case may not be based upon "an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment." Chapman, *supra*, 500 U.S. at 465.

Subdivision (b) of section 190.5 is vague in that it does not make clear whether the court has equal discretion to impose the two possible sentences, or whether there is a presumption favoring LWOP. The Fourth Appellate District has interpreted subdivision (b) to require LWOP "*unless* the court, in its discretion, finds good reason to choose the less severe sentence of 25 years to life." People v. Guinn, 28 Cal.App.4th 1130, 1141 (1994) [emphasis in original]. The court in Guinn found support for this presumption for LWOP in the use of the word "shall" in the phrase "shall be confined in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." Id. Thus, although vague, some courts have held that LWOP is favored, absent a specific exercise of discretion by the judge to impose the lesser punishment. This interpretation violates the principles expressed by the Supreme Court in Miller and Graham.

Moreover, subdivision (b) is also unconstitutional as it fails to provide any guidance as to how the statutory sentencing discretion must be exercised. Subdivision (b) simply states that the choice shall be at the court's discretion. Thus, it allows for similarly-situated individuals to be treated differently based on an individual judge's interpretation of this highly vague statute, violating equal protection and due process.

The federal constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., 14th Amend., § 1. Article I, section 7(a), of the California Constitution similarly provides: "A person may not be . . . denied equal protection of the laws . . . ." Subdivision (b) provides: "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." Likewise, Article IV, section 16, subdivision (a), of the California Constitution provides that: "All laws of a general nature have uniform operation." Subdivision (b) of Penal Code section 190.5 violates all of these provisions.

Where legislation results in a great disparity of treatment, the fundamental right to liberty is at stake and the classification is subject to strict scrutiny. People v. Fryman, 97 Cal.App.4th 1315, 1331 (2002). Here, the lack of criteria provides unfettered discretion to choose to sentence a juvenile to LWOP or to an indeterminate sentence. Although both are harsh, the complete lack of any opportunity for release with a sentence of LWOP renders it fundamentally different, even than a sentence of 25 years to life. For this reason the statute violates the state and federal constitutional rights to due process, to equal protection, and to be free from cruel and unusual

punishment.

Here, the court failed to consider Petitioner's age in sentencing him to LWOP, focusing instead on the heinousness of the crime to which he had been convicted. At sentencing, defense counsel asked the court to consider Scott's youth as a factor in mitigation, as did numerous individuals who provided statements and letters in support of Scott. (15 RT 4295-98; 5 CT 1723-1749.)

Although, in sentencing Scott to life without possibility of parole, the trial court referred to the fact that people had requested leniency as a result of Scott's age, in explaining her rationale for imposing a sentence of life without the possibility of parole, the Court relied solely on the nature of the crime, and did not take into account Scott's age or level of maturity in any way. The court stated:

> People do not want to understand and do not want to accept that someone who looks like you, who is the young man living next door, can be so evil. I can understand how they have difficulty comprehending that in this day and age society can produce someone like you. . . . We are indeed a produce [sic -- product] of our environment. But you also have free will, sir, and we make choices, and you made the choice, sir, to murder Ms. Vitale. . . . Sir, you do not deserve to live among human people, decent people. Your commitment is going to be for life.
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> (15 RT 4303-4304.)

The Court's failure to consider Petitioner's age speaks to the exact concerns expressed in Graham and Miller, as to the imposition of LWOP sentences on juveniles.

In Miller, the Supreme Court ruled that statutes that mandate the imposition of sentence of LWOP for juveniles are unconstitutional under the Eighth Amendment, as they fail to provide the court with the discretion

to consider the defendant's age and circumstance. Id. at 2475. Here, section 190.5's apparent presumption in favor of the imposition of LWOP and the lack of any standards for the exercise of discretion result in courts imposing LWOP without weighing the factors found to be constitutionally necessary in Miller.

The recent decisions by the Supreme Court make clear that the considerations when sentencing a juvenile to life sentences are different than for adults. "[Y]outh matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole." Id. at 2465. Because of the nature of youth, and its effect on decision-making, as well as the possibility of rehabilitation, it always must be considered in sentencing: "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." Graham, *supra*, at 2031.

However, although 190.5 allows for such considerations, it does not require them, and as a result, sentencing decisions can be made that run afoul of the constitution. In Miller, the Court rejected the idea that prosecutorial discretion in deciding whether to charge a defendant as an adult was sufficient to permit for mandatory sentencing schemes, at least partially due to the lack of standards imposed on the exercise of that discretion: "prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decisionmaking." Miller, *supra*, at 2474.

The court in Graham, in finding that sentencing a juvenile defendant to LWOP for crimes other than homicide was a violation of the Eighth

Amendment, specifically considered, and rejected, the possibility that the exercise of discretion by the trial judge could be sufficient to render such sentences constitutional. The court was concerned that courts are ill-equipped to determine a juvenile's likelihood of rehabilitation, and that the heinousness of the crime would overwhelm the court's decision:

> Another possible approach would be to hold that the Eighth Amendment requires courts to take the offender's age into consideration as part of a case-specific gross disproportionality inquiry, weighing it against the seriousness of the crime. This approach would allow courts to account for factual differences between cases and to impose life without parole sentences for particularly heinous crimes . . . .

The case-by-case approach to sentencing must, however, be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this. For even if we were to assume that some juvenile nonhomicide offenders might have sufficient psychological maturity, and at the same time demonstrate sufficient depravity to merit a life without parole sentence, **it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.** Roper rejected the argument that the Eighth Amendment required only that juries be told they must consider the defendant's age as a mitigating factor in sentencing. The Court concluded that **an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.** Here, as with the death penalty,

the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for a nonhomicide crime despite insufficient culpability.

Graham, *supra*, at 2031-32 (internal quotations omitted) (emphasis added).

The Court's concern in Graham that courts are ill-equipped to consider the effect of age on a defendant and that the nature of the crime would overwhelm other considerations seems to perfectly capture what occurred at sentencing in this case. The trial court failed to consider Petitioner's age, or his possibility for rehabilitation, and instead found that, based on the depravity of the crime, "you do not deserve to live among human people." Indeed, the court specifically rejected the idea that Petitioner's age should have been considered, stating that people who requested mercy based on Petitioner's age just "do not want to accept that someone who looks like you, who is the young man living next door, can be so evil." (15 RT 4303-4304.) "And these individuals have focused all on your age. They claim because of your age, you're too immature to understand what happened, that you didn't know what you were doing . . . These individuals did not see all the evidence in this case." (15 RT 4300-4301.) Thus, because of the absence of specific criteria in Penal Code section 190.5, the Court was permitted to entirely ignore critical factors deemed constitutionally relevant by the Supreme Court in Graham and Miller.

Another concern expressed by the Court in Graham is particularly poignant in light of the egregious miscarriage of justice alleged in this

petition. Here, it is not merely that Mr. Dyleski was sentenced pursuant to an unconstitutional statute, but rather that the sentence was a result of a wrongful conviction, which occurred as a result of a confluence of factors, including ineffective assistance of counsel and prosecutorial misconduct. The Court in Graham recognized the difficulties in obtaining a fair trial for a juvenile because of their immaturity and lack of foresight:

> Another problem with a case-by-case approach is that it does not take account of special difficulties encountered by counsel in juvenile representation. As some amici note, the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense.
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> Graham, *supra*, at 2032.

These added difficulties are apparent in the poor choices made by Petitioner in lying to try to cover up the credit card fraud, and in the absence of effective communication between defense counsel and Petitioner, which exacerbated the ineffectiveness of defense counsel. Perhaps if Petitioner had the maturity to effectively communicate with his defense counsel and the foresight to understand the seriousness of the situation he found himself in, he would have been better equipped to persuade her of his innocence, and she may have pursued the critical investigation and meritorious defenses that she entirely ignored. All of this contributed to the wrongful conviction here at issue.

The absence of any statutory mandate that the court consider any specific factors when rendering its sentencing decision resulted in the court sentencing Petitioner without taking into consideration his age. What the recent Supreme Court decisions have made clear, is that sentencing juvenile defendants is fundamentally different than sentencing adults, and that the decision to sentence a minor to a life sentence cannot be entered into lightly, without fully considering the implications of the defendant's age, as occurred here: "Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." Graham, *supra*, at 2032. Although the holdings of Miller and Graham are both limited to situations outside the scope of the present case, the rationale behind their respective holding orders is directly applicable to the instant case, and mandates a finding that the sentencing of Petitioner to life without the possibility of parole was unconstitutional.

CONCLUSION

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

DYLESKI has made a *prima facie* showing entitling him to relief.

Dated:

Respectfully submitted,

KATHERINE HALLINAN
SARA ZALKIN
Attorneys for Petitioner
SCOTT EDGAR DYLESKI

DECLARATION OF KATHERINE HALLINAN

I, Katherine Hallinan, hereby state and declare:

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

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

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

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

5. 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.

6. 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.

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

8. 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.

9. 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.

10. 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.

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

12. 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.

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

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

15. 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. This included approximately 1000 photographs taken at the crime scene, the home of Mr. Dyleski, and at the autopsy. At this time, we immediately provided them to Dr. Laufer for his review.

16. 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.

17. 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.

18. In trial counsel's computer files, provided to present counsel by appellate counsel, there are no notes relating to the interviews of Tamara Hill, Daniel Horowitz, Joe Lynch, Donna Powers, Gerry Wheeler, Mario Vitale (son), Marissa Vitale, or Mario Vitale (ex-husband), nor are there transcriptions of these interviews. However, there are transcripts and / or notes about the interviews of Fred Curiel, Kim Curiel, Esther Fielding, Marjorie Fielding, Liz Ing (school psychologist), Hazel McClure, Marcus Miller-Hogg, Jena Reddy, Karen Schneider, Michael Sikkema, Araceli Solis, or Oscar Timms.

19. 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.

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

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

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

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

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

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

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

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

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

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

30. We filed a Motion for Order Allowing Expert Access to Physical Evidence for DNA Testing, pursuant to Penal Code § 1405, on June 11, 2012 requesting access to certain items of evidence, to wit: item 3-10 (the foot swab) and the bloody tissues found in the garbage at 1901 Hunsaker, and never tested. We are seeking access to these items so that Dr. Blake may test and re-test them. The District Attorney filed an opposition on or about July 16, 2012. By unreported minute order of July 23, 2012, the Honorable Barbara Zuniga directed that counsel would be notified "no later

than September 24, 2012 as to whether a hearing will be necessary."

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

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

I declare under penalty of perjury that the foregoing is true and correct, except as to matters stated on information and belief (which I have been so informed and do so believe). Executed this 11th day of October, 2012 at San Francisco, California.

KATHERINE HALLINAN

DECLARATION OF SARA ZALKIN

I, Sara Zalkin, hereby state and declare:

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

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

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

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

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

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

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

8. With our concern about the looming deadline, we were hesitant to undertake representation until we had the files in our possession and then confirm whether or not it would be possible to file a habeas petition prior to

May 24, 2011.

9. I contacted Mr. Brooks via email on March 1, 2011 regarding the size and location of the record and files. On March 2, 2011, Mr. Brooks informed me that he had provided the record to Scott in prison, and that Scott sent it to Esther. However, he retained approximately ten boxes of material that he had received from the public defender which he agreed to make available.

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

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

12. We then began to organize and review the material obtained from Mr. Brooks, which consisted of approximately ten boxes. In addition to tens of thousands of documents, there were also at least 25 hours of recorded interviews (some audio only; some in digital form; and some analog).

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

14. Thus, we had less than two months to review the available material; identify potential issues; investigate; contact experts and then

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

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

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

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

18. Mr. Turvey was away teaching at the time. Upon his return, he duplicated these items (consisting of at least fifteen compact disks) and sent them by private carrier. We received these on or about May 1, 2011, isolated and duplicated the specific items requested by Dr. Laufer and provided him with five disks to review along with the autopsy report. There are approximately 1000 photographs in total, from the crime scene, autopsy, and depicting other items such as apparel and a knife, all of which I have personally reviewed and indexed.

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

20. Ms. Leonida referred us to her investigator in this case, Mr. Ed Stein, for specific details that were beyond her immediate recall. (*See* Declaration of Katherine Hallinan.)

21. Ms. Hallinan and I both contacted Mr. Stein on May 18, 2011, and learned that he had not contacted the Ms. Vitale's sister and brother-in-law (the Hills) or Ms. Powers. Mr. Stein said it was "possible" that his associate may have, but he did not think so. Mr. Stein explained that he works at the direction of counsel, and if he had not contacted any witnesses it was because he was not asked to do so.

22. In trial counsel's files, obtained from appellate counsel, there are no notes relating to the interview of Tamara Hill, Donna Powers or Daniel Horowitz, although there are summaries of interviews for other witnesses.

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

24. We immediately followed up with Mr. Ortiz, who was the general contractor for the home being built at 1901 Hunsaker Canyon Road, and who became close with the couple - until money ran out and he became a target of Mr. Horowitz's rage. Mr. Ortiz provided a wealth of information relevant to the claims set forth in Mr. Dyleski's petition (*See* Petition Exhibits K and K1.) .

25. With the extremely short time frame in which we had to file the petition in the trial court (in order to preserve Mr. Dyleski's right to challenge his conviction in federal court, if need be), we were only able to transcribe two recorded interviews: Ms. Hill (sister of the victim, Pamela

Vitale, who had contacted police after the murder) and Ms. Powers (who had also contacted police to provide information suggesting that Mr. Horowitz may have been engaged in an extramarital affair in the months prior).

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

27. After the trial court denied Mr. Dyleski's petition, I received the transcrip of Mr. Horowitz at the police station (transcribed by Ms. Zoray Kramer who resides in Indonesia and previously worked as a legal secretary at our San Francisco law office), and reviewed it in conjunction with the recording (now on DVD) for accuracy. (*See* Petition Exhibit B; B1; and B2.)

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

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

30. Ms. Hallinan and I have continued to research and investigate the facts of this case. As a conservative estimate, I have personally spent hundreds of hours immersing myself in Mr. Dyleski's file (in addition to my existing caseload), including analysis of cell phone records contained in the public defender file, for the purpose of presenting supplemental evidence to

this Court. The cell phone records of Mr. Horowitz show that he made at least 50 phone calls in the hours after reporting his wife's murder. In the course of this review, I determined that Mr. Horowitz did not contact his sister-in-law, Ms. Vitale, for several hours after reporting the murder to the authorities; I also determined that many of the phone numbers appearing on Mr. Horowitz's cell phone records were those of reporters (including but not limited to Mr. Bruce Gerstman of the Contra Costa Times), and networks both local (e.g. KRON; KTVU) and national (e.g. CNN, MSNBC, and Court TV).

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

32. In December 2011/January 2012 we contacted Dr. Carole Lieberman, who had sent a letter to Ms. Leonida prior to Mr. Dyleski's trial. Dr. Lieberman, a psychiatrist, expressed concern that Mr. Horowitz was not acting in a manner "typical" of grieving husbands.

33. In April of 2012, I returned my attention to a disk of emails that had been provided in discovery to prior counsel, containing files copied from the laptop computer used by Ms. Vitale via Microsoft Outlook. According to the prosecution's computer experts (Mr. Ritter of Alameda County, and Inspector Venable of Contra Costa County), there is another disk containing material from a computer used by Mr. Horowitz, which is not in our possession, and which we intend to obtain by filing a motion in

the trial court (unless the District Attorney agrees to provide us with a copy).

34. Not being familiar with Outlook or having access to Outlook software, I enlisted the aid of a personal friend who assisted me by copying the files to an extra laptop he owned, which he loaned to me so I could review the emails which had been copied by Mr. Ritter from the computer used by Ms. Vitale.

35. As a conservative estimate, I spent at least 40 hours reading through approximately 2000 or more emails dating back to 2003. In so doing, I determined that the laptop had been used by Mr. Horowitz prior to June, 2004, when he apparently purchased a new computer from himself and then provided the older laptop to Ms. Vitale for her use. Exhibit EE to this petition consists of several emails from Mr. Horowitz to Ms. Vitale and *vice versa*, as well as emails to other individuals written by Horowitz or Vitale.

36. In June of 2011 we met with DNA expert, Dr. Edward Blake. As a result of our consultation with him and in conjunction with our review of the file, after presenting the petition to the First District Court of Appeal, on June 11, 2012 we filed a Motion for DNA Testing in the trial court, pursuant to Penal Code § 1405, requesting access to certain items of evidence, to wit: item 3-10 (the foot swab, for retesting) and the bloody tissues and paper towels found in the garbage at the crime scene (which has never been tested). We are seeking access to these items so that Dr. Blake may test and re-test them, respectively. The District Attorney filed an opposition on or about July 16, 2012. The trial court ordered the District

Attorney to produce all laboratory reports pertaining to the DNA testing conducted in this case. We then filed a reply to the opposition, and await ruling on the motion. Unless the trial court rules on the papers, a hearing is scheduled for October 5, 2012 in front of the Honorable Barbara Zuniga, Contra Costa County Superior Court.

37. In April of 2012 we began consultation with a blood spatter expert who we hope to retain for further expert opinion by way of declaration or written report.

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

I declare under penalty of perjury that the statements contained in the petition and in this declaration are true and correct, except as to matters stated on information and belief; as to those matters, I have been so informed and do so believe. Executed this 11th day of October, 2012 at San Francisco, California.

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 CORPUS EXHIBITS, APPENDIX to be served on the following parties in the following manner:

Office of the Attorney General 455 Golden Gate Avenue #11000 San Francisco CA 94102	personal service
Scott Dyleski F46590 Salinas Valley State Prison B5-139 PO Box 1020 Soledad CA 93960-1020	U.S. Mail

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration is executed on October 15th, 2012, at San Francisco, California.

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